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CASES ARGUED AND DETERMINED

IN THE

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AND DISTRICT COURTS OF THE  
UNITED STATES.

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**JURISPRUDENCE**

# AMENDMENTS TO RULES.

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## UNITED STATES CIRCUIT COURT OF APPEALS.

### Ninth Circuit.

#### 23.<sup>3</sup>

[Paragraph 8 of rule 23 was amended March 2, 1900, so as to read as follows:]

8. At the time of filing the record and docketing the cause, counsel for the plaintiff in error or appellant in patent cases may furnish the clerk with copies of patent-office drawings and specifications to be used as inserts, and the same, if in proper form and of convenient size, shall be used in printing the record.

#### 28.<sup>3</sup>

[Rule 28 was amended March 2, 1900, so as to read as follows:]

#### OPINIONS OF THE COURT.

The original opinions of the court shall be filed with the clerk of this court for preservation, and when so filed they shall be deemed to have been recorded within the meaning of this rule.

<sup>3</sup> For rule 23, as amended, see 31 C. C. A. cxxxvii., 90 Fed. cxxxvii.

<sup>3</sup> For rule 28, as originally adopted, see 31 C. C. A. clxvii., 90 Fed. clxvii.



## JUDGES

OF THE

### UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

#### FIRST CIRCUIT.

Hon. HORACE GRAY, Circuit Justice.....Washington, D. C.  
Hon. LE BARON B. COLT, Circuit Judge.....Bristol, R. I.  
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Hon. NATHAN WEBB, District Judge, Maine.....Portland, Me.  
Hon. EDGAR ALDRICH, District Judge, New Hampshire.....Littleton, N. H.  
Hon. FRANCIS C. LOWELL, District Judge, Massachusetts.....Boston, Mass.  
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.....Providence, R. I.

#### SECOND CIRCUIT.

Hon. RUFUS W. PECKHAM, Circuit Justice.....Washington, D. C.  
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Hon. ADDISON BROWN, District Judge, S. D. New York.....New York, N. Y.  
Hon. EDWARD B. THOMAS, District Judge, E. D. New York....29 Liberty St., New York.  
Hon. HOYT H. WHEELER, District Judge, Vermont.....Brattleboro, Vt

#### THIRD CIRCUIT.

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#### FOURTH CIRCUIT.

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Hon. CHARLES H. SIMONTON, Circuit Judge.....Charleston, S. C.  
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Hon. THOMAS R. PURNELL, District Judge, E. D. North Carolina.....Raleigh, N. C.  
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 Hon. HENRY F. SEVERENS, Circuit Judge.....Cincinnati, Ohio.  
 Hon. HORACE H. LURTON, Circuit Judge.....Nashville, Tenn.  
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## SEVENTH CIRCUIT.

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 Hon. PETER S. GROSSCUP, Circuit Judge .....Chicago, Ill.  
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 Hon. WILLIAM J. ALLEN, District Judge, S. D. Illinois.....Springfield, Ill.  
 Hon. JOHN H. BAKER, District Judge, Indiana.....Indianapolis, Ind.  
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 Hon. ROMANZO BUNN, District Judge, W. D. Wisconsin.....Madison, Wis.

## EIGHTH CIRCUIT.

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 Hon. WALTER H. SANBORN, Circuit Judge.....St. Paul, Minn.  
 Hon. AMOS M. THAYER, Circuit Judge.....St. Louis, Mo.

<sup>1</sup> Resigned March 15, 1900.

<sup>2</sup> Appointed to succeed William H. Taft, March 16, 1900.

<sup>3</sup> Term began March 16, 1900.



Hon. JOHN A. WILLIAMS, District Judge, E. D. Arkansas.....	Little Rock, Ark.
Hon. JOHN H. ROGERS, District Judge, W. D. Arkansas.....	Ft. Smith, Ark.
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Hon. CHARLES S. JOHNSON, District Judge, Alaska.....	Sitka.



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# CASES

## ARGUED AND DETERMINED

IN THE

### UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS:

STICHTENOTH v. CENTRAL STOCK & GRAIN EXCH. OF CHICAGO.

(Circuit Court, N. D. Illinois, N. D. January 23, 1900.)

**1. JURISDICTION—QUESTION—HOW RAISED.**

The question of jurisdiction may be considered on motion to dismiss, though a plea to the jurisdiction is the better practice.

**2. SAME—ACTION FOR PENALTY.**

An action for treble the amount lost at gambling,—one half thereof to go to the person bringing the action, and the other half to the county,—authorized by 1 Starr & C. Ann. St. Ill. 1885, p. 792, c. 38, § 132, to be brought against the winner by any person in case the loser fails to sue for his losses, is for a penalty, and cannot be taken jurisdiction of by a federal court, though the money lost belonged to plaintiff, and had been surreptitiously taken by the loser.

Rufus S. Simmons, for plaintiff.

C. D. Follen, for defendant.

JENKINS, Circuit Judge. This cause comes on for hearing upon a motion by the defendant, before pleading, to dismiss the suit for want of jurisdiction here to entertain it. The better practice is to present the objection by a plea to the jurisdiction; but since the federal court will at any stage of the case, when want of jurisdiction appears, decline to further proceed, irrespective of the manner in which the want of jurisdiction is disclosed, the question may be considered under the present motion.

This is a special action on the case brought by the plaintiff, who alleges herself to be the wife of one William Stichtenoth. The amended declaration, in substance, after asserting the necessary diverse citizenship of the parties, alleges that prior to March 15, 1897, her husband took and misappropriated her money, without her knowledge or consent, to the amount of \$20,660.63, and thereafter, and prior to that date, by "playing, betting, wagering, and gambling upon certain lots, chances, casualties, and unknown and contingent events, such as the rising and falling of market prices or alleged market prices, and speculating and dealing in futures and options in wheat, pork, shares of stock in certain corporations, and other property

and commodities, with the defendant, without the intention on the part of either the said William Stichtenoth or the defendant of actually buying or selling or receiving or delivering, or engaging in any bona fide transaction of buying or selling, any products or commodities, did lose to the defendant, the Central Stock & Grain Exchange of Chicago," the said money of the plaintiff; that such moneys were so lost more than six months prior to suit, and her husband did not within six months of the loss sue to recover the money so by him lost and paid, and the defendant has not repaid the same to her said husband, whereby, as it is alleged, the plaintiff has become "entitled to recover from the defendant treble the value of the money so lost as aforesaid, according to the statutes of Illinois in such cases made and provided, from the defendant, who won and received said sums of money as aforesaid, wherefore the defendant has become indebted to the plaintiff in the sum of sixty-one thousand nine hundred and eighty-one dollars and eighty-nine cents, and costs of suit,—one-half to the use of the county of Cook, in the state of Illinois, and one-half to the use of the plaintiff. And the defendant, though requested so to do, has not paid said sums of money, or any part thereof, wherefore the plaintiff brings this her suit against the defendant for the said sum of sixty-one thousand nine hundred and eighty-one dollars and eighty-nine cents, and prays for judgment as aforesaid, and for her costs herein."

The Criminal Code of the state of Illinois provides as follows:

"Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain, or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so, in relation to any of such commodities, shall be fined not less than \$10 nor more than \$1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void." 1 Starr & C. Ann. St. 1885, p. 791, c. 38, § 130. "Any person who shall, at any time or sitting, by playing at cards, dice or any other game or games, or by betting on the side or hands of such as do game, or by any wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election or unknown or contingent event whatever, lose to any person, so playing or betting, any sum of money, or other valuable thing, amounting in the whole to the sum of \$10, and shall pay or deliver the same or any part thereof, the person so losing and paying or delivering the same, shall be at liberty to sue for and recover the money, goods or other valuable thing, so lost and paid or delivered, or any part thereof, or the full value of the same, by action of debt, replevin, assumpsit or trover, or proceeding in chancery, from the winner thereof, with costs, in any court of competent jurisdiction. In any such action at law it shall be sufficient for the plaintiff to declare generally as in actions of debt or assumpsit for money had and received by the defendant to the plaintiff's use, or as in actions of replevin or trover upon a supposed finding and the detaining or converting the property of the plaintiff to the use of the defendant, whereby an action hath accrued to the plaintiff according to the form of this act, without setting forth the special matter. In case the person who shall lose such money or other thing, as aforesaid, shall not within six months really and bona fide, and without covin or collusion, sue, and with effect prosecute, for such money or other thing, by him lost and paid or delivered, as aforesaid, it shall be lawful for any person to sue for, and recover treble the value of the money, goods, chattels and other things, with costs of suit, by special action on the case, against such winner aforesaid; one half to the use of the county, and the other to the person suing." Id. p. 792, c. 38, § 132.

It has been ruled by the supreme court of Illinois, in *Pearce v. Foote*, 113 Ill. 228, that transactions such as are stated in the amended declaration are within the prohibition of the statute, and the amount lost may be recovered. The question here presented, however, is this: Whether the federal court will entertain a suit, not by the original loser to recover his loss, but one brought under the statute by an informer, on behalf of herself and of the county of Cook, to recover treble the amount of the loss. The statute is clearly highly penal in its nature. The action is given, not to restore to the loser the money obtained from him in speculations denounced by the statute, but in the event, and only in the event, of the failure of the loser within six months to sue for a recovery of the money or property lost, any person (a total stranger to the loser and to the transaction) may recover treble the amount of the loss,—one half of the amount to go to him, and the other half to the county in which the transaction was had. Such a recovery is permitted against the winner by way of punishment for his violation of the statute, but the recovery in no part inures to the benefit of the loser. The statute assumes that a loser in such a transaction is not to be depended upon to seek restitution, and, that the winner may not escape without punishment, it provides that any person whatever may recover of the winner, with respect to a transaction in which he had no part or lot, treble the amount won and lost. One half of this amount goes to the informer, for his diligence and philanthropy in asserting the dignity of the state; the other half goes to the municipality within whose jurisdiction the violation of law was committed; but the entire amount is imposed as a fine or penalty upon the winner for his violation of law. I can conceive of no statute more thoroughly penal in its character, and, within the reasoning of the supreme court of the United States in *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123, I apprehend a federal court cannot take jurisdiction of such an action. The courts of the United States do not sit to punish offenders against the law of the state. The courts of a state have exclusive jurisdiction to punish all infractions of its criminal law.

But it is urged that as the plaintiff was the wife of the loser, and he had surreptitiously taken and lost her money in the speculative and forbidden transactions, therefore she has an interest which renders this statute, as to her, not penal, and brings the case within the definition stated by Mr. Justice Gray in *Huntington v. Attrill*, supra. It is there said:

"The question whether a statute of one state, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the courts of another state, depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."

Whether a statute be penal is not dependent upon the circumstances which surround the person who prosecutes under it. It depends, as stated by Mr. Justice Gray, upon the question whether the purpose of the statute is to punish an offender, or to afford a private remedy to the person injured. This action is brought under the stat-

ute referred to. It does not give a private remedy. It is not requisite to a recovery that the plaintiff in such an action should have any private interest whatever in the subject-matter complained of. It is brought, and can be brought, only upon failure of the loser to sue to recover his loss within the time specified. It is brought to recover treble the loss, which the statute permits as a punishment upon an offender against the law, and is brought by her as an informer, and in the interest of herself and of the municipality in which the offense was committed, as the statute directs. All that is alleged with respect to her ownership of the funds which her husband used and lost in speculation is mere surplusage, and in no sense adds to her right of recovery, which is otherwise complete. The allegations in that behalf have no place in this declaration. Whether outside of this statute she could recover, either at law or in equity, for her property wrongfully taken by her husband, and lost in speculation to the defendant, need not now be considered. Any suit therefore must proceed upon the ground that the title to the property had not passed, and that, tracing her money into the hands of the defendant, she can follow and recover it; but that is not this case. It is an action in the nature of a *qui tam* action, wherein a plaintiff is a mere volunteer, without interest in the subject-matter, to recover under this statute the treble amount of the loss which the law imposes upon an offender for the infraction of the law; and, to recover under such statute, the plaintiff must seek her remedy in the courts of the state whose law has been offended, and whose punishment is sought to be imposed. The suit will be dismissed for want of jurisdiction of the subject-matter.

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**MILES v. NEW SOUTH BUILDING & LOAN ASS'N (AMERICAN TRUST & BANKING CO., Intervener).**

(Circuit Court, N. D. Georgia. January 5, 1900.)

No. 1,077.

**1. INSOLVENT CORPORATION—SUIT FOR WINDING UP—PARTIES.**

A trustee holding securities of a corporation, deposited to secure its outstanding bonds, is a proper party to a suit in equity to wind up the corporation as insolvent.

**2. SAME—ANCILLARY RECEIVERSHIP—INTERVENTION.**

Where, after the commencement of a suit to wind up the affairs of an insolvent corporation in a federal court in the district of its domicile an ancillary suit is brought in a federal court of another district, in which the receiver appointed in the original suit is made ancillary receiver, and a trustee holding assets of the corporation and residing in such district is ordered by the court to turn the same over to the ancillary receiver for collection, such trustee is entitled to intervene, and become a party to such suit, in the court which has custody of the fund, and have its rights and duties with respect to its trust there determined and enforced, and cannot be compelled to go into another jurisdiction, where the original suit is pending.

**3. SAME—RIGHTS OF TRUSTEE HOLDING ASSETS.**

Where a corporation which has issued bonds, and to secure the same has deposited securities with a trustee with power to sell the same on default in the payment of interest, becomes insolvent, and the trustee has

been ordered by a court to turn the securities over to a receiver appointed in a suit to wind up the affairs of the corporation, such trustee has the right to intervene in the suit for the protection of its trust, although there has been as yet no default.

### In Equity.

On June 2, 1899, Mrs. Felician R. Miles filed a bill in the United States circuit court for the Eastern district of Louisiana against the New South Building & Loan Association, a corporation created and organized under the laws of Louisiana, alleging insolvency of the corporation, and asking that a receiver be appointed, and the affairs of the corporation wound up. On June 3, 1899, a receiver was appointed as prayed. On June 6, 1899, Mrs. Miles filed an ancillary bill in the United States circuit court for the Northern district of Georgia. On the filing of this bill an order was rendered by said court taking ancillary jurisdiction of the cause, and recognizing and confirming the receiver already appointed. At the time the bill was filed, there were in the hands of the American Trust & Banking Company securities of the association to the amount of \$447,466, which securities were held by the trust company under a trust agreement. The receiver demanded of the trust company the surrender of said securities, which was refused. On July 3, 1899, the receiver presented a petition to the circuit court of the United States for the Northern district of Georgia, which was heard by Judge Shelby, praying for an order directing the delivery to him of the property in question. For decision rendered in said case, see *Miles v. Association* (C. C.) 95 Fed. 919. On September 20, 1899, the American Trust & Banking Company, a Georgia corporation, having its home in the Northern district of Georgia, filed its intervention in the United States circuit court for the Northern district of Georgia, in which, after setting forth the status of the litigation prior to the date of the bringing of its intervention, it set up the following facts: That on December 14, 1891, the New South Building & Loan Association desired to issue bonds and secure the same by the deposit of cash or certain notes and other securities. To this end it created the Manhattan Trust Company of New York trustee, and entered into an agreement on the date named with said trust company, in which it was stipulated that the association should deposit with the trust company \$100 in cash or \$125 in securities for each \$100 of bonds issued. In 1893 and 1894 supplemental agreements were entered into, which only related to the amount of bonds to be issued and the amount of securities to be deposited, and are not material here. On June 23, 1898, an agreement was entered into between the association and the American Trust & Banking Company, by which the latter company was substituted as trustee for the Manhattan Trust Company, and in which there were certain other stipulations, immaterial here. The trust agreement provides, as it now stands, in the hands of the American Trust & Banking Company, that upon default in the payment of interest the trustee shall proceed through itself or through the courts to realize on the securities in its hands for the benefit of the bondholders. The American Trust & Banking Company prays that it may be allowed to come into the litigation in the Northern district of Georgia, and that, in view of the insolvency of the association, and the fact that it is being wound up in the courts, the bonds may be declared due and be paid. It contains other prayers immaterial for present purposes. To this intervention demurrers were filed by the complainant and the receiver.

Denegre, Blair & Denegre, for complainant.

Denegre, Blair & Denegre and W. A. Wimbish, for receiver.

Dorsey, Brewster & Howell and Gray, Brown & Randolph, for intervenor American Trust & Banking Company.

NEWMAN, District Judge. In determining the demurrers filed by Mrs. Felician R. Miles, complainant in the original bill, and Armstrong, receiver, to the intervening petition of the American Trust & Banking Company, it is unnecessary at this time to pass upon

some of the interesting questions ably argued by counsel at the bar and in briefs subsequently filed. It is necessary, however, to decide: (1) Is the intervener a proper party to this litigation? (2) May it come into the litigation by intervening petition in the circuit court for this district? (3) Can it proceed at all before default in the payment of interest on the bonds secured by the trust agreement in which it is named as trustee?

As to the first question, it can scarcely be doubted that the intervening trust company is a proper party. It was named as trustee to hold certain notes and mortgages of the association which were placed in its hands to secure bonds and other obligations of the association. As the association is now in the hands of a receiver, and its business is being wound up for the benefit of persons at interest, the trust company is not only a proper, but probably a necessary, party to the cause.

It is contended, however, that the trust company cannot come into the circuit court for this district, even if it is a proper party to the case. The claim is that, if it becomes a party at all, it should be in the cause in the court of primary jurisdiction in the Eastern district of Louisiana. So far as the demurrer on this ground by the receiver is concerned, it may be answered that he has brought the trust company into the litigation in this district by his motion filed in this court for the purpose of having the assets of the association in the hands of the trust company turned over to him as receiver. He filed his petition in the court in this district. It was answered here by the trust company, and heard and decided by Circuit Judge Shelby on the pleadings in this district. The status of the trust company in the litigation, so far as it has been determined, is to be gathered from proceedings in this district. Judge Shelby, in the motion referred to (95 Fed. 919), while directing that the assets held by the trust company should be turned over to the receiver to be collected, ordered that the money realized from the same should be deposited by the receiver with the trust company. He seems to have reserved any rights of the trust company for further determination, and simply decided the question of possession for the purpose of reducing the securities to money. In concluding his opinion on the motion to turn over the assets to the receiver, Judge Shelby says: "Whether or not the trust company is a necessary party defendant to the bill is a question not necessary to be now decided. If it is, and is not made a party, it would be permitted to intervene in the cause by petition if it became necessary to do so to protect or assert any interest involved in the suit." While learned counsel endeavor to give this expression a different construction, I think it is fair to infer that, as he was discussing the case in this district, the judge had reference to the right of the trust company to intervene in the suit in this district. Especially is this true as the judge directed, as has been stated, that the money be deposited by the receiver with the trust company in this district. But, independently of the decision of Judge Shelby, and of anything to be gathered from that proceeding, or his order and opinion, an ancillary bill is pending, in the circuit court for this district, and this is the home



of the trust company. The securities of the association deposited with the trust company are still probably in contemplation of law, in this district, the naked possession being in the receiver for collection; and it would seem to be eminently proper that any peculiar rights the trust company may have should be enforced, and any duty that may be upon it discharged, by applying to the circuit court for this district. There is no reason whatever why there should be any conflict between the court for the Eastern district of Louisiana and the court for this district. The circuit court in Louisiana is the court of primary jurisdiction, and has the general control of this case, and any orders that may be entered or any decree made in this district must be in accordance with the recognized equity practice in federal courts concerning courts of ancillary jurisdiction.

As to the right of the trustee to come into court before there is default in the payment of interest on the bonds secured by the trust agreement, it is only necessary to say that the affairs of the association are being liquidated and wound up by a receiver, and its inability to carry out the purposes for which it was organized is conceded. It is certainly the right, if not the positive duty, of the trustee, to come into the litigation, and set up the trust agreement, and the rights of the beneficiaries under the same. What relief will be granted it is a question which must be determined as the case proceeds. Much, necessarily, may depend upon the action of the circuit court in Louisiana having general control of the litigation, when its orders and decrees are brought to the attention of this court.

There is no question about the correctness of the argument that there should be harmonious and concentrated management of the affairs of the association, the collection of its assets and the disposition of the same, and nothing whatever will be done in this court to retard or prevent it. An order will be entered overruling the demurrer, and the case made by the intervening petitioner will be retained in this court for such further action as may be necessary and proper.

The bill in this case was first presented to Circuit Judge PARDEE, who made the order appointing the receiver, and who authorized and directed the filing of the ancillary bill in this district. He has been present in this district while I have had the case under consideration, and I have conferred with him about it, and have also shown him this opinion. He authorizes me to state that he concurs both in the conclusion reached, and in the reasons I have briefly given for the same.

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AMERICAN BUILDING & LOAN ASS'N v. CARTER et ux.

(Circuit Court of Appeals, Fifth Circuit. January 9, 1900.)

No. 766.

**MORTGAGES—COLLUSIVE SALE UNDER MORTGAGE AFTER PAYMENT OF DEBT.**

Evidence considered, and held to establish that the taking up of a note by the maker was a payment, and not a purchase on behalf of his mother, whose check was used in making the final payment, and that a subsequent sale of property under a trust deed securing such note was fraudulent and

voldable as against a subsequent mortgagee which took its mortgage under an agreement that the lien of the note should be extinguished out of the proceeds of its mortgage.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

U. F. Short, for appellant.

Alexander, Clark & Hall, for appellee.

Before PARDEE and SHELBY, Circuit Judges.

PARDEE, Circuit Judge. The transactions out of which the suit arose were as follows: On the 22d day of June, 1889, James B. Simpson made a conveyance of the property involved in this litigation, and located in Dallas, Tex., to J. J. Carter, in consideration of the sum of \$3,000,—one-half cash, and a note for \$1,500, payable 12 months after date, with interest at the rate of 10 per cent. per annum, a lien being retained in the deed of conveyance to secure the payment of this note. A deed of trust was also executed at the time to secure the payment of this note, but this deed of trust was not recorded until January 6, 1892. The American Building & Loan Association, on the 2d day of October, 1889, made a loan of \$5,000 to J. J. Carter and wife, Josephine M. Carter, for which they executed their bond in writing and a deed of trust to secure the payment of the same upon the property so purchased by the said J. J. Carter from James B. Simpson. At the time of this transaction the loan association had no actual notice of the existence of the deed of trust executed by J. J. Carter to secure the payment of the \$1,500, and it was expressly understood between J. J. Carter and Josephine M. Carter and the association that the \$1,500 vendor's lien note should be paid off and canceled out of the proceeds of said \$5,000 loan. The by-laws of the company and the laws of the state of Minnesota forbade its lending money except upon first liens and mortgages. On December 9, 1891, default having been made in the payment of the bond, the American Building & Loan Association instituted a suit in equity (No. 200, equity docket of the circuit court) to foreclose its deed of trust upon the property, and made J. W. Young a party defendant to the bill, it being supposed that James B. Simpson had transferred the note for \$1,500 executed by J. J. Carter to the said J. W. Young, and that the latter then held the same. At the time of the institution of this suit the complainant therein did not know that Mrs. N. J. Carter had any interest in said \$1,500 note. It appears that, after the maturity of the \$1,500 lien note, J. W. Young, at the instance of J. J. Carter, bought from James B. Simpson, the then holder, the said note, and the same was indorsed "Without recourse" by said James B. Simpson. J. W. Young acquired the note in apparent good faith, and held the same until the 5th of November, 1891. During the time Young held the note, various payments were made thereon by J. J. Carter and his agents, and to such an extent that on the 5th of November, 1891, the amount due thereon had been reduced to the sum of \$900. J. J. Carter testifies that these several payments made upon the note were with moneys furnished by his mother, Mrs. Nancy J. Carter, but, taking

his evidence in this regard, in connection with his whole evidence and conduct in the case, we are not inclined to the opinion that Carter's evidence, although uncontradicted by any other witness, imports absolute verity. On the 5th of November, the note was taken up by J. J. Carter, who paid the balance thereon—\$900—in a check drawn by his mother on the National Exchange Bank of Dallas, Tex., where the mother had opened an account on the 19th of October, 1891. The following indorsement appears upon the note (there is no evidence showing or tending to show when it was made), to wit: "Pay to order of Mrs. N. J. Carter. J. W. Young. Mrs. J. W. Young, per J. P. A. Heintz."

It further appears from the evidence that on the 6th day of January—long prior to filing the answer of J. J. Carter and Josephine M. Carter in the original suit—the trustee in the deed given by J. J. Carter to secure the \$1,500 lien note, which deed was not recorded until January 6, 1892, sold, after notice and advertisement, the property in controversy to Mrs. Nancy J. Carter for the apparent consideration of \$1,000. The deed executed in pursuance of this sale was not filed for record until May 3, 1893. The evidence further shows that prior to the 6th of January, 1892, and thereafter until her death, in 1894, the said Mrs. Nancy J. Carter resided with her son, J. J. Carter, and that thereafter until the present time all the rents and revenues collected on the said property have been received by Mrs. Nancy J. Carter and her devisee, Mrs. Josephine M. Carter, the wife of J. J. Carter. It appears also from the record, on the 28th day of February, 1885, Mrs. Nancy J. Carter made a last will, devising all her property among her two sons, two daughters, and a granddaughter, share and share alike, with the exception of a special legacy in favor of his granddaughter; that on the 22d day of June, 1892,—very shortly after J. J. Carter and his wife, Josephine M. Carter, filed their answer in the original suit of foreclosure,—Mrs. Nancy J. Carter added a codicil to her will, giving and specially devising to Mrs. Josephine M. Carter, the wife of her son, J. J. Carter, the premises apparently acquired by her under trustee's deed aforesaid. The defendants J. J. Carter and Josephine M. Carter filed an answer to said bill on June 9, 1892, and on the same day J. W. Young filed his disclaimer of all interest in or right to the properties. The case was referred to a master, tried, and a final decree rendered July 16, 1895. This decree gave judgment for the complainant therein and against J. J. Carter for the amount of its said loan, with interest, together with a foreclosure upon the lands involved in this controversy, against the defendants J. J. Carter and Josephine M. Carter, and ordered a sale of the property. Although various attempts were made, no final sale of the property was made under the decree of July 16, 1895, and on October 8, 1896, the American Building & Loan Association, complainant, filed the present bill, charging the facts, among others, of the sale by James B. Simpson to J. J. Carter on October 19, 1889; the execution of the vendor's lien note for \$1,500 by the said J. J. Carter to the said James B. Simpson; the execution of the deed of trust at the same time; that it was not recorded until January 6, 1892; the loan of \$5,000 made by the complainant herein on October

2, 1889, to the said J. J. Carter and Josephine M. Carter, and the execution by them of their bond and deed of trust to secure the payment of the same; that at the time the complainant filed its original bill it had instituted inquiries of James B. Simpson for the purpose of discovering the then holder of the note, and found that it had been transferred to and was then held by J. W. Young, who was made a party defendant to that suit; that the \$1,500 vendor's lien note was to be taken up with this loan, but that defendant J. J. Carter, for the purpose of cheating and defrauding the complainant, and depriving it of its lien, had fraudulently procured a transfer of the note from James B. Simpson to the said J. W. Young; that it had no knowledge of the existence of the deed of trust until after the sale had been made under the same by the trustee, M. L. Robertson, and then only constructive knowledge under the statutes; and that at the time of the institution of said cause complainant had no notice whatever of any transfer to Mrs. N. J. Carter, nor of any claim by her to the note. It further charges that the note was really paid by J. J. Carter, and was transferred to Mrs. N. J. Carter merely for convenience; that the sale made by M. L. Robertson, trustee, was collusive, and made for the benefit of the said J. J. Carter, and for the purpose of defrauding his creditors, and especially the complainant herein; that the said Mrs. N. J. Carter never paid any consideration whatever for said note, nor did she pay any consideration whatever to the trustee for said lands; that a final decree was rendered in the former cause, No. 200, in equity, in its favor, establishing the amount due it from said J. J. Carter on account of said loan, to wit, the sum of \$3,100, with interest at the rate of 6 per cent. per annum from January 1, 1891, and 10 per cent. on the entire amount as attorney's fees, and all costs of suit, and decreeing a foreclosure of its lien against all the defendants therein, and a sale of the property to pay the judgment; but that there was never any final sale made of said properties under said decree. The complainant prays that the deed from J. J. Carter and wife to M. L. Robertson, trustee, to Mrs. N. J. Carter be canceled, set aside, and held for naught; and if it should appear that the said Mrs. N. J. Carter purchased the note executed by J. J. Carter to the said J. B. Simpson with her own means, then that an account be taken of the interest accruing upon the note, and of the rents collected by the said Mrs. N. J. Carter and the said Josephine M. Carter, as well as an account of all outlays for taxes, repairs, improvements, or other expenses incurred upon said property, and that the balance found in their hands, or in the hands of either of them, be ascertained, and the same applied to the payment of the note of \$1,500 and interest, and, if any sum should remain due upon the note, then that the complainant be allowed to pay the same to such person as the court shall declare to be entitled to receive it; that the complainant be substituted to the place of the holder of said note; that the property be sold under the decree of the court already rendered; and for such order and decree as the court may see proper to render in this cause, and for all such other relief as in equity and good conscience may seem proper in the premises, etc. J. J. Carter and his wife, Josephine M. Carter, filed an answer to this bill on April 7, 1897, in which they, in substance,

deny that the complainant was without knowledge of the existence of the deed of trust to secure the payment of the \$1,500 note; that its existence was concealed; that J. J. Carter was the owner of said \$1,500 note; that the \$1,500 was to be paid out of the loan; that J. J. Carter caused or procured the transfer to be made to Mrs. N. J. Carter for the purpose of procuring a foreclosure; and that there was collusion or attempt to defraud the creditors of J. J. Carter, or that the said Nancy J. Carter and Josephine M. Carter paid no consideration for said lands. They claim that the entire transaction was in good faith; that Mrs. Nancy J. Carter purchased the note from J. W. Young with her own separate means, and became thereby the owner of the same, and afterwards that she became the owner by purchase at trustee's sale of the property, and that Mrs. Josephine M. Carter became the owner of the property as devisee under the will of the said Mrs. Nancy J. Carter; and that the complainant had made no effort to make the real owner of said note a party for the purpose of protecting itself against the \$1,500 vendor's lien note. Otherwise, the defendants admit generally the statements of the bill, and that Mrs. N. J. Carter purchased the property at the trustee's sale on the 6th day of January, 1892, and afterwards departed this life. The defendants state that the said Nancy J. Carter, on the 6th day of January, 1892, took possession of said property, and continued to occupy and possess the same openly, peaceably, and adversely up to the date of her death, which occurred on the 9th day of March, 1894; that the said Nancy J. Carter departed this life on the said 9th day of March, 1894, testate, and by the terms of her last will and testament devised and conveyed the property to Josephine M. Carter; that the will was duly filed for probate on the 20th day of August, 1894, and afterwards duly probated; and that the said Josephine M. Carter has been in possession of said property, holding the same by virtue of the will of the said Nancy J. Carter, ever since the death of the said Nancy J. Carter.

On the hearing the following decree was rendered:

"This cause came on to be heard upon the pleadings and proof in the case, and thereupon, upon consideration thereof, it is ordered, adjudged, and decreed by the court that the sale and conveyance of the premises in controversy made by M. L. Robertson, trustee, to Nancy J. Carter, on the 5th day of January, 1892, mentioned in the bill and answer in this cause, and the conveyance and bequest of said property by the said Nancy J. Carter to the defendant Josephine M. Carter, were made with the intent to defraud the creditors of the said J. J. Carter, and particularly the plaintiff in this cause, and are, therefore, as to the plaintiff, voidable. It is therefore ordered, adjudged, and decreed by the court that the said sale made by the said Robertson, and the bequest of said property by the said Nancy J. Carter, deceased, to the defendant Josephine M. Carter, ought to be rescinded, set aside, and for naught held; and the court doth order and decree that the said conveyances by said deed and will be declared null and void, and orders and directs that they be canceled. And it appearing to the court that the prior incumbrance existing against the property described in the bill and answer herein for the sum of \$1,500, payable originally to James B. Simpson, and afterwards transferred by him to J. W. Young, was by the said J. W. Young transferred and assigned to Nancy J. Carter, deceased, and that at the time of the transfer there was unpaid of said original indebtedness the sum of \$1,500, which said sum the said Nancy J. Carter paid to the said J. W. Young as a consideration for said transfer, out of her own individual prop-

erty. And it further appearing to the court that after the foreclosure of the said deed of trust on, to wit, the 5th day of January, 1892, the said Nancy J. Carter took possession of said mortgaged premises under the foreclosure of the same hereinbefore declared to be null and void, and that she remained in possession thereof, enjoying the use and benefits of the same and receiving the rents therefor during the remainder of her life; that the said Nancy J. Carter died on the — day of —, 1894; that the reasonable rent of said property during the time the said Nancy J. Carter was in possession thereof was fifty dollars per month, and that the said rents were paid to her; that she devised said property by a codicil to her last will and testament to the defendant Josephine M. Carter, and that the reasonable rent of said property since the death of said Nancy J. Carter, and whilst the said Josephine M. Carter has been in the possession thereof, is fifty dollars per month: The court finds and adjudges that neither the said Nancy J. Carter, whilst she was in possession of said property, nor the said Josephine M. Carter, is liable to account for the rents so received by them, and that the debt secured by the deed of trust under which the said Nancy J. Carter purchased, and which said sale is hereby set aside, is not entitled to credit for said rents, and that neither the said Nancy J. Carter nor Josephine M. Carter are liable to account for the same at the suit of the plaintiff herein, nor will they be allowed as a credit upon the prior mortgage assigned to the said Nancy J. Carter. It is further ordered, adjudged, and decreed that the plaintiff may redeem the property hereinafter described from the mortgage transferred to the said Nancy J. Carter by the said J. W. Young, and that the amount now due upon said mortgage is twenty-six hundred and sixty-five dollars, and that upon the payment of the said sum to the defendant Josephine M. Carter by the complainant herein within forty days from this date the said Josephine M. Carter and J. J. Carter are hereby ordered and directed to assign and transfer the same without recourse upon them to the plaintiff herein. It is further ordered, adjudged, and decreed that R. M. Love, master commissioner, heretofore appointed by this court to execute the decree rendered in this cause as originally adjudged and determined on the 9th day of March, 1894, foreclosing the mortgage lien on the property described in complainant's bill, \* \* \* be, and is hereby, directed to sell the said above-described premises in obedience to the order heretofore made as above stated, and that an order of sale issue to the said master commissioner in accordance with the decree heretofore mentioned, and that the said master commissioner be, and he is hereby, directed to execute the said judgment and decree as heretofore rendered in said cause in all respects as therein directed, and that the sale made by him, the said master commissioner, be made subject to the indebtedness secured by the deed of trust heretofore existing in favor of James B. Simpson, and herein directed to reassign and transfer to the plaintiff, and that the proceeds of the sale of the premises made under the order to be issued by the decree of this court be applied first to the payment of the costs of this litigation, and next to the satisfaction of the complainant's debt and any sum the complainant may become subrogated to under this decree, and that the balance, if any, be paid to the defendant J. J. Carter. It is further ordered and adjudged that the plaintiff do have and recover of the said defendants its costs in this behalf expended, and that it have execution therefor."

The complainant herein filed its assignments of error, and sued out this appeal.

The evidence as to the extinguishment of J. W. Young's interest in the \$1,500 lien note, while decidedly uncertain in many respects, is clear to the effect that the note was paid by J. J. Carter, and not sold to any one. J. W. Young himself, in his testimony, speaks only of payments, but says that all were made to his wife and partner, Heintz; the last payment having been made to Heintz; and he (Young) knows nothing about any transfer or indorsement. He made none himself. Mrs. Young, the wife of J. W. Young, in her

testimony, speaks only of payments by J. J. Carter. 'Among other things, she says:

"Q. Did you finally collect all that was due you on account of said notes? and, if you did, state from whom you received the said installments, and what you did with the notes which the entire sum coming to you was paid off. A. Yes. We finally collected all that was due on said note. While the payments, up to the last payment, were made by Mr. Carter, I do not know whether they were made out of his own money or not. I was at the store of my husband when he received a check from Mr. J. J. Carter's mother for the last payment on the note, amounting to something near \$1,000."

Heintz, the partner, was not examined, nor was Mrs. Nancy J. Carter's check for \$900, with which the final payment was made, produced. The answers of J. J. Carter on his examination are shifty and uncertain. He speaks throughout of the payments made on the note; sometimes of his mother's taking the note up; never plainly swearing that his mother bought the note, or ever intended to buy it. There is no evidence that Mrs. Nancy J. Carter ever saw the note, or directed the foreclosure of the lien, and the quick care she took, soon after the trustee's deed to her, to secure the property to the wife of J. J. Carter, is lively evidence of the way she regarded the transaction. Considering the undisputed and well-established circumstances attending this case from the beginning, and particularly the conduct and testimony of J. J. Carter, we are forced to the conclusion that the \$1,500 note was paid and taken up by J. J. Carter, and that to the extent thereof he used moneys obtained from his mother, Mrs. Nancy J. Carter. The same were obtained by him as loans or advances for the repayment of which Mrs. Nancy J. Carter looked only to him, and in no respect relied on the property or the lien securing the note; and we think that the circuit court should have so found. This conclusion renders it unnecessary to consider the propositions advanced, and very ably discussed, concerning the right to compel an account of the rents and profits of mortgaged premises from a mortgagee or lienholder in possession for the benefit of a junior mortgagee. We are clear that the equities are with the complainant below, appellant here, and that the decree below, while properly holding the trustee's sale fraudulent as against the complainant, should have gone further, and held that the \$1,500 note was paid and satisfied, and the lien thereof extinguished. The decree appealed from is reversed, and the cause is remanded, with instructions to enter a decree in favor of complainants adjudging the \$1,500 lien note to have been paid and satisfied, the lien thereof extinguished, and that the sale and conveyance of the premises in controversy made by M. L. Robertson, trustee, to Mrs. Nancy J. Carter on the 5th day of January, 1892, were fraudulent and void as to complainants, and that the same be canceled; and, further, decreeing that the final decree rendered in the court below in the case of the American Building & Loan Association against J. J. Carter et al. (No. 200 of the equity docket), as finally amended and rendered on July 16, 1895, as of date March 2, 1894, be executed, and to further proceed in the cause as equity may require.

NASHUA SAV. BANK et al. v. BURLINGTON ELECTRIC LIGHT CO. et al  
(Circuit Court, S. D. Iowa, E. D. January 13, 1900.)

**MORTGAGES—RIGHT OF BONDHOLDER TO FORECLOSE TRUST DEED.**

Defendant corporation issued 130 bonds, secured by a trust deed, 30 of which it delivered to complainant in payment for property purchased. It subsequently refused to pay the interest on such 30 bonds, on the ground of fraud and misrepresentation in regard to the property, but continued to pay the interest on the remaining 100. The trustee refused to bring suit to foreclose the trust deed, to which a majority of the bondholders objected, and such suit was brought by complainant. *Held*, that it was necessary to determine the question of fraud alleged by defendant before it could be adjudged that defendant was guilty of any default which entitled complainant to a foreclosure, and that, the court having refused to permit defendant to plead a set-off based on such ground in the foreclosure suit, the decision of such suit would be withheld until complainant brought an action at law on its coupons, in which such question could be adjudicated.

This was a suit in equity by a bondholder to foreclose a trust deed given by defendant corporation to secure an issue of bonds of which complainant held a part.

E. S. Huston, for complainants.

Walsh Bros., for defendants.

SHIRAS, District Judge. In order to reach a proper understanding of the questions now presented for consideration, it may not be out of place to briefly state the facts in the case as they appear on the record, supplemented by the admissions of counsel. In the year 1892 the complainants herein were the owners of certain bonds issued by the Burlington Steam-Heating Company, upon which suit had been brought, a decree obtained upon which sales of the plant and property of the named company had been had, and C. W. Spalding, as trustee for complainants, had become the purchaser of the property at sheriff's sale, holding two certificates of sale as evidence of such purchase. In the month of July, 1892, C. W. Spalding, acting as trustee for complainants, acquired the legal title of the property covered by the certificates of sale, and by written agreement conveyed the same to the J. P. Calnan Construction Company, assigning to that company the certificates of sale held by him, and thereupon the Calnan Construction Company assigned the Spalding contract and the certificates of sale to the Burlington Electric Lighting Company, and the sheriff's deeds of the property were executed to that company. Thereupon the electric lighting company executed and delivered to complainants its 30 bonds, for \$1,000 each, coming due in 1912, with annual interest payable according to the terms of the interest coupons thereto attached; these bonds being so executed and delivered to complainants in payment for the property conveyed by C. W. Spalding, trustee, through the Calnan Construction Company, to the electric lighting company. It also appears that the latter-named company issued its other negotiable bonds, 100 in number, for \$1,000 each, with interest coupons attached, which are now owned by different parties, and, to secure the total issue of \$130,000 of its bonds, the company, under date of September 1, 1892, executed a trust deed



upon its plant, property, and franchises to the New York Guaranty & Indemnity Company, as trustee, which trust deed was duly recorded. It further appears that the annual interest upon the bonds, other than the 30 bonds owned by complainants, has been paid, and no default exists thereon; that, upon the bonds owned by complainants, the interest coming due September 1, 1895, and ever since then, has not been paid or tendered; that it is claimed on behalf of the electric lighting company that in bringing about the sale of the property covered by the sheriff's certificates of sale hereinbefore referred to, and which forms the consideration for which the 30 bonds owned by complainants were issued to them by the electric lighting company, a fraud upon the company was practiced, in misrepresenting the actual condition of the boilers and mains owned by the Burlington Steam-Heating Company, which property was conveyed to the electric company, and which proved to be largely out of repair, and required a heavy expenditure of money and labor to put them into working condition, and for this reason the electric company refused to pay interest to complainants on the bonds held by them. It also appears that the complainants gave notice of the failure to pay the interest on their bonds to the trustee, and demanded that it take action for declaring the principal of the bonds to be due and to foreclose the trust deed; that the trustee, in reply, called complainants' attention to the question whether, under the terms of the trust deed, the trustee could maintain proceedings in foreclosure, and suggested that complainants should bring an action at law to obtain judgment for the interest in default; that thereupon the complainants, on April 2, 1897, filed the bill in this case, making defendants thereto the Burlington Electric Lighting Company, the Burlington Electric Railway Company, the Burlington Railway & Light Company, and the trustee in the mortgage, whose corporate name has been changed to the Guaranty Trust Company of New York. It appears that on November 27, 1897, the electric lighting company by deed conveyed its property covered by the trust deed to the Burlington Improvement Company, which, in turn, conveyed the property to the Burlington Railway & Light Company. To the bill thus filed a demurrer was interposed, and overruled, and thereupon the trustee filed its answer, setting up the provisions of the trust deed, and averring that, under the facts, the complainants could not maintain the present suit for foreclosure. The electric lighting company also answered the bill, and, among other matters, it set forth that there was a failure of consideration of the 30 bonds held by complainants, in that there had been false representations made with regard to the actual condition of the boilers and mains of the Burlington Steam-Heating Company, for the purchase price of which the bonds held by complainants were issued, it being averred that the damage resulting therefrom was the sum of \$17,000, which it was prayed might be set off against any sum found due complainants. On behalf of complainants, exceptions were filed to the portions of the answer setting up the alleged failure of consideration, and, upon a hearing, the exceptions were sustained, upon the ground that the defendant had a plain and adequate remedy at law to recover the damages claimed. Thereupon the defendant

the Burlington Electric Lighting Company asked leave to file an amendment to its answer and a cross bill, in both of which were set forth the facts upon which that company claimed that it had a cause of action against complainants for the false representation claimed to have been made as an inducement to the purchase of the plant of the steam-heating company, and it sought to present this claim as a defense to the foreclosure proceedings. A hearing was had before Judge Woolson, on the application for leave to file the amendment to the answer and the cross bill, and the record contains his opinion in writing upon the matters submitted; it being therein held that the amendment to the answer presented the same allegations to which the exception had already been sustained, and that, as the issues tendered by the cross bill seemed to be almost exclusively, if not entirely, touching the entire issue of the bonds included in the trust deed, and as the holders of the majority of the bonds were not before the court, therefore leave should not be granted to file the cross bill. The opinion clearly recognizes the fact that the issue sought to be tendered by the proposed amendment and cross bill is one that in some form should be heard and decided, and, while it is not made plain, I construe the opinion as an intimation to counsel that the question of fraud in the sale of the heating plant should be heard and determined in a law action. On the 19th of October, 1899, an application was filed asking leave, on behalf of the Burlington Railway & Light Company, to file an amended and substituted answer, in which the charges of fraud in the sale of the heating plant are reiterated, and the damages alleged to have resulted therefrom are sought to be set off against the sums claimed to be due to complainants. Under date of October 20, 1899, an entry appears reciting that the case, having been fully heard, is submitted and taken under advisement; but this entry does not deal with the application for leave to file an amended answer, and, as counsel for complainants properly wish to reserve the right to put in further evidence in case leave is granted to file the amended answer, the entry above cited cannot be given force, as a rehearing must be had in the matter. The application is therefore now before the court, and it is strongly urged by complainants that it is nothing but a repetition of the leave asked from the court and refused by Judge Woolson, and that the judge now hearing the case should not rehear questions decided by him, but should only deal with the record as he left it.

It is a matter of regret that, owing to the untimely death of Judge Woolson, the case must be brought up for disposition before a judge who cannot have the benefit of the knowledge Judge Woolson had of the past history of the case, and who is compelled to seek out the view he had of the proper course to be pursued from a record which is not as clear as it ought to be, in order to enable the court to discern with certainty the course he intended to take in disposing of the issues involved.

The situation as it is now made to appear to the court is as follows: The complainants, being the owners of \$30,000 out of a total of \$130,000, of the bonds secured by the trust deed sought to be foreclosed, ask a decree of foreclosure on the ground that the interest

coming due on their bonds has not been paid since September 1, 1895. It appears that the interest on the \$100,000 of bonds, owned by parties other than complainants, has been paid up, and that the earnings of the mortgaged property have been sufficient to pay the interest on complainants bonds also, but such payment has not been made, because the mortgagor claims that a valid set-off exists in its favor, growing out of misrepresentations made to induce the purchase of the heating plant, which formed the consideration for the 30 bonds owned by complainants. The majority of the bondholders in number and amount are opposed to a foreclosure of the trust deed, and the trustee therein named has not deemed it to be its duty to institute foreclosure proceedings. Thereupon the complainants have brought the present suit in equity, and the mortgagor, by answer and by cross bill, endeavored to present the question of its claim for damages, based upon the alleged misrepresentations in the sale of the heating plant. In its previous action, the court, speaking through Judge Woolson, while recognizing the right of the mortgagor to be heard in support of its claim to a set-off, has ruled that it could not be presented in the way attempted, to wit, by answer or by cross bill, but intimated that it would be a proper subject for an action at law. The defendants now ask to be permitted to raise the issue by an amended answer to the bill for foreclosure, and it is objected that the right so to do has already been refused by the court, and the record so shows.

On behalf of the defendants, it is contended that the complainants have not the right to ask a foreclosure of the trust deed against the wishes of the majority of the bondholders, when the facts show that the earnings of the property are sufficient to pay the yearly interest, and that the reason why the interest has not been paid to complainants is because the mortgagor has a set-off larger in amount than the overdue interest claimed by complainants. If it be true that there exists on behalf of the mortgagor a valid set-off, as claimed, it would seem clear that a court of equity would not grant a decree for the foreclosure of the trust deed against the protest of the majority of the bondholders, because such action would not be needed to protect the rights of the complainants. If there exists a valid set-off against the amount of the unpaid interest, that is a sufficient reason why the court should refuse to grant the decree of foreclosure. If such set-off does not in fact exist, then the defendants are in default, and it would be the duty of the court to require the interest to be paid, and, upon a failure to make prompt payment, the court would doubtless be able to grant a decree of foreclosure.

The proper disposition of this case, therefore, hinges upon the question of the existence of a valid set-off in favor of the mortgagor as against the debt due complainants, and evidenced by the bonds and coupons held by them. The mortgagor, from the beginning of the foreclosure proceedings, has sought to present the question of the set-off by way of answer and cross bill, but the court, speaking through Judge Woolson, has held that it is a question proper to be considered, but that it could not be presented to the court by answer or cross bill in the foreclosure proceedings. Under this position of

the case, as it appears of record, I deem it my duty to follow the rulings made by Judge Woolson, and to refuse the application for leave to file the amended answer, because the answer seeks to present, in that way, the question of the set-off based upon the alleged misrepresentations in the sale of the Burlington heating plant, and which Judge Woolson refused leave to present in that form. The question, however, of the existence of a valid set-off is not disposed of by the refusal to grant leave to file the amended answer, and, as already stated, I cannot see how the court can justly deal with the rights of the parties until the question of set-off is heard and decided. The only method by which, under the rulings already made in this case, this question can be heard, is by the bringing of an action at law in such form that in it the matter of the set-off can be heard and be finally decided.

In the present condition of the case, I can see no better way to protect the rights of the parties, and to secure a prompt presentation and decision of the question, than to order that this case in foreclosure shall be stayed until further order of the court; that the complainants be directed to bring an action on the law side of this court to recover judgment for the amount of interest claimed to be due from the mortgagor. In this action the set-off claimed to exist can be pleaded, and thus the question of the existence of a valid set-off can be fully heard and determined, and the court, in equity, will then be advised of the rights of the parties, and be enabled to deal understandingly therewith. The order, therefore, will be that this case is stayed until further order of the court; that complainants bring an action on the law side of the court to recover the interest claimed to be due; that the defendants therein be required to answer in the action at law within 30 days from service of summons therein; and that the action be prepared for hearing at the next term of this court at Keokuk.

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**HAMILTON et ux. v. FOWLER et al.**

(Circuit Court of Appeals, Sixth Circuit. December 4, 1899.)

No. 717.

**1. PROMISSORY NOTES—RIGHTS OF TRANSFEREE—BONA FIDE HOLDER.**

The transfer of negotiable obligations as security for an antecedent debt is as much in the usual course of business as their transfer in payment of a debt, and in neither case is the bona fide holder affected by equities between prior parties of which he had no notice.

**2. SAME—NOTES SECURED BY REAL-ESTATE MORTGAGE.**

By the indorsement of notes secured by mortgage on real estate as collateral security to debenture bonds issued by the indorser the transferees become bona fide holders for value, and entitled to all the protection extended to any other bona fide holder of commercial paper against defenses between the original parties of which they had no notice.

**3. SAME—INDORSEMENT WITHOUT RECOURSE.**

That a note is indorsed "Without recourse" does not affect its negotiability nor operate as a notice of defenses.

**4. FOREIGN CORPORATIONS—BUSINESS DONE IN VIOLATION OF STATUTE—VALIDITY OF NOTES TAKEN.**

The Tennessee statute (Acts 1891, c. 122) requiring foreign corporations doing business in the state to record their charters with the secretary

of state and in each county where they do business, and making it unlawful for such corporations to do business in the state without having complied with its requirements, does not declare that negotiable notes made in the course of a business carried on in violation of its provisions shall be void in the hands of bona fide holders for value without notice of their illegality, nor is it to be so construed; and, where such a note appears on its face to be a contract made in another state, a holder who acquired it for value before maturity is not charged with notice that it grew out of a transaction within the prohibition of such statute, although it is secured by a mortgage on real estate in Tennessee.

**5. MORTGAGE—DEFENSES—BONA FIDE PURCHASER OF NOTE SECURED.**

Where the maker of a negotiable note cannot defend against the same in the hands of a transferee by showing the illegality of the consideration, he is equally debarred from resisting the enforcement of a mortgage given to secure it, which passed as a mere incident to the transfer of the debt.

**6. USURY—EFFECT UPON NOTE—BONA FIDE PURCHASER.**

Where a usurious note is not made void by statute, but is voidable only to the extent of the usury included therein, an innocent purchaser for value, before maturity and without notice, is unaffected by the fact that an unlawful rate of interest is secretly included as principal.

**7. SAME—LAW GOVERNING—PLACE OF CONTRACT.**

A note which purports on its face to have been made in Missouri, and is there payable, is a Missouri contract, and governed by the law of that state as to usury, although the makers reside in another state, and the note is secured by a mortgage on real estate situated in such state where the note and mortgage were in fact executed.

**8. PROMISSORY NOTES—NEGOTIABILITY—PROVISION FOR ATTORNEY'S FEES IN MORTGAGE.**

A provision in a mortgage for the payment of attorney's fees in case of foreclosure does not affect the negotiability of the note secured, even where, under the law of the state, it would have had that effect if contained in the note itself.

**9. DEED—CONSTRUCTION—ESTATE CONVEYED.**

A deed conveying all the right, title, and interest of the grantor in real estate to a husband and wife, "to have and to hold \* \* \* as joint tenants during the period of their natural lives," upon the death of either the said real estate "to be and become the property in fee simple absolute of the survivor of them," does not convey merely a joint life estate to the grantees, but vests the fee in them jointly.

**10. SAME—POWER TO CONVEY—MORTGAGE.**

A provision, in a deed of real estate to a husband and wife, that "during their natural lives the same may be conveyed by their joint deed," if treated as a power only, and not as a statement of the character of the title conveyed, is sufficient to support a mortgage made by the husband and wife jointly.

**11. MORTGAGE—FORECLOSURE—TERMS OF SALE.**

In Tennessee, where, by statute, the right of redemption does not extend to a sale made under a power in a mortgage, wherein the right of redemption is waived, where such a mortgage is foreclosed by suit, the court may order a sale without redemption in accordance with the terms of the mortgage.

**12. SAME—SALE—ADVERTISEMENT.**

A provision in a mortgage authorizing the trustee, in case of default, to sell "after having advertised such sale 30 days in a newspaper," does not require 30 consecutive advertisements, but that the sale shall not be made until 30 days after the first advertisement, and is satisfied by a publication each week for four successive weeks.

**13. SAME—ELECTION OF REMEDIES.**

Where, in a suit by mortgagors to restrain a sale of the mortgaged property by the trustee under a power of sale in the mortgage, the mortgagors file a cross bill, asking a foreclosure by the court, they cannot

complain that the court treated such cross bill as an election of remedies, and, upon granting the relief prayed for therein, enjoined them from proceeding under the power of sale.

### Appeal from the Circuit Court of the United States for the Western District of Tennessee.

The original bill was filed by Thomas A. Hamilton and his wife, Elizabeth H. Hamilton, in the chancery court for Shelby county, Tenn., for the purpose of enjoining the sale of certain premises situated in that county under a power of sale contained in a mortgage made by the complainants to secure a certain promissory note theretofore made by them to the Jarvis-Conklin Mortgage Trust Company, a corporation of the state of Missouri, whose principal office was at Kansas City. The note aforesaid was in these words:

"Mortgage Bond.	
"United States of America.	
"Number.	Dollars.
"One.	\$10,000.00.
"Real-Estate Mortgage.	
"Coupon Bond.	
"Secured by	Six Per Cent.
"First Mortgage.	Semiannually.
"Negotiated by Jarvis-Conklin Mortgage Trust Co., Kansas City, Mo.	
<p>"Five years after date, for value received, we promise to pay to the order of the Jarvis-Conklin Mortgage Trust Co., at its office in Kansas City, Mo., ten thousand (\$10,000.00) dollars lawful money of the United States, with interest thereon at the rate of six per cent. per annum, payable semiannually on the first days of January and July in each year, according to the tenor and effect of the interest notes of even date herewith, and hereto attached. This note is to draw interest from date at the rate of six per cent. per annum if either principal or interest remain unpaid ten days after due. At the option of the legal holder, after any of said interest notes remain due and unpaid ten days, the whole of the principal and interest may be declared immediately due and payable. This note is given for an actual loan of the above amount, and is secured by a trust deed of even date herewith, which is a first lien on the property therein described.</p>	
"Dated at Kansas City, Mo., July first, 1891.	
"Thos. A. Hamilton.	
"Elizabeth H. Hamilton.	
"Witness: W. A. Smith."	

Relief against the sale was sought mainly upon the ground that the note was for money loaned in Tennessee by a foreign corporation engaged in doing business in Tennessee without having first complied with the Tennessee statute requiring foreign corporations, before carrying on business in the state, to record their charters, and the note and mortgage therefore void. Other objections to the right of the trustee to enforce the mortgage were also urged, which will be hereafter stated. A stay order was granted by the chancellor. Thereafter the defendants removed the cause to the circuit court of the United States for diversity of citizenship. The defendants Fowler and Caesar then answered, and, after denying the averments of the bill, averred that they were bona fide purchasers of the note secured by the mortgage before maturity, for value, and without notice of any of the infirmities alleged, if they in fact existed. Later the same defendants filed a cross bill, and sought a foreclosure of the mortgage by a sale under decree. Upon final hearing the issues were decided for Messrs. Fowler and Caesar, the note and mortgage were held valid, and a decree settling the amount of the debt due and ordering foreclosure by sale, as prayed by the cross bill, was granted, but enjoining the trustee from proceeding with the sale theretofore advertised. 83 Fed. 321.

Wm. M. Randolph, for appellants.  
Thomas M. Scruggs, for appellees.

**Before TAFT, LURTON, and DAY, Circuit Judges.**

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

Hamilton and wife have appealed from the decree upon the cross bill, and Fowler, Caesar, and Maxwell have appealed from the decree enjoining a foreclosure by sale by Maxwell as trustee under the mortgage. The Tennessee act of 1891, c. 122 (Acts Tenn. 1891, p. 264), provides that all foreign corporations proposing to carry on business in Tennessee shall record their charters with the secretary of state, and in each county in which it is proposed to do business, and that "it shall be unlawful for any foreign corporation to do or attempt to do any business or to own or acquire any property in this state, without having first complied with the provisions of this act, and a violation of this statute shall subject the offender to a fine, of not less than \$100, or more than \$500, at the discretion of the jury trying the case." Though this act does not, in express terms, declare void the contracts of corporations doing business within the state in violation thereof, yet it is well established by the Tennessee decisions that every contract made in the state by a foreign corporation doing business within the state, not having complied with the law, is unenforceable as between the parties thereto. *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn. 587, 22 S. W. 743; *Association v. Cannon*, 99 Tenn. 344-348, 41 S. W. 1054. These cases are in accord with a line of earlier decisions of the state holding that every contract made in the conduct of a business, or for or about a business which is prohibited and made unlawful, is, by implication, void, and unenforceable. *Wetmore v. Brien*, 3 Head. 723; *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230; *Haworth v. Montgomery*, 91 Tenn. 17-19, 18 S. W. 399. But the Tennessee act has no application to interstate commerce, and a mortgage to secure the price of mill machinery sold by an Indiana corporation and set up on realty in the state was held valid and enforceable, although the corporation had not complied with the Tennessee law; the court holding that a contract made outside of the state was not within the prohibition of the statute, and that a mortgage on lands in the state was not a carrying on of business within the state under the statute. *Manufacturing Co. v. Gorten*, 93 Tenn. 590, 27 S. W. 971, 26 L. R. A. 135. In *Neal v. Association*, 100 Tenn. 607, 46 S. W. 755, the court held that a contract for the loan of money by a foreign corporation having no office or agency in the state, made direct from its home office in Louisiana, and secured by a mortgage on land in Tennessee, was a Louisiana contract, and that same was valid and enforceable. The question as to whether the *Jarvis-Conklin Mortgage Trust Company* was at the time of the transaction with Hamilton and wife carrying on business within the state, or whether the loan to Hamilton and wife was in fact a loan negotiated and made in Tennessee, is not material in view of the fact that the appellees Fowler and Caesar are bona fide purchasers of the note made by Hamilton and wife, for value, and before maturity, and without notice that it had been made in the course of a prohibited business.

The note purports on its face to have been made at Kansas City, Mo., and is there made payable. It is true that it recites that it is secured by a mortgage upon land in Tennessee. But neither the fact that the note was secured by a mortgage upon realty situated in that state, nor that the mortgage was acknowledged there before a Tennessee notary, operates to make the note a Tennessee contract, nor to require the purchaser thereof to make further inquiry. The note purports to be a Missouri contract, and is payable to a Missouri corporation. This note, before maturity, was indorsed in blank by the payee to Messrs. Lubbock & Lubbock, London bankers, as security for certain debenture bonds theretofore or then issued, which does not clearly appear, and negotiated for value by the Jarvis-Conklin Mortgage Trust Company. Default was thereafter made in the payment of interest on those bonds, and this note, with others held as collateral security, were, by the terms of the trust under which they were held, forfeited, and by a decree of an English court of competent jurisdiction, delivered to Messrs. Fowler and Caesar as trustees for the debenture bondholders. It is immaterial whether these bonds were originally issued upon the security of this and other notes, or that they were subsequently assigned to secure them. The transfer of negotiable obligations as security for an antecedent debt is as much in the usual course of business as its transfer in the payment of the debt. In neither case is the bona fide holder affected by the equities between prior parties of which he had no notice. *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *McCarty v. Roots*, 21 How. 432, 438, 439, 16 L. Ed. 162; *Brooklyn City & N. R. Co. v. National Bank*, 102 U. S. 14-28, 26 L. Ed. 61.

Counsel for the mortgagors have placed much reliance upon *Bank v. Bates*, 120 U. S. 556, 7 Sup. Ct. 679, 30 L. Ed. 754, as in some way affecting the status and title of Messrs. Fowler and Caesar. But that case presented only the question as to whether the position of a mortgagee under a chattel mortgage made to secure a pre-existing debt was identical with that of one who took negotiable paper before maturity, and without notice of defenses, as collateral security for an antecedent debt. The court declined to extend to such a mortgagee the doctrine of *Brooklyn City & N. R. Co. v. National Bank*, cited above. Touching the distinction between the two cases, the court said:

"The rules established in the interest of commerce to facilitate the negotiation of mercantile paper, which, for all practical purposes, passes by delivery as money, and is the representative of money, ought not, in reason, to embrace instruments conveying or transferring real or personal property as security for the payment of money. At any rate, there is nothing in the usages of merchants, as shown in this record, or so far as disclosed in the adjudged cases, indicating that the necessities of commerce require that chattel mortgages be placed upon the same footing in all respects as negotiable securities which have come to the hands of a bona fide holder for value, before their maturity. Such a result, if desirable, must be attained by legislation, rather than by judicial decisions."

By the indorsement of the notes of Hamilton and wife to Lubbock & Lubbock as collateral security to debenture bonds of the indorser, the holders of such bonds became bona fide holders for value, and



are entitled to all the protection extended to any other bona fide holder of commercial paper acquired before maturity, and without notice of defense between the original parties. That the note was indorsed "Without recourse" neither affected its negotiability nor operated as notice of defenses. Story, Bills, § 214; 1 Daniel, Neg. Inst. (3d Ed.) p. 627; Rand. Com. Paper, § 722.

2. The purchaser, before maturity, of this note had a right to assume that this note was what it purported to be, a Missouri contract, and was, therefore, unaffected by any law of Tennessee prohibiting the Missouri payee from doing business in Tennessee without first complying with the Tennessee law. This is the appearance which the makers of the note gave to the transaction on its face, and they should not be heard to deny that appearance as against one who became a holder for value, before maturity, and without notice. The Tennessee statute does not declare that negotiable notes made in the course of a business carried on in Tennessee in violation of the statute shall be void in the hands of a bona fide holder for value, without notice of its illegality.

In the case of *Lauter v. Trust Co.*, decided by this court, and reported in 54 U. S. App. 49-51, 29 C. C. A. 473, 85 Fed. 894, we had to consider the attitude of an indorsee of a negotiable note made for money loaned in Tennessee by this same mortgage company while engaged in carrying on business in that state without compliance with the statute requiring foreign corporations to register their charters. The note there in question purported to have been made at Kansas City, Mo., and was there made payable. It was secured by a mortgage upon lands in Tennessee. The indorsee of the note acquired it before maturity, for value, and without notice that the note was made in the conduct of a business carried on in Tennessee contrary to the prohibition of the statute. A decree enforcing the mortgage was affirmed. In that case we said:

"The general and well-settled rule in favor of negotiable paper is that an innocent purchaser for value, before maturity, is unaffected by the fact that the consideration was illegal, and the note void and unenforceable by one having notice of the facts. If the illegality of the consideration results from a statute merely prohibiting a business or imposing a penalty, but does not declare a note or bill based upon such a prohibited transaction absolutely null and void, a bona fide holder of such paper will be protected. \* \* \* There are few exceptions to this general rule, mainly dependent upon statutes against usury and gaming. The Tennessee statute relied upon as making this note void contains no provision either expressly or impliedly declaring a note made in the course of such a prohibited business void in the hands of an innocent holder for value."

In support of the doctrine upon which we decided the case we cited: 1 Daniel, Neg. Inst. (4th Ed.) §§ 197, 198; 2 Rand. Com. Paper, § 559; *Farmers' Nat. Bank of Valparaiso v. Sutton Mfg. Co.*, 6 U. S. App. 312-334, 3 C. C. A. 1, 52 Fed. 191, 17 L. R. A. 595; *Williams v. Cheney*, 3 Gray, 215; *Cazet v. Field*, 9 Gray, 329; *Converse v. Foster*, 32 Vt. 828; *Bank v. Thompson*, 42 N. H. 369; *Vallett v. Parker*, 6 Wend. 615; *Vinton v. Peck*, 14 Mich. 287; *Lacy v. Sugarman*, 12 Heisk. 354-364. To these authorities we may add: 4 Am. & Eng. Enc. Law (2d Ed.) p. 192, and cases there cited; and Press

Co. v. City Bank of Hartford, 17 U. S. App. 213, 7 C. C. A. 248, 58 Fed. 321, where the same question arose under a Pennsylvania statute similar to the Tennessee act of 1891. Neither does the fact that the mortgage made to secure the note was a Tennessee mortgage subject it to defenses which cannot be made against the note. The mortgage is a mere incident to the note, and the benefit of the security passed to the indorsee the note without any specific assignment of the mortgage. *Clark v. Jones*, 93 Tenn. 639, 27 S. W. 1009; *Graham v. McCampbell*, Meigs, 57; *Cleveland v. Martin*, 2 Head, 128; *Trust Co. v. Smythe*, 94 Tenn. 513, 29 S. W. 903, 27 L. R. A. 663. In the latter case Chief Justice Snodgrass, after an able and comprehensive review of the authorities, announced for the court the conclusion that "the assignment of negotiable paper carries with it the security of the mortgage, and is unaffected by the equities between the mortgagor and mortgagee." To the same effect are the cases of *Carpenter v. Longan*, 16 Wall. 271, 21 L. Ed. 313, and *Kenicott v. Supervisors*, 16 Wall. 452, 21 L. Ed. 319. It therefore follows that, if the makers of the note could not, as against the present holders thereof, defend by showing the illegality of the consideration, they are equally debarred from resisting the enforcement of the mortgage, which, as a mere security, passes with the debt as an incident. *Manufacturing Co. v. Gorten*, cited above.

3. The next objection is that the note includes usury to the extent of \$1,000. This does not appear on the face of the note, which, on its face, recites that it "is given for an actual loan of the above amount." The present holders, being bona fide purchasers without notice of the inclusion of unlawful interest, are protected against such a defense. Neither the Tennessee nor Missouri statutes made a contract absolutely void where the unlawful interest does not appear upon the face of the instrument. Section 3499, Shannon's Code Tenn.; *Causey v. Yeates*, 8 Humph. 605; Rev. St. Mo. 1879, §§ 2726, 2727; *Montany v. Rock*, 10 Mo. 506; *Long v. Long*, 141 Mo. 352, 44 S. W. 341. Where the note is not made void by the statute, and is voidable only to the extent of usury included, an innocent purchaser for value, before maturity, and without notice, is unaffected by the fact that an unlawful rate of interest is secretly included as principal. *Ramsey v. Clark*, 4 Humph. 244; *Bradshaw v. Van Valkenburg*, 97 Tenn. 316, 37 S. W. 88; *Fleckner v. Bank*, 8 Wheat. 338, 355, 5 L. Ed. 631; *McBroom v. Investment Co.*, 153 U. S. 318-325, 14 Sup. Ct. 852, 38 L. Ed. 729; *Tilden v. Blair*, 21 Wall. 241-248, 22 L. Ed. 632; *Norris v. Langley*, 19 N. H. 423; *Converse v. Foster*, 32 Vt. 828.

4. The provision of the note on its face that "this note is to bear interest from date at the rate of six per cent. per annum if either principal or interest remain unpaid ten days after date," was probably meant to provide for interest only from date of maturity, inasmuch as the note, by another provision, bore same interest from date, and had interest coupons attached. But, if intended to make the note bear 12 per cent. from date to maturity as a penalty for failure to pay at maturity, it would be usurious, and unenforceable, under the construction given to the Tennessee usury statute by the

supreme court of that state. *Richardson v. Brown*, 9 Baxt. 242; *Bang v. Mill Co.*, 96 Tenn. 361, 34 S. W. 516. This construction of local usury statute is authoritative in a court of the United States in respect to a Tennessee contract. *Trust Co. v. Krumseig*, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474. But the note here involved was a note dated at Kansas City, Mo., and was there made payable. The parties had a right to contract with reference to the law of the state of Missouri, although the payors of the note were citizens and residents of Tennessee. It is, therefore, a Missouri contract, and governed by the law of Missouri in respect to usury. *Brown v. Gardner*, 4 Lea, 145; *Hubble v. Improvement Co.*, 95 Tenn. 585, 32 S. W. 965; *Coghlan v. Railroad Co.*, 142 U. S. 101, 12 Sup. Ct. 150, 35 L. Ed. 951. Under the law of Missouri a contract is not void even though it carry interest upon its face at an unlawful rate. It is voidable only as to the excess of interest. *Long v. Long*, 141 Mo. 352-374, 44 S. W. 341. Stipulations providing that an obligation shall draw after maturity a greater rate of interest than permitted by statute are generally regarded as penalties to induce prompt payment, a penalty which the debtor may avoid by paying when due, and, therefore, not usurious. *Lloyd v. Scott*, 4 Pet. 205, 7 L. Ed. 833; *Sumner v. People*, 29 N. Y. 337; *Cutler v. How*, 8 Mass. 257; *Floyer v. Edwards*, Cowp. 112; *Rogers v. Sample*, 33 Miss. 310; *Chaffe v. Landers*, 46 Ark. 364. This, however, is an academic question, and need not be decided. The utmost effect of the Missouri statute would be to make only the stipulation invalid. The court below did not enforce it, and the appellees do not assign error upon the decree.

5. It is next assigned as error that the court below included in the debt payable out of the proceeds of the mortgaged property a solicitor's fee of \$1,000. The mortgage expressly provided that out of the proceeds of sale of the mortgaged property such fee should be paid if any suit should be instituted for the collection of the debt secured therein, and that a judgment for said sum should go in favor of the trustee. This provision was valid under both the law of Tennessee and Missouri. *Oppenheimer v. Bank*, 97 Tenn. 19, 36 S. W. 705, 33 L. R. A. 767; *Bank v. Gay*, 63 Mo. 33; *Samstag v. Conley*, 64 Mo. 477; *Bank v. Marlow*, 71 Mo. 618. The provision in respect to the fee is definite and certain, and is included in the mortgage only. This note does not affect the negotiability of the note, as no such provision is found in the note itself, even if its presence there would render the note nonnegotiable under the law of Missouri.

6. It is next assigned as error that the court below did not construe the mortgage as conveying only the joint life estate of Thomas A. Hamilton and his wife, Elizabeth H. Hamilton. The mortgage purports to convey the fee, and contains the usual covenants of seisin and warranty, and it is a little difficult to understand how appellants are affected if, in fact, their estate was less than the fee. The contention, however, is that Henry F. Dix, the immediate vendor of Hamilton and wife, conveyed to them only an estate for their joint lives, and that the fee remains in Dix, who did not join in the mortgage, and will pass to the survivor of the joint life tenants unaffected by the mortgage. Waiving the question as to whether the fee would

not pass when it shall vest in the survivor, and thus feed the warranty if this contention was true, we are of opinion that the fee did pass under Dix's deed, and that it vested in Hamilton and wife as tenants by the entirety. The granting clause could not be more specific or full. It is as follows: "Doth hereby bargain, sell, release, remise, and quitclaim and convey unto the said Thos. A. Hamilton and Elizabeth H. Hamilton all his right, title, and interest in and to," etc. When land is conveyed to husband and wife, they take but one estate, being deemed as one person in law, and both are seised of the entirety. If one die, the estate continues in the survivor. Nothing passes on the death of either husband or wife, but by a condition in law the longest liver takes the entire estate. This has been the common law for ages, and is the well-settled law of Tennessee. 2 Bl. Comm. 182; Co. Litt. 187b, 2; Taul v. Campbell, 7 Yerg. 319; Johnson v. Lusk, 6 Cold. 116. If the deed had stopped here, counsel concede that the fee would have passed to the grantees, but they say that the broad language of the granting clause is cut down by the habendum clause, which is as follows:

"To have and to hold the aforesaid land, with all and singular the hereditaments and appurtenances of and to the same or in any wise appertaining, to the said Thomas A. Hamilton and Elizabeth H. Hamilton as joint tenants during the period of their natural lives, and upon the death of said Thos. A. Hamilton or Elizabeth H. Hamilton then the said real estate is to be and become the property in fee-simple absolute of the survivor of them. During their natural lives the same may be conveyed by their joint deed."

This was obviously but an attempt to define an estate by entireties, erring only, if at all, in using words which, by a strained construction, might imply that upon the death of one of the grantees something would pass to the survivor which had not theretofore vested. In a sense this is so. During the life of husband and wife the entire estate vests in them jointly, as it would in a corporation. Upon the death of one, by a condition of law the survivor is seised singly. The provision that during the lives of both the property might be conveyed by their joint deed was not intended as a power, but is a statement of the character of the title, and, in connection with the whole of the deed, plainly indicates the intent to vest in the grantees a joint estate in fee. If any doubt existed as to the vesting of the fee in Hamilton and wife as tenants by entireties, it should be solved by section 3672 (Shannon's Code Tenn.) which provides that:

"The term 'heirs' or other words of inheritance, shall not be requisite to create or convey an estate in fee, and every grant or devise of real estate, or any interest therein, shall pass all the estate or interest of the grantor or devisor, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of the instrument."

But, if in error as to this, the deed from Dix expressly provides that "during their natural lives the same may be conveyed by their joint deed." If we treat this as a power only, it is plainly sufficient to support a mortgage of the entire estate. The power to a married woman to dispose of property by deed includes "the power to incumber or charge as the greater includes the less." *Steifel v. Clark*, 9 Baxt. 466; *Williams v. Whitmore*, 1 Tenn. Cas. 239.

7. It is next assigned as error that the court erred in decreeing a sale for cash in bar of the right of redemption. The mortgage provided that the trustee, in event of default, might, "after having advertised such sale 30 days in a newspaper published in the county where the premises are situated," sell the property for cash, free from the right of redemption. In Tennessee the right of redemption does not extend to a sale made under a power in a mortgage wherein the right of redemption is waived. Shannon's Code Tenn. § 3812. The power of the court to enforce the mortgage by a sale under its decree in accordance with the power contained in the instrument cannot be denied. A sale for cash free from redemption was, therefore, not error. *Knox v. McClain*, 13 Lea, 197. The court pursued the terms of the power of sale by ordering the sale to be made "after giving 30 days' notice of the time, place, and terms of sale by advertisement in the Evening Scimitar once a week for four successive weeks." The requirement that the trustee should sell "after having advertised such sale 30 days in a newspaper" does not mean 30 consecutive advertisements, but that the sale shall not be made under 30 days after the first advertisement. The decree provides for four advertisements, and thus required more insertions than demanded by the power.

8. The defense of *res judicata* is not made out. The former record is not filed, and no proof was taken to support the plea. The appellants must, therefore, rely upon the admissions of the answer to the amended bill of complainants. The answer shows that the former suit was filed before maturity of the principal, and upon a default in payment of interest. This interest was paid, and the bill by agreement dismissed. This was no bar to another suit on maturity of the principal.

Other assignments of error by Hamilton and wife have been examined. They are not well taken, and the decree, so far as involved by the appeal of Hamilton and wife, is without error, and is affirmed.

The cross appeals of Fowler and Caesar and Maxwell from the decree perpetuating the injunction restraining a sale by the trustee must be dismissed. The cross appellants did not ask for leave to dismiss their cross bill, but proceeded with it, and took, according to its prayer, a decree for the foreclosure of their mortgage by a sale under the direction and order of the court. This the learned judge below regarded as an election between two remedies. Inasmuch as the court taxed the costs of both the original and cross bill to Hamilton and wife, and gave to the cross appellants the full relief asked by their cross bill, we can see no reason for complaining that the court enjoined them from proceeding with the remedy by a sale by the trustee under the power of sale in the mortgage. This was an election to resort to the court for a foreclosure decree, and it was not error to enjoin the trustee's sale.

The appellants Hamilton and wife will pay two-thirds of the cost, and the cross complainants Fowler and Caesar the remainder.

## LEEDS v. EVANS.

(Circuit Court, E. D. Pennsylvania. January 18, 1900.)

No. 82.

**1. PLEADING—AMENDMENT—STATEMENT OF CLAIM.**

Where the original statement of claim filed by a plaintiff alleged his ownership of a farm, an amendment stating facts showing that he was the equitable owner of such farm, although the legal title was in another, involves no departure, and may be permitted, where the relief sought is not dependent on the nature of his title.

**2. DEPOSITIONS—EXCEPTIONS TO INTERROGATORIES.**

Under rules of court requiring exceptions to interrogatories to be taken before commission issues, but which also permit exception to be taken on the trial to the admissibility of the evidence returned, where it might have been taken if the witness had been offered for oral examination, an exception to an interrogatory, which goes to the relevancy of the answer anticipated, can be better determined after the answer has been returned, and will not be sustained in advance of the examination.

On motion for leave to amend statement of claim and exception to cross interrogatories filed to be propounded under a commission to take a deposition.

Francis S. Laws and Sharpe & Alleman, for plaintiff.  
Theo. F. Jenkins and Charles F. Stilz, for defendant.

DALLAS, Circuit Judge. This court may at any time permit either of the parties to amend defects in the process or pleadings. Rev. St. U. S. § 954. But a statement of claim cannot be so amended as to alter or vary the cause of action, as by adding new parties, or presenting a new subject-matter, after the statute of limitations has become a bar. The amendment here proposed is not, however, subject to this objection. The action is one of deceit, founded upon the allegation that certain representations made by the defendant, or on his behalf, were false, etc.; and this cause of action, its subject-matter, and every material averment affecting the defendant's liability, will remain precisely the same as before after the proposed amendment shall have been made. The original statement alleges that the plaintiff was the owner of a farm, which he (the plaintiff) agreed to exchange for a certain farm of the defendant, concerning which it is averred the representations complained of were made. The amendment now sought to be introduced is entirely consistent with this allegation. It involves no departure from the original statement that the plaintiff was the owner of the farm first mentioned, but merely sets out the nature of the plaintiff's title, and can have no other effect than to give notice that he proposes to prove his ownership by evidence that the equitable title was in him, although the legal title was in the name of a certain James Bengé.

The plaintiff has filed three exceptions to the cross interrogatories proposed to be propounded under a commission to be issued to Nashville, Tenn. Two of these exceptions (relating, respectively, to the forty-seventh and to the forty-eighth cross interrogatories) have been withdrawn. The exception to the forty-sixth interrogatory is insisted

upon, but will not be sustained. Although clause 2 of rule 10 provides that exceptions to the interrogatories filed by either party must be taken before the commission be issued, yet, under clause 6 of the same rule, exception may be taken on the trial of the case to the admissibility of the evidence returned, where the exception is one that might be taken to the evidence if the witness were offered for examination orally in court. This exception is really to the anticipated irrelevancy of the evidence to be adduced in answer to the interrogatory objected to, and, as the question thus suggested may, in this instance, be more safely determined after the return of the commission, the plaintiff will be allowed to then renew his exception sec. reg., if he shall be so advised. The plaintiff's motion for leave to amend is granted. His exception to the forty-sixth cross interrogatory under the commission to Nashville, Tenn., is, without prejudice, overruled.

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LUXFER PRISM PATENTS CO. v. ELKINS et al.

SAME v. BETZ et al.

(Circuit Court, E. D. Pennsylvania. January 18, 1900.)

Nos. 5, 6.

1. COSTS—DOCKET FEE—WHEN TAXABLE.

The dismissal by a complainant of a bill for the infringement of certain patents as to one of such patents does not constitute a final hearing of the suit, so as to entitle the defendant to have the docket fee provided for by Rev. St. § 824, taxed in his favor.

2. SAME—EXPENSE OF PRINTING BRIEFS.

The expense of printing briefs is neither by statute nor by rule in the Third circuit made a part of the taxable costs.

Appeal from Taxation of Costs.

Kerr, Page & Cooper, for complainant.

Kenyon & Kenyon, for respondents.

McPHERSON, District Judge. At the time the demurrers to these bills were argued, the plaintiff's motions to dismiss as to one of the patents that were involved in each case were also heard. The demurrers were overruled, and the motions to dismiss were allowed upon condition that all the costs thus far accrued in each case should be paid. The defendants contend that they are entitled to the docket fee of \$20 in each case, and also to the cost of printing their brief for use upon the argument of the demurrers; or, at all events, to so much of the cost of printing as was caused by their argument concerning the two patents embraced in the motions to dismiss. The clerk disallowed these items, and an appeal from his decision is now before the court.

I think the clerk was right in refusing the allowance. There has been no final hearing upon either bill, and therefore the docket fee provided for by section 824 of the Revised Statutes cannot now be taxed. The parties are unchanged, and the only difference in either bill is that the area of the controversy has been narrowed. The mere

dismissal of the bill so far as one patent was concerned cannot, in any sense, be said to be a final hearing of the whole case. If it were, there might be two final hearings in a dispute between the same parties, and this is, of course, a contradiction in terms.

The expense of printing the brief is nowhere made by statute a part of the taxable costs, and there is no rule or practice in this circuit permitting it. Neither do I think it a desirable practice to establish, for it would enable the successful party to impose upon the other excessive charges for printing, or lead to constant disputes about the necessity or propriety of the matter printed. The policy in this state (with rare exceptions) has always been to require each party to a lawsuit to bear his own expenses; and on the whole, the rule has worked well. It tends to restrain litigation, and it certainly prevents some abuses. The cost of printing the record in some cases is permitted in the admiralty by a rule of the district court, but obviously this stands upon a different footing.

The appeal in each case is dismissed.

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FITZWILLIAM v. CAMPBELL et al.

(Circuit Court of Appeals, Fifth Circuit. January 9, 1900.)

No. 833.

PROBATE COURTS—POWER TO SELL LANDS—CONSTRUCTION OF STATUTE.

The act of the congress of Texas of December 20, 1836 (Hart. Dig. Tex. 1850, p. 146), organizing inferior courts, and defining their powers and jurisdiction, which created a probate court in each county, and defined its jurisdiction, which included "full jurisdiction of all testamentary and other matters appertaining to a probate court," when construed as an entirety, and in view of the fact that under the civil law, upon which the jurisprudence of the republic was founded, no distinction was made between the personal and real estate of a decedent, both of which passed to his administrator, and also in view of the contemporaneous and subsequent construction of the act both by the courts and the congress, must be held to have conferred on such probate courts the power to sell both the personal and real estate of a decedent, when required in the administration of his estate.

In Error to the Circuit Court of the United States for the Western District of Texas.

This was a suit by Ida F. Fitzwilliam against Collin Campbell and others for the recovery of the James W. Fannin headright survey of 4,605 acres of land, situated in Karnes county, Tex. The original petition was filed on July 22, 1895, and the amended petition was filed on February 18, 1897, and was in the usual Texas statutory form of an action in "trespass to try title." The defendants, except three who disclaimed, filed answers in which they asserted title to specific portions of the league and labor, comprising in the aggregate the entire league and labor. These several answers each contained a general exception, a plea of not guilty, pleas of the three, five, and ten years' statutes of limitation, and a plea of improvements in good faith; and each answer indicated the boundaries of the particular tract claimed by the particular defendant. The plaintiff filed a first supplemental petition or replication on November 29, 1898, alleging that Minerva J. Fannin owned the said land from 1838 to the time of her death, on July 27, 1893, and that during all that time she was a person of unsound mind, and that plaintiff acquired her title; the plaintiff also pleading that the defendants claimed the



land under a pretended administration sale made to George W. Grant by the probate court of Brazoria county, Tex., and that the sale was coram non iudice and void, and denying that the purchase money was paid, and offering to refund the purchase money, with legal interest, should the court find it had been paid; and also pleading that the defendants had been using the land ever since January 1, 1884, and praying for judgment for rents since that time, to offset the value of the improvements. The cause came on for trial on November 30, 1898, before the court, a jury having been waived. The plaintiff offered in evidence a certified copy of the patent, showing that the land in controversy was patented to the heirs of James W. Fannin, their heirs and assigns, on July 28, 1849. The plaintiff also proved that James W. Fannin, "the hero of Goliad," was killed in 1836, and that his heirs were his wife, Minerva D. Fannin, who died in 1841 or 1842, and his two daughters, Pinckney M. Fannin, who died in 1845, while a minor, and Minerva J. Fannin, who died on July 27, 1893. The plaintiff also showed title to  $1\frac{3}{4}$  of the estate of Minerva J. Fannin, and rested. The defendants thereupon offered in evidence, over the objections of the plaintiff, which are hereinafter stated, properly certified copies from the probate records of the county court of Brazoria county, Tex., of the following proceedings had in the administration upon the estate of the said James W. Fannin in said court:

(1) "Republic of Texas, County of Brazoria.

"To the Honorable the Probate Court in and for Said County: The petition of Thomas F. McKinney, administrator of the estate of James W. Fannin, deceased, respectfully represents that the said succession consists of an equal moiety of a tract of land situated in this county, containing three thousand acres or thereabouts, and an equal interest in about thirty negroes and other property, such as stock, etc., as will more fully appear by a contract between Joseph Mims, of said county, and the petitioner's intestate, which contract is hereunto annexed as a part of this petition; that a partition of said property cannot as yet be made, as will be seen by the terms of said contract, and, even if it could be legally done, that it would diminish the value of said property; that the estate is insolvent, and the creditors are attempting to enforce the collection of their respective debts; that Minerva Fannin, the widow of said James W. Fannin, is entitled to the half of said property, as gains of matrimony, after the payment of the debts, and that Pinckney M. and Minerva Fannin, the children of said James W. Fannin, are entitled to the remainder of said estate, and that they are minors, and have no guardian to defend them in this suit; that Joseph Mims refuses to permit partition of said property until a dissolution of said partnership. Wherefore the petitioner prays that the said Minerva D. Fannin, the said Pinckney M. and Minerva, minors, and the said Mims be cited to appear at the next term of the court and answer this petition; that proper guardian be appointed to defend the interests of the said minors; that an estimative inventory be made of said succession, and that a decree be rendered for the sale of the property of said succession, for cash; and, finally, that all other relief be granted that the nature of the case requires. The petitioner here makes an exhibit of the debts of said succession, and will pray," etc.

"Jack & Townes, for Petitioner."

"The petition of George Knight & Co., Edwin Waller, Edmund Andrews, and others, creditors named in the tableau of debts, by their attorneys, come into court, and pray for a sale of the property named in the foregoing petition as prayed for; and they pray that they may be made parties to the said petition, and be entitled to all the relief which under the law they are entitled to. Petitioners will pray," etc.

"S. Whiting, by H. P. Brewster, Attorney.

"George W. Grant, by J. Theon, Attorney.

"R. J. Townes, for the Other Creditors.

"Harris and Pease, Attorneys for George Knight & Co. and E. Waller."

"Republic of Texas, County of Brazoria—In Probate.

"Joseph Mims, a joint owner with the estate of James W. Fannin, deceased, of certain property named in the petition of Thomas F. McKinney,

administrator of said estate, comes into court, and consents to the sale of said property upon the terms as set forth in said petition, and further represents that he is a creditor of said estate to a large amount, and joins in the petition of the other creditors for a sale [there] of.

Jos. Mims."

"Republic of Texas, County of Brazoria—In the Court of Probate.

"Minerva D. Fannin, widow of James W. Fannin, deceased, and Pinckney M. and Minerva Fannin, minor children of said decedent, represented by H. P. Brewster, counsel ad litem, in answer to the petition of Thomas F. McKinney, administrator of said Fannin's estate, and to the petition of sundry creditors, say that they consent to the sale of the property named in said petition, and upon the terms and in the manner prayed.

"Minerva D. Fannin.

"Henry P. Brewster, Counsel Ad Litem for Pinckney M. and Minerva Fannin, Minors."

"This day came on to be heard the petition of Thomas F. McKinney, administrator of the estate of James W. Fannin, deceased, and also of the creditors of said estate; and the court having considered the same, and examined the exhibits filed, and heard the answer of Joseph Mims, as well as the answers of Henry P. Brewster, counsel ad litem appointed by the court to defend the interests of the minors, Pinckney M. and Minerva Fannin, in this suit, and heard the arguments of counsel, it is ordered, adjudged, and decreed that all the right, title, and interest of the succession of James Fannin in and to the land, negroes, and other property mentioned in the petition be sold according to law, for cash; and, the court being satisfied that no partition can be made of said property, it is ordered that an estimative inventory be made of the same, and that a sale be made without a partition thereof."

All the above proceedings bear date October 1, 1839.

(2) "Be it remembered that on the 28th day of October, 1839, there was held at the court house in the town of Brazoria a regular term of court of probate for said county. Present: Wm. P. Scott, chief justice; Wm. Eckel, associate justice; and M. B. Williamson, deputy clerk; and Wm. McMaster, deputy sheriff. This day came on to be heard the petition of Thomas F. McKinney, administrator of the estate of James W. Fannin, deceased, and also the petition of the creditors of said estate; and the court having examined the exhibits filed, and heard the answers of Joseph Mims and Minerva D. Fannin, as well as the answer of Henry P. Brewster, counsel ad litem appointed by the court to defend the interest of the minors, Pinckney M. and Minerva Fannin, in this suit, and heard the argument of counsel, it is ordered, adjudged, and decreed that all the right, title, and interest of the succession of James Fannin in and to the land, negroes, and other property mentioned in the petition be sold according to law, for cash; and, the court being satisfied that no partition can be made of said property, it is ordered that an estimative inventory be made of the same, and that a sale be made without a partition, and that an extension of time for twelve months be allowed said McKinney to settle said estate."

(3) "Republic of Texas, County of Brazoria.

"To the Honorable the Probate Court in and for Said County: The petition of Thomas F. McKinney, administrator of the estate of James W. Fannin, deceased, respectfully represents that at a former term of the court the said estate was reported insolvent, and an order obtained for the sale of the property, except the headright of the deceased, containing one league and labor of land lately located, which was omitted to be included in the prayer for the sale of the property. He therefore prays that the same may be sold for cash, according to law. Petitioner will pray," etc.

"December 30, 1839.

Jack & Townes, for Petitioner.

"Granted. Wm. P. Scott, Probate Judge."

(4) "Be it remembered that on the 30th day of December, 1839, there was holden at the court house in the town of Brazoria a regular term of the probate court of said county. Present: The Hon. Wm. P. Scott, chief justice; Wm. Eckel, associate justice; M. B. Williamson, deputy clerk; Wm. McMaster, sheriff. This day came on to be heard the petition of Thomas F. McKinney,

administrator of the estate of James W. Fannin, representing that at a former term of the court an order was obtained to sell the property belonging to the estate, in the prayer for which order the headright of said Fannin was omitted to be included,—said headright being a league and labor of land recently located,—and praying the court to order the sale of the same for cash. And the court having considered the prayer of the petition, and being satisfied of the truth of the allegations therein contained, it is ordered, adjudged, and decreed that the prayer of the petition be granted, and the land sold for cash."

(5) "Republic of Texas, County of Brazoria.

"Before me, Wm. P. Scott, chief justice and ex officio judge of probate in and for said county, personally came and appeared Sam C. Douglass and Theodore Bennett, appraisers, and R. J. Calder, umpire, called upon by me to value and appraise one headright of a league and labor of land belonging to the estate of James W. Fannin, located near Gonzales, in order for a sale thereof for cash in pursuance of a decree of the probate court for said county, who, being duly sworn, value and appraise the same at fifty cents per acre. To all of which I certify by signing with said appraisers.

"Samuel C. Douglass.

"T. Bennett.

"R. J. Calder.

"Sworn to and subscribed before me this, the 4th day of February, 1840.

"Wm. P. Scott, Probate Judge."

(6) "Be it remembered that on the 4th day of February in the year of our Lord one thousand eight hundred and forty, at the court-house door in the town of Brazoria and republic of Texas, between the hours prescribed by law, I, Wm. P. Scott, chief justice and ex officio judge of probate in and for the county of Brazoria, in pursuance of a decree of the probate court for said county, and advertisement made in accordance with law, having previously had the property appraised by experts appointed by me, as will be seen by the procès verbal thereof hereunto annexed and made a part of this act, offered for sale at public auction at the time and place aforesaid, for cash, the following property belonging to the estate of James W. Fannin, deceased, to wit: One league and one labor of land situated near Gonzales, in the county of ———, being the headright of said Fannin; and, the terms having been proclaimed by me, the said George W. Grant appeared and bid the sum of fifty cents per acre for said land, or two thousand three hundred and five dollars and fifty cents, that being the full amount for which the said land was appraised, and the highest bid offered for the same; and the said Grant having paid to Thomas F. McKinney, administrator of said succession, the full amount bid as aforesaid, as is evidenced by the said McKinney signing this act with me: Now, therefore, I, the said Wm. P. Scott, judge as aforesaid, in consideration of the premises, do hereby grant, bargain, sell, and convey unto the said George W. Grant, and to his heirs and assigns, forever, all the right, title, interest, and claim which the succession of the said James W. Fannin had in said property, viz. one league and labor of land situated as aforesaid, to have and to hold the same unto him, the said George W. Grant, and his heirs and assigns, forever; hereby divesting the said succession, and the heirs thereof, of all right, title, and interest in and to the property aforesaid. And the said McKinney, administrator as aforesaid, signed this act with me, the said judge, on the day aforesaid, in the presence of the subscribing witnesses. I certify this 4th day of February, 1840.

"Wm. P. Scott, Chief Justice, Ex Officio Probate Judge.

"Thomas J. McKinney, Administrator.

"Witnesses:

"C. Dart.

"R. J. Townes."

The above deed was offered in evidence from the proper custody of the defendants, and by them, as an ancient instrument, and also as a recorded instrument. This deed is the ancient instrument it purports to be, and in addition the same was duly proven for record in 1881, by proof of the handwriting of the two subscribing witnesses, made by William McMaster, the person

whose name appears in some of the foregoing probate proceedings as sheriff of said county of Brazoria, and by E. M. Pease, whose name likewise appears in the foregoing probate proceedings as a member of the firm of Harris & Pease; and this deed was duly recorded in Karnes county, Tex., in 1881. The defendants further offered in evidence, as coming from the possession and custody of them, the original patent to the land and premises sued for by the plaintiff in this cause. The defendants also read in evidence a written agreement signed by counsel for plaintiff and defendants, wherein it was expressly admitted by the plaintiff that all title, if any, acquired by said George W. Grant by virtue of said administration sale, was duly vested in the defendants in this cause, through a regular chain of title, through due and proper conveyance from Grant, and through mesne conveyances to the respective defendants. To the introduction of all said probate proceedings as aforesaid, and to said deed of said probate judge and said administrator as aforesaid, the plaintiff made this objection: "That the action of the probate court in making this sale was coram non iudice and void, because the probate court of Brazoria county, at the time said proceedings were had, had no jurisdiction or power to sell the property of an estate, the law not having clothed that court with such power; it being contended by the plaintiff that prior to the probate act of Texas of date February 5, 1840, which went into effect on March 16, 1840, the probate court of Texas had no jurisdiction or power to sell the property of an estate." The court thereupon ruled that the county court of Brazoria county, Tex., at the time of the petition for sale, order of sale, and execution and delivery of said deed conveying said league and labor in said administration proceedings, had the jurisdiction and power to sell property of said estate, and to sell said league and labor; and the court stated that it would further hold, if no further testimony was adduced, that said sale in said administration proceedings and deed would completely divest the title out of the estate of said James W. Fannin and pass it to George W. Grant, and, by virtue of the agreement of counsel, to the defendants in this cause. The plaintiff thereupon duly excepted to the rulings of the court. The defendants then rested. The court thereupon rendered judgment for the defendants, and the plaintiff brings the case to this court to review the judgment.

R. C. Walker, for plaintiff in error.

L. H. Browne and V. B. Proctor, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The defendants deraign title to the land sued for from a sale made under a decree of the probate court of the county of Brazoria, republic of Texas. The land was sold as the property of the estate of James W. Fannin, deceased. The decree authorizing the sale was rendered on December 30, 1839. The conveyance was made to the purchaser by authority of the probate court on February 4, 1840. The only material question in the case is raised by the following assignment of error:

"The court erred in admitting in evidence, over the objections of the plaintiff, the transcript of the probate proceedings of Brazoria county, Texas, and the deed to George W. Grant made thereunder, because the probate courts of Texas, at the time said proceedings were had [prior to February 5, 1840], had no jurisdiction or power to sell the property of an estate, and that the action of the probate court of Brazoria county in making said sale was coram non iudice and void."

More than 40 years ago, in *Baker v. Coe*, 20 Tex. 429, Wheeler, J., in delivering the opinion of the court, said that "much the greater part of the real property of the state is held under probate or sher-

iffs' sales." It has been more than 60 years since the decree was entered which is attacked in this case, and we are advised by the argument of the learned counsel for the plaintiff in error that "there has been no decision of the supreme court of Texas upon this precise question," and that "this is the first Texas case in which the question has been presented in such shape as to require a decision." To correctly understand a statute, we must know its subject and its purpose. When we understand its subject-matter and general purpose, we have the key to what would otherwise appear doubtful. To effectuate the general intent by construction, general words may be restrained, or those of narrow import may be expanded. The act of December 20, 1836, was in force when the decree in question was rendered. It is entitled "An act organizing the inferior courts, and defining the powers and jurisdiction of the same." Hart. Dig. Tex. 1850, p. 146. The act creates a county court for each county in the republic of Texas, composed of a chief justice and two associates, and provides that four terms yearly shall be held in each county. The jurisdiction of the county court is defined, and the office of clerk created. The act then provides that the chief justices of the county courts shall be judges of the probate courts for their respective counties. Before quoting the part of the statute conferring probate jurisdiction, let us examine other parts of the act. Provision is made (with some exceptions) for 12 terms a year of the probate court. Id. art. 253. Appeals may be taken from decrees of the probate court to the district court of the county. Id. art. 254. The clerk of the county court is made clerk of the probate court, and is required to record all wills and other instruments required by law to be recorded in that office. Id. art. 257. Before the passage of this act the primary courts had probate jurisdiction, including the authority to decree sales of real estate belonging to the estates of decedents. *Baker v. Coe*, 20 Tex. 430, 433. The act provides that all probate business heretofore pending before the primary courts shall be transferred to, and be completed in, the probate courts. Hart. Dig. art. 258. It is made the duty of the probate court to compel a settlement within 12 months of all estates heretofore administered upon. Id. art. 259. Section 24 of the act specially relates to the jurisdiction of the court, and is as follows:

"The chief justices of the county courts shall be judges of probate for their respective counties; shall take the probate of wills; grant letters of administration on the estates of persons deceased, who were inhabitants of, or resident in said county, at the time of their decease; shall appoint guardians to minors, idiots, and lunatics; and in conjunction with the associate justices, shall examine and settle the accounts of executors, administrators, and guardians; and said chief justices shall have full jurisdiction of all testamentary and other matters appertaining to a probate court, within their respective counties." Id. art. 252.

Does the statute confer jurisdiction to decree a sale of real estate? If the section stood alone, it may be conceded that the phrase, "shall have full jurisdiction of all testamentary and other matters appertaining to a probate court," would be at least of doubtful significance. Certainly apter language could be used to confer jurisdiction to sell the real estate of an intestate. But this section

is part of an entire act. The act, taken as a whole, creates a probate court, and provides for the administration and final settlement in that court of the estates of decedents, with provision for an appeal to the district court. There is nothing in the scheme to indicate that the probate court is deficient in its power to entirely settle the estate. It does not appear that parties interested must go to the district court within the year in which final settlements must be made, to obtain decrees of sale, before making settlements in the probate court. In its general terms, the act seems to contemplate that all that is needful to make complete settlements may be done in the probate court. This construction becomes more essential when it is remembered that no difference in the power of the court exists as to real estate and personal property. It has power to decree the sale of both or neither. Not one estate in twenty could be settled without a sale of some of its property. The act is passed by the legislature of a republic imbued with the principles of the civil law, which in such cases made no distinction between personal property and real estate. In fact, the administrator at that time placed both the land and the personal property in his inventory of the property of the estate. In a suit begun in 1842, relating to an administration opened in 1834, Lipscomb, J., speaking for the supreme court of Texas, said:

"These distinctions are unknown to the civil law as it prevailed under Spanish modification in Texas. Land here was thought to be of comparatively little value, and many a fine league has been transmitted with as little form and ceremony by our early colonists as would attend the sale of an Indian pony. All property, without distinction, was classed together. The Spanish civil law being the basis of our jurisprudence, much of our legislation after the revolution was imbued with its influence. Hence our act of congress passes all of the estate of a decedent into the hands of the personal representative. He is required to return an inventory of the land, to have it appraised, and it is taken into the estimate of the value of the estate; and his bond, given with reference to the aggregate amount of the estate, binds him to its faithful administration." *Thompson v. Duncan*, 1 Tex. 486, 488.

The acts which follow the act of December 20, 1836, indicate that the legislature of Texas believed that the power to sell the property of an estate was vested in the probate courts of Texas. On May 18, 1838, the second congress passed an act providing for the settlement of estates of deceased soldiers. Section 3 of the act provided:

"That no sale of any of the effects of a deceased soldier or officer shall be made, unless by order of the court granting letters of administration, approved by the secretary of war, and published in some newspaper sixty days; and all sales made contrary to the provisions of this section (unless by heirs of full age) shall be entirely null and void." *Sayles' Early Laws*, § 471; *Hart. Dig. arts. 985-988*.

By an act of December 24, 1838, this act of May 18, 1838, just above quoted, was amended, and section 1 of the amendment provided:

"That the above recited act shall not be so construed as to apply to the duty of any administrator upon the estate of any deceased citizen soldier, who was a citizen of Texas, in the full exercise of his rights as such at the time of his death." *Sayles' Early Laws*, § 548; *Hart. Dig. art. 989*.

An act of the third congress, of date January 23, 1839, regulates sales of real estate by administrators, executors, and guardians. It

provides that the sales shall be made on the first Tuesday of every month, after advertisement for 30 days. Id. arts. 991, 992. These acts are pertinent, as showing the intention of the legislature in the act of December 20, 1836. They are legislative constructions of the former act. In *Rex v. Loxdale*, 1 Burrows, 447, Lord Mansfield said:

"Where there are different statutes *in pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other."

In *Doggett v. Walter*, 15 Fla. 355, the court held that:

"The meaning and intention of the legislature in the enactment and repeal of laws may often be found in the contemporaneous and subsequent action of that body in reference to the subject-matter, and the evident intention of the legislature will control the construction of its acts."

In *Webb v. Sellers*, 27 Tex. 423, the probate court of Washington county, at the October term, 1838, had made a decree authorizing an administrator to sell real estate belonging to the estate of his intestate. It is true that no question was made as to the construction of the statutes conferring probate jurisdiction, but the validity of the administrator's sale was necessarily involved. The court said:

"The evidence as a whole shows very clearly, we think, that the probate court of Washington county exercised a rightful jurisdiction in ordering the sale of the land in controversy for the payment of debts due by the estate. It is clearly enough shown that all the orders of the probate court relating to the matter in controversy were made in the course of the administration."

In *Pendleton v. Shaw*, 44 S. W. 1002, the court of civil appeals of Texas holds valid a sale made under decree of the probate court of Washington county rendered at the September term, 1839. This sale had previously been held valid by the United States circuit court of appeals for the Fifth circuit. *Land Co. v. Pendleton*, 52 U. S. App. 328, 26 C. C. A. 608, 81 Fed. 784. In *Ferguson v. Templeton*, 32 S. W. 151, the court of civil appeals of Texas, for the First district, said:

"That a purchaser at administrator's sale under the law of 1836 was not required to look further into the record than the order of sale, for the reason that the probate court was one of general jurisdiction, and its order would therefore protect the purchaser."

In *Pleasants v. Dunkin*, 47 Tex. 343, the court treats as valid an administrator's sale made under a decree of the probate court rendered at the January term, 1840, which was under the law of December 20, 1836.

It is true that in none of these cases, so far as appears from the reports, was the point urged upon the consideration of the court that the act of December 20, 1836, was not sufficient to confer jurisdiction upon the probate court. Seemingly the bar conceded that the probate court had jurisdiction. The cases perhaps have some value from that fact. They surely have value as showing the practical contemporaneous construction placed by the courts on the act in question. In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law is entitled to great respect. *Edwards' Lessee v. Darby*,

12 Wheat. 206, 6 L. Ed. 603; U. S. v. Pugh, 99 U. S. 265, 269, 25 L. Ed. 322.

It is insisted by the plaintiff in error that the case of *Bank v. Dudley's Lessee*, 2 Pet. 492, 7 L. Ed. 496, sustains the contention against the jurisdiction of the probate court. We find nothing in that case in conflict with the views we have expressed. The decree in question in that case was made in August, 1805, and the law under which it was made had been repealed on June 1, 1805. The statement of the case shows that "the plaintiff insisted, and the court ruled, that the law under which the court proceeded in granting the license to sell had been repealed before the license was granted." This holding of the trial court was affirmed. The phrase, "jurisdiction of all probate and testamentary matters," which was commented on in the case, was quoted from the constitution of Ohio. The question as to this phrase was whether it so fixed the jurisdiction of the court of common pleas to sell real estate of a decedent that it was not subject to the control of the legislature. Marshall, C. J., said:

"'Jurisdiction of all probate and testamentary matters' may be completely exercised without possessing the power to order the sale of the lands of an intestate. Such jurisdiction does not appear to us to be identical with that power or to comprehend it. The constitution did not mean, and could not mean, to deprive the legislature of the power of exercising its wisdom on a subject so vitally interesting to the people, nor do its words convey such an intent. Were it even true—which we cannot admit—that the constitution established the jurisdiction of the court of common pleas in the case, still the legislature might prescribe the rule by which that jurisdiction should be exercised."

The question and circumstances were entirely unlike the present case. In Ohio, the jurisprudence being unaffected by the civil law, the distinction between personal property and real estate was maintained in administrations. The administrator had no title to or control over the real estate. He had the power only to sell by virtue of a statute which was repealed before the order of sale was made. The court was construing a sentence in a state constitution which was intended to briefly indicate the jurisdiction which might be conferred on the court of common pleas by the legislature. The legislature had conferred the jurisdiction, but withdrew it before the decree in question was made. The supreme court was not in that case, as we are in this, construing a statute creating a court and establishing its jurisdiction, and providing elaborately for the administration of estates. An isolated sentence in the constitution of Ohio was under consideration, and there were no contemporaneous constructions by the legislature or judiciary of that state indicating that the words quoted were intended to confer jurisdiction to sell the property of a decedent. On the contrary, the legislature had assumed that legislation was necessary to confer such jurisdiction. In construing section 24 of the act of December 20, 1836 (Hart. Dig. art. 252), we do not look alone at its language. The words conferring jurisdiction, viewed alone, might or might not be held sufficient to confer jurisdiction to decree a sale of a decedent's real estate. But when we examine the entire act in the light of the jurisprudence of the republic as it existed when the act was passed, and in view of the sub-



sequent legislative construction, and consider also the practical contemporaneous construction of it by the probate courts, and the sanction of that construction by the acquiescence of the highest Texas courts, we are convinced that the act conferred on the probate court the jurisdiction to render the decree in question. We think the judgment of the circuit court is right, and it is affirmed.

## DAVIS v. MILLS et al.

(Circuit Court, D. Connecticut. January 22, 1900.)

No. 457.

## 1. JURISDICTIONAL AMOUNT—ASSIGNMENT OF SEVERAL CLAIMS.

Rev. St. 1878, § 629, as amended by 25 Stat. 433, c. 866, § 1, providing that the circuit court shall not have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of the assignee unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made, does not prevent action in such court by an assignee of several claims, each less, but aggregating more, than \$2,000, the assignors having been citizens of states other than that of defendant.<sup>1</sup>

## 2. PENAL STATUTE—ENFORCEMENT OUT OF STATE.

Comp. Laws Mont. p. 728, § 460, requiring corporations to annually file financial reports, and making the trustees of one which does not liable for its debts, is not a penal statute, so as to prevent enforcement out of the state of the trustees' liability thereunder.

## 3. CORPORATIONS—ASSIGNMENT OF CLAIM—RIGHT OF ASSIGNEE.

An assignee of a claim against a corporation has a right to enforce against its trustees their liability therefor, under a statute making them liable if the corporation fails to file an annual financial report.

## 4. CONFLICT OF LAWS.

Validity of an assignment is governed by the law of the state where the liability arose and which is the domicile of the assignor and assignee.

John A. Shelton, for plaintiff.

Gross, Hyde & Shipman, for defendants.

TOWNSEND, District Judge. Demurrer to plea to jurisdiction in action at law. The complaint alleges that while defendants herein were trustees of the Obelisk Mining & Concentrating Company, a corporation organized under the laws of Montana, it became indebted to the assignors of sundry claims now held by plaintiff, and failed to file the report of its condition as required by law, and claims that, it being insolvent, defendants are jointly and severally liable for the amount of said claims.

The statute of Montana provides as follows:

"Every such company shall, annually, within twenty days from the first day of September, make report, which shall be published in some newspaper published in the town, city or village, or if there be no such newspaper published in said town, city or village, then in some newspaper published nearest the place where the business of the said company is carried on, which shall state the amount of capital stock and of the proportion actually paid in and the amount of existing debts, which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or

<sup>1</sup> As to amount in controversy to determine jurisdiction of circuit courts, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Shoe Co. v. Roper*, 36 C. C. A. 459.

secretary of said company, and filed in the office of the clerk of the county where the business of the company shall be carried on, and if any of said company shall fail to do so all the trustees shall be jointly and severally liable for all the debts of said company then existing, and for all that shall be contracted before said report shall be made. No liability shall attach to any trustee, or board of trustees, by virtue of the provisions of this section, for a failure to cause to be published in a newspaper the report in this section mentioned, if within the time herein mentioned, the said trustee, or board of trustees, or company shall annually cause said report to be filed in the office of the clerk and recorder of the county in which the business of the said company is carried on, as declared in its certificate of incorporation." Comp. Laws, p. 728, § 460.

The defendants have pleaded to the jurisdiction on the following grounds, namely:

"(1) Because the action was brought by the plaintiff as assignee of three separate and distinct causes of action, neither one of which amounts, without interest and costs, to the sum of two thousand dollars, and neither one of which could have been brought within the jurisdiction of this court by the assignor. (2) Because the sum or amount, viz. two thousand dollars, required to give jurisdiction of this action to this court, is made up by illegally joining three several counts for less amounts, each of which sets up a separate and distinct cause of action, not arising out of the same transaction, and in no way related to each other, and not proper to be joined in the same action. (3) Because the complaint is an attempt to enforce in this court a penal statute of the state of Montana, which can only be enforced in the courts of that state, and of which this court will not entertain jurisdiction. (4) Because the rights, such as they are, of the several assignors, mentioned in said complaint, to the benefits of the Montana statute, are not assignable, and do not follow the alleged assignments to the plaintiff of the said rights of action against said Obelsk Mining & Concentrating Company."

Counsel for defendants, in support of the first point, cited section 629, Rev. St. 1878, as amended by the act of August 13, 1888 (25 Stat. 433, c. 866), which provides that the circuit court shall not "have cognizance of any suit \* \* \* to recover the contents of any promissory note or other chose in action in favor of any assignee, \* \* \* unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." It has been repeatedly held that the restrictions as to amounts and as to suits by assignees are distinct and independent in language and purpose; that the intent of all the legislation since the enactment of the judiciary act of 1789 has been, by the provision as to amounts, merely to prevent the dockets of the federal courts from being crowded with small cases, and, by the provision as to assigned choses in action, to prevent the creation of jurisdiction by the transfer of claims held by a citizen of the same state with the debtor to a citizen of another state. *Stanley v. Board* (C. C.) 15 Fed. 483; *Hammond v. Cleaveland* (C. C.) 23 Fed. 1; *Bernheim v. Birnbaum* (C. C.) 30 Fed. 885; *Chase v. Roller-Mills Co.* (C. C.) 56 Fed. 625.

In *Bowden v. Burnham*, 8 C. C. A. 248, 59 Fed. 752, Judge Caldwell, delivering the opinion of the court of appeals, said:

"When the plaintiffs had acquired, in good faith, from citizens of states other than the state of which the defendants were citizens, claims amounting in the aggregate to \$2,000, they had a right to sue the defendants on all of such claims in one action in the circuit court, although no one of the claims amounted to \$2,000. The requisite amount and the citizenship necessary to confer the jurisdiction are united in the plaintiffs, and the jurisdiction is not

affected by the fact that the several assignors of the claims could not have maintained separate suits thereon because the claim of each was less than \$2,000 in amount."

The complaint alleges that the assigned claims originally belonged to citizens of the state of Montana, and they together aggregate more than \$2,000.

The second point, namely, misjoinder, was disposed of by Judge Shipman on a prior hearing, on motion for leave to amend the complaint by the addition of a third count. 83 Fed. 982. Judge Shipman was of the opinion that "these statutory claims arose out of the same transaction,—that is, the same neglect,—and that, being owned by one person, they can be proved in one complaint."

The third point raises the question whether said statute is penal, so as not to be enforceable outside the state of Montana. It is unnecessary now to consider what the law may formerly have been in the federal courts or what may now be the law in the state courts. In *Huntington v. Attrill*, 146 U. S. 676, 13 Sup. Ct. 231, 36 L. Ed. 1131, the supreme court of the United States says that as such a statute "gives a civil remedy at the suit of the creditor only, and measured by the amount of his debt, it is, as to him, clearly remedial. To maintain such a suit is not to administer a punishment imposed upon an offender against the state, but simply to enforce a private right secured under its laws to an individual. We can see no just ground, on principle, for holding such a statute to be a penal law, in the sense that it cannot be enforced in a foreign state or country." See, also, *Whitman v. Bank*, 28 C. C. A. 404, 83 Fed. 288. Counsel for defendants contends that the supreme court of Connecticut decided in *Mitchell v. Hotchkiss*, 48 Conn. 1, that such a cause of action was penal, and that this court is concluded by said decision. But that case only holds that the cause of action does not survive against the administrator, and that decision is not necessarily inconsistent with the opinion of the court in *Huntington v. Attrill*, *supra*. The Connecticut statute, which was considered in *Mitchell v. Hotchkiss*, like that of New York, which was considered in *Huntington v. Attrill*, is penal in the provision for the punishment of the corporate officer who intentionally neglects or refuses to file the statutory notice. Therefore, "as the statute imposes a burdensome liability upon the officers for their wrongful act, it may well be considered penal, in the sense that it should be strictly construed." *Huntington v. Attrill*, *supra*. But the Montana statute does not impose a burdensome responsibility for a wrongful act. For the benefit of the creditors of the corporation, it provides that, if any such corporation shall fail to file a report, all the trustees shall be liable. In short, it merely makes such trustee liable in case of loss by reason of his failure to watch the other officers, and see that they perform their statutory obligations. And as this provision "gives a civil remedy at the private suit of the creditor only," etc., "it is as to him clearly remedial." *Huntington v. Attrill*, *supra*. Such a transitory statutory right of action can be enforced in another state, where it does not substantially conflict with the public policy of such state. *Dennick v. Railroad Co.*, 103 U. S. 17, 26 L. Ed. 439; *Railroad Co. v. Cox*, 145

U. S. 604, 12 Sup. Ct. 905, 36 L. Ed. 829; *Stewart v. Railroad Co.*, 168 U. S. 445, 18 Sup. Ct. 105, 42 L. Ed. 537; *Railroad Co. v. Doyle*, 60 Miss. 983; *Whitford v. Railroad Co.*, 23 N. Y. 465; *McDonald v. Mallory*, 77 N. Y. 547. The whole question is exhaustively discussed in *Huntington v. Attrill*. It has been found impossible to distinguish the principles therein involved from those in the case at bar. See, also, *Fitzgerald v. Weidenbeck* (C. C.) 76 Fed. 695. Even if the decision in *Mitchell v. Hotchkiss*, supra, is inconsistent with the decision in *Huntington v. Attrill*, the authority of the latter case must prevail. There the court holds that the question whether such a statute is penal or remedial is one not of local, but of international, law, and adds as follows:

"In this country, the question of international law must be determined by the court, state or national, in which the suit is brought. If the suit is brought in a circuit court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions. *Burgess v. Seligman*, 107 U. S. 20, 33, 2 Sup. Ct. 10, 27 L. Ed. 359; *Railway Co. v. Cox*, 145 U. S. 598, 605, 12 Sup. Ct. 905, 36 L. Ed. 829."

The fourth point raises the question whether the liability under the statute follows the assignment of the choses in action. The original choses in action are assignable, and the assignee may sue thereon in his own name, under the provisions of the statutes both of Montana and Connecticut. Sections 1351 and 1981 of the Civil Code of Montana provide as follows:

"A thing in action arising out of the violation of a right of property or out of an obligation may be transferred by the owner."

"The right arising out of an obligation is the property of the person to whom it is due and may be transferred as such."

Section 587, Code Civ. Proc., provides as follows:

"An action, or cause of action, \* \* \* shall not abate by death, or other disability of a party, or by the transfer of an interest therein, but shall in all cases where a cause of action or defense arose in favor of such party prior to his \* \* \* transfer of interest therein survive and be maintained by his representative or successors in interest; and in case not begun may be begun by his successor."

The Connecticut statute (Gen. St. p. 234), as to suits by assignees, is as follows:

"Sec. 981. The assignee and equitable and bona fide owner of any chose in action, not negotiable, may sue thereon in his own name; but he shall, in his complaint, allege that he is the actual, bona fide owner thereof, and set forth when and how he acquired title thereto."

It is unnecessary to decide whether the naked right to enforce this statutory liability would be such a chose in action as to be the subject of assignment, or whether there is any conflict on this point between the law in the federal and state courts. The assignee herein has brought this action, not by virtue of the assignment of a right to enforce a penalty, but as the assignee of the notes and judgment sued on, and of the debts evidenced thereby; and, when the debt itself is assigned, the assignee thereby acquires the right to secure the benefit of such statutory remedy. *Brackett v. Griswold*, 103 N. Y. 425, 9 N. E. 438; *Stokes v. Stickney*, 96 N. Y. 323; *Bolen v.*

Crosby, 49 N. Y. 183; Bonnell v. Wheeler, 1 Hun, 332, 338. As such assignee, he acquires the right to every remedy available to his assignor. Hill v. Frazier, 22 Pa. St. 324. In Fitzgerald v. Weidenbeck, supra, the court, construing the statute in question, said:

"We see nothing in the nature of the claim itself which prevented the holder from assigning it. It was not, as the defendant insists, a mere penalty. It was a debt from the company to Frazier, which he might transfer like any other debt, and the assignee was entitled to all the remedies for its recovery which the original creditor would have had."

The validity of the assignment is governed by the law of the state where the liability arose, and which is the domicile of the assignor and assignee; and, so far as the right and interest of the assignee to the thing assigned is concerned, the federal courts and the courts of this state will recognize and follow the law of such foreign state. The demurrer is sustained.

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STERNENBERG et al. v. MAILHOS et ux.

(Circuit Court of Appeals, Fifth Circuit. January 9, 1900.)

No. 869.

**1. APPEAL—RECORD.**

Instructions printed in a transcript on appeal as having been given, or asked and refused, on the trial, but which are not contained in any bill of exceptions, or in any manner authenticated by the trial judge, do not constitute a part of the record in the case.

**2. SAME—BILL OF EXCEPTIONS.**

To enable an appellate court to review exceptions to the giving or refusal of instructions, the bill of exceptions should contain a sufficient statement of the evidence to show whether or not such instructions were applicable to the case before the jury.

**3. SAME—QUESTIONS PRESENTED BY RECORD—PRESUMPTIONS.**

Where the record on appeal fails to show that it contains all the evidence, the presumption is that there was evidence which justified the court in refusing to direct a verdict.

**4. WRONGFUL DEATH—ACTION BY PARENTS—DAMAGES—LOSS OF SERVICES.**

Under the Texas statute (Rev. St. 1895, art. 3017) giving a right of action for actual damages on account of injuries causing the death of any person, when caused by the negligence or wrongful act of another, the parents of a minor may recover in such an action for the loss of services of the deceased during minority, although he was instantaneously killed.

**In Error to the Circuit Court of the United States for the Eastern District of Texas.**

The following statement is agreed to: On the 16th day of September, 1898, plaintiffs in error were the owners of a steam sawmill and plant located in Hardin county, Tex.; and in connection therewith they owned a tram road running from the mill into the forest, with which they supplied their mill with sawlogs. The tram car was supplied with rolling stock, such as a steam engine or locomotive and log cars. The log cars were about 30 feet in length, and were so constructed that they could be fastened together by means of a coupler on each end. On the last-named date the deceased, Robert Mailhos, was employed by plaintiffs in error in the dual capacity of fireman and brakeman; and, while engaged as a brakeman, in an effort to couple together two cars loaded with logs he was so crushed that he instantly died. On the 20th day of March, 1899, Dominique Mailhos, father of the deceased, for himself and for the use and benefit of his wife, Christie Mailhos, began this suit against

plaintiffs in error for the sum of \$12,000 actual damages, and \$5,000 exemplary damages. Plaintiffs' first amended original petition, upon which they went to trial, contained two counts as a basis for the recovery of actual damages, as follows: "(1) Plaintiff says that it was negligence on the part of defendant, their agents and servants, in loading and placing said logs on said cars in the manner and position in which they were placed thereon, for he says that on said cars the logs, which were twenty-eight feet, were so loaded and in such a position that the ends of the same projected over the ends of said cars to such an extent that it rendered dangerous an attempt to couple together said cars, as was necessary in the prosecution of said business, as before mentioned, and whereby the lives of the defendants' employes and servants whose duty it was to go between said cars for the purpose of coupling together the same were greatly endangered." The other count for actual damage is as follows: "Plaintiff further alleges that defendants' said roadbed and track at the time when and place where said Robert Mailhos was killed was defective and in bad repair, and in a dangerous and unsafe condition, in that at said place said track was very unlevel, one side being much lower than the other, and that there was not sufficient support, by means of cross-ties or otherwise, under the rails of said track, to keep the same in a steady and safe position and condition, but, on the contrary, the rails of said track at said point, on account of the unlevel position and condition of said track, and on account of the insufficient support under said rails, and consequent depression in the roadbed, were very unsteady, unlevel, loose, and unsafe for the operation of said engine and cars over the same; that on the occasion aforesaid, while plaintiff's said son, in the discharge of his duty as brakeman, and in obedience to the orders of said engineer, was attempting to couple one of said cars to another, then being run back for that purpose by said engineer, and just as said car being run back passed over the rails at said point, and just as the drawheads of said cars were about to meet and join together in the usual and proper manner, whereby the said Robert Mailhos could have made the coupling with safety (he having gone between said cars for the purpose of making said coupling), one of the rails on the lower side of said track, by reason of the unlevel position of said roadbed, and the want of the proper and necessary support under said rails, and depression in said roadbed consequent therefrom, immediately sank down below its usual and proper place and position, whereby and on account of which the drawheads of said cars failed to meet and join together, but, instead, said drawheads passed one under the other, thereby permitting said cars and logs to run and jam together while plaintiff's said son was between the same, whereby said plaintiff's son, without fault or negligence on his part, was caught between said cars and logs, and thereby crushed and mangled and instantly killed; that the defendants well knew of the defective, unlevel, unsafe, and dangerous condition of said roadbed and track as before set out, or by the use of ordinary care could have known of the same; that it was no part of the duty of plaintiff's said son to inspect, repair, or in any manner look after the condition of said road, and that his said son at said time was a young, inexperienced boy, of immature judgment, and never knew of the dangers attendant upon his duties in coupling together said cars, and never knew of the dangerous condition of said track and roadbed at said time and place when and where he was killed, and had never been warned by defendants of the same; that, while he had been in the employ of the defendants for several years previous to his death, he had only acted in the capacity of fireman and brakeman, or either, for about ten days previous to his death." The count alleging gross negligence as a predicate for exemplary damages, after the testimony was all in, was abandoned by plaintiffs, and formed no part of the issues submitted to the jury. That count was as follows: "Plaintiff alleges that defendants were grossly negligent in having and keeping in their employ said engineer, Bud Herrington, who, plaintiff alleges, was an incompetent, unskillful, and reckless engineer, and that defendants well knew that said engineer was incompetent, unskillful, and reckless, and unfit for and unsafe to operate and control said engine, but, notwithstanding their knowledge of said fact, said defendants kept said engineer in their employ, and permitted him to operate, run, and control their said engine, and placed the said Robert Mailhos under him, as fireman on said

engine and brakeman on said cars, without warning or in any manner apprising the said Robert Mailhos of the fact that said engineer was incompetent, unskillful, and reckless, which facts were not known to the said Robert Mailhos, who at said time was an inexperienced youth, and of immature judgment." The measure of damages, as shown by plaintiffs' petition, was the value of the deceased's services to plaintiffs, as follows: "Plaintiff further represents that he is about sixty-eight years of age, and his wife, the mother of said Robert Mailhos, is about fifty-eight years of age; that neither of them possesses any means of support, and are both unable to perform manual labor, and are unable to secure other kind of employment, or to earn a livelihood by any means; that he and his wife were, previous to the death of their son, entirely dependent upon him for support and maintenance; that their said son had, previous to his death, contributed all his earnings to the support of his said father and mother, up to the time of his death, and had promised to do so, and would have continued to do so, during the remainder of their lives; that he had been working for the defendants several years previous to his death, and that he had been earning \$1.15 per day; that he was an industrious, sober, moral, and intelligent boy, and very careful and attentive in his business, and had every reasonable expectation of being promoted to the position of engineer, or other lucrative position, whereby he would have earned \$150 per month, to contribute to plaintiff and his mother for their support and maintenance during the remainder of their lives, and plaintiff and his said wife have a reasonable expectation of living twenty years longer." The defendants' answer contained (1) a general demurrer, (2) a general denial, and (3) a special answer, which, in substance, alleged that the cars which deceased was in the act of coupling were loaded as other cars were usually loaded on defendants' tram road, with which cars, and the method of loading, the deceased was well acquainted, and that he assumed the risks ordinarily incident to the employment, and was well aware of the dangers that were attendant upon and incident to the same; that he was guilty of negligence in standing in an erect attitude while attempting to make the coupling; that it was necessary for him to stoop below the logs in order to make the coupling, and his failure to do so was the direct and proximate cause of his injuries. The plaintiffs' right to recover was made to depend upon the loss of services of the minor, as actual damages, as will appear more fully from the following part of the court's charge to the jury, as follows: "You have the right to consider the age, health, habits, and what he was earning, the probability of increased earnings, and what would fairly compensate them in their expectancy. They do not recover for loss of the company, or grief for loss, of son. Do not understand that to be the case, but it is based on the grounds that he was their servant, and that they were entitled to the servant's wages, and the loss to them is to be considered in such way as will compensate the parents for the loss of same." The jury on June 8, 1899, rendered a verdict for \$1,500 in favor of the plaintiffs, upon which judgment was entered. A motion for a new trial was overruled, and defendants were granted 60 days in which to file a bill of exceptions, which bill was filed July 31, 1899, and thereafter this writ was sued out.

J. D. Martin and J. N. Votaw, for plaintiff in error.

J. F. Lanier, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). We find printed in the transcript four propositions labeled, "Charge Asked by Defendants," and indorsed, "Refused. D. E. Bryant, Judge." They are abstract propositions of law, unaccompanied by any statement of fact showing their pertinency to the case on trial; and, while we may presume that they were requests made and ruled on before the jury retired, there is nothing to show that there was any exception taken at the time to the rulings thus made. We also find printed in the transcript a document entitled, "Charge of the

Judge to Jury," verified by the affidavit of one J. R. O'Hara as "a true and correct copy of the charge delivered by the Hon. David E. Bryant to the jury on the trial of the case of Dominique Mailhos v. Olive Sternenberg & Co., tried in the United States circuit court on the 7th and 8th days of June, 1899"; but the same is not set forth in any bill of exceptions, and it does not have the indorsement or any other approval of the judge, nor is there any objection or exception connected with the same. None of the matters referred to above, although contained in the transcript, form any part of the proper record in the case. *Blake v. U. S.*, 33 U. S. App. 376, 18 C. C. A. 117, 71 Fed. 286; *Clune v. U. S.*, 159 U. S. 590, 16 Sup. Ct. 125, 40 L. Ed. 269. There is one document, denominated "Bill of Exceptions," in the record, filed many days after the trial, and commencing:

"Be it remembered, that the defendants in the above styled and numbered case come now, and except to the judgment of the court rendered in said case upon the verdict of the jury, and the judgment of the court overruling defendants' motion for new trial, for the following reasons."

Then appear some 16 alleged reasons, with more or less argument, and the bill concludes as follows:

"This bill is allowed and approved, with the following explanations and qualifications: As to the grounds of plaintiff's cause of action as construed by me, it embraces the grounds set forth by defendants, and in addition thereto a charge of general bad repair and unsafe condition of defendants' roadbed. As to the exceptions to failure of the court to give certain special instructions asked, I think the general charge, and the charge number six asked by defendants and given by the court, taken together, presented to the jury the law as applied to the facts, without needless reiteration.

"Filed July 31, 1899.

D. E. Bryant, Judge."

This alleged bill is a combination motion for a new trial and an assignment of errors, and it is defective and insufficient to authorize this court to review any of the alleged errors suggested. The bill does not show any ruling of the court during the trial of the case, except, perhaps, as to the charges actually given and refused; and it is not shown that any ruling of the court was excepted to before the jury retired, or, as for that matter, excepted to at any time prior to the verdict. None of the charges given, nor any of the special charges requested and said to have been refused, are accompanied with such a statement of the evidence as would show whether the charges given or refused were applicable to the case before the jury. See *Railway Co. v. Twombly*, 100 U. S. 78, 25 L. Ed. 550; *Worthington v. Mason*, 101 U. S. 149, 25 L. Ed. 848; *U. S. v. Carey*, 110 U. S. 51, 3 Sup. Ct. 424, 28 L. Ed. 67; *Insurance Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644; *Express Co. v. Malin*, 132 U. S. 531, 10 Sup. Ct. 166, 33 L. Ed. 450; *Newman v. Iron Co.*, 25 C. C. A. 382, 80 Fed. 228; *Cotton Oil Co. v. Ashburn*, 26 C. C. A. 436, 81 Fed. 331.

In short, we find only one assignment of error calling for any attention, and that is not well taken. It is the seventh, and to the effect that the court erred in failing to give a peremptory instruction to find for the defendant. This assignment, as based on the contradicted evidence in the case, cannot be considered, for the entire evidence in the case is not certified, and in the absence of the evi-



dence we are bound to presume that there was sufficient evidence before the jury to support the verdict.

The learned counsel for the plaintiffs in error, however, contend that as the death of the minor, Robert Mailhos, was instantaneous, the parents of said Robert Mailhos cannot recover; under the pleadings in this case, for the loss of his services during minority, either at common law or under the statutes of Texas, and cite *Railway Co. v. Beall*, 91 Tex. 310, 42 S. W. 1054, 41 L. R. A. 807. In that suit the parents were suing to recover damages for the unlawful killing, resulting in the instantaneous death, of a minor son; and two questions were certified by the court of civil appeals, Third supreme judicial district of the state of Texas, to the supreme court of the state. One was as to the right of the parents to recover under the common law, and the other was as to whether the contributory negligence of the deceased could be attributed to the parents, when they had not consented to the employment of their minor son. The court held that the action could not be maintained at common law, and that "since the father's right to recover depends upon the statute, which imputes to him the deceased son's contributory negligence, the second question certified must be answered in the affirmative." The Texas statute (Rev. St. 1895) is as follows:

"Art. 3017. An action for actual damages on account of injuries causing the death of any person may be brought in the following cases: (1) When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, hirer of any railroad, steamboat, stage coach or other vehicles for the conveyance of goods or passengers, or by the unfitness, negligence or carelessness of their receiver or receivers or other person or persons in charge or control of any railroad, their servants or agents; and the liability of receivers shall extend to cases in which the death may be caused by reason of the bad or unsafe condition of the railroad or machinery or other reason or cause by which an action may be brought for damages on account of injuries, the same as if said railroad were being operated by the railroad company. (2) When the death of any person is caused by the wrongful act, negligence, unskillfulness or default of another."

This action seems to be fully authorized by the above statute, and we know of no decision, controlling or otherwise, to the contrary. Diligence of counsel has failed to find any such decision, and we know, as a matter of fact, that such actions have been maintained frequently, and without this particular objection, in both the United States and state courts in Texas. *Railway Co. v. Compton*, 75 Tex. 667, 13 S. W. 667, is a case where the mother sued the railway company for damages for negligently causing the death of her minor son; and the supreme court of Texas, among other things, said:

"The appellee, being the sole surviving parent of Alexander Compton, was entitled to his services during minority, and hence at common law could have recovered their value during that period, in the event the appellant was found liable for the injury. But it does not follow that this right abridges in any manner her claim for the compensation given by the statute (Rev. St. 2899 et seq.). It happens in this particular case that the plaintiff, being the sole surviving parent of the deceased, is entitled to recover, if at all, damages not only for the loss of services during her son's nonage, but also for the loss of any prospective pecuniary benefits which she may have received from him after he attained his majority. She has sued for the whole in the statutory action, as we think she had the right to do, and her right to recover in such action cannot be restricted to the period of her son's minority."

There is no question in the present case as to the right of the parents to recover exemplary damages for the death of a minor child, and therefore *Winnt v. Railway Co.*, 74 Tex. 32, 11 S. W. 907, 5 L. R. A. 172, is not applicable. The judgment of the circuit court is affirmed.

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In re FRONASCONI. In re SALASIN. In re MAYROVICA. In re POLLACK.

(Circuit Court, E. D. Pennsylvania. January 18, 1900.)

**ALIENS—ADMISSION TO CITIZENSHIP—PROOF REQUIRED.**

Under Rev. St. § 2167, which permits an alien who has resided within the United States for 3 years next preceding his arriving at the age of 21 years to be admitted as a citizen without having made the declaration of intention required by section 2165 to be made by adult immigrants at least 2 years prior to their admission, but which requires that such applicant shall make such declaration at the time of his admission, "and shall further declare on oath, and prove to the satisfaction of the court, that for two years next preceding it has been his bona fide intention to become a citizen of the United States," substantial evidence of the existence of such intention for the required time, in addition to the oath of the applicant, is required; and vague, oral statements of a single witness should not be accepted as a sufficient substitute for the documentary evidence required by section 2165.

These were applications by aliens to be admitted as citizens of the United States.

DALLAS, Circuit Judge. Section 2167 of the Revised Statutes provides that "any alien, being under the age of twenty-one years, who has resided within the United States three years next preceding his arriving at that age, and who has continued to reside therein to the time he may make application to be admitted as a citizen thereof, may \* \* \* be admitted a citizen of the United States, without having made the declaration required in the first condition of section 2165"; that is to say, without having declared on oath, before one of the courts designated in that section, "two years, at least, prior to his admission, that it is bona-fide his intention to become a citizen of the United States," etc.; "but such alien shall make the declaration required therein, at the time of his admission; and shall further declare, on oath, and prove to the satisfaction of the court, that, for two years next preceding, it has been his bona-fide intention to become a citizen of the United States." For more than 20 years preceding the passage of the statute from which section 2167 of the Revised Statutes is derived, the law had imposed upon any alien, as a condition precedent to the acquisition of citizenship, the requirement that, two years, at least, prior to his admission, his intention to become a citizen should have been declared under oath, before a court of record; and this preliminary proceeding was evidently regarded by congress, and therefore must be viewed by the courts, as of substantial importance. Section 2167 does not

dispense with it in the class of cases to which that section relates; for, even as to them, it provides that the same declaration must be made at the time of admission, and it must be made under oath (U. S. v. Walsh [C. C.] 22 Fed. 646); and the act of February 1, 1876, which sanctions the making of the declaration required by section 2165 before the clerk, as well as before the court itself, plainly exhibits the continuing legislative design that it shall be solemnly made, and become matter of record. But section 2167 also requires that every such applicant thereunder "shall further declare on oath, and prove to the satisfaction of the court, that for two years next preceding, it has been his bona fide intention to become a citizen of the United States"; in other words, that he shall establish the existence of the requisite intention, as in the case of other aliens, for at least two years prior to his admission to citizenship, but may do this by any relevant and competent evidence which shall "prove to the satisfaction of the court" the truth of his own deposition. Under section 2165 the essential fact of declaration is always decisively shown by production of the record, or by due certification thereof; and the solicitude of congress to preclude the too-ready acceptance of less conclusive testimony under section 2167 is evinced by its provision that the oath of the applicant himself, though required, must be supplemented by proof which the court shall deem satisfactory. Not only the manifest spirit, but the express terms, of this section, call for the exercise of scrupulous care in this particular; and experience has convinced me that the vague oral statement of a single witness, which is commonly offered under section 2167, in substitution for the documentary evidence required by section 2165, cannot safely be relied upon where the applicant, though having arrived in this country more than 3 years before attaining the age of 21 years, has continued to reside here for several years after he might have applied to be made a citizen, without having taken any practical step to carry out his asserted intention. It is not necessary to refer with particularity to each of the cases mentioned at the head of this opinion. The observations which have been made are applicable to all of them, and therefore the prayer of the petition is in each instance denied.

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MAUPIN v. TEXAS & P. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. January 9, 1900.)

No. 831.

**MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANTS.**

If the negligence of a master contributed to an injury to his servant, it is no defense to an action against him therefor that fellow servants were also guilty of negligence which contributed thereto.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

S. P. Jones, for plaintiff in error.

T. J. Freeman and F. H. Prendergast, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. W. E. Maupin, the plaintiff in error, was a section hand in the employ of the defendant in error, the Texas & Pacific Railway Company. His petition charged that on or about the 24th day of August, 1897, while he, together with other section hands, was returning from his work, the hand car on which they were riding, provided by the defendant for their use in going to and returning from their work, was derailed and ran off the track, and threw the plaintiff to the ground, on a lot of rocks, a distance of about 10 feet, inflicting on him serious injuries, for which he claims damage on the ground that the car was defective, out of repair, and in a condition unfit for use; that the wheels were old, worn out, defective, cracked, and broken, and the axles old, worn, crooked, defective, and out of repair, and the whole car worn, defective, and out of repair; that the cogs of the running gear were worn, defective, and out of repair; that the defective condition of the car caused it to leave the track, and caused the injuries to the plaintiff; that the defendant knew of the defective and unfit condition of the hand car, or could have known the same by the use of proper care; that the plaintiff did not know of the defective condition, and could not have known thereof; that the brake on the hand car was old, worn, defective, and out of repair, and in such defective and worthless condition that the hand car, while in motion, could not be stopped by the use of the brake; that the defendant knew this, or should have known it by the use of proper care; that while the plaintiff and other section men were riding on this car it ran upon another hand car on the same track; that, by reason of the defective condition of the hand car which the defendant was on, it could not be stopped by applying the brake; and that by reason thereof it ran into the front car, and was knocked off the track, and the plaintiff was thrown to the ground and injured. The defendant answered by a general demurrer, a general denial, and these special pleas:

"(3) Defendant says the car on which plaintiff was riding when injured was in good condition, and, if there was any defect, it was such a defect that did not contribute nor cause the injury. (4) The plaintiff knew, or by ordinary care could have known, of said defect, and assumed the risk of being injured as he was injured. (5) Defendant says, if there was any negligence of any person that caused the injury to plaintiff, it was the negligence of one of plaintiff's fellow servants, for which defendant is not liable."

There was a conflict in the testimony as to the condition of the hand car which left the track. There was substantially no dispute as to any other material issue of fact.

The court charged the jury, on its own motion, giving in connection with other instructions, not excepted to, the following:

"If the parties in charge of that hand car had instructions not to run closer to the front car than 90 feet, or any other number whatever— You may remember from the evidence, and there was evidence upon that subject. My recollection is that Louis testified that he had repeatedly cautioned them not to run closer than 90 feet, one hand car following the other. Now, if the parties in charge of the rear hand car disregarded that instruction, and ran at a closer distance, and ran into the front car, without using care to prevent a collision, then that is negligence upon the part of that hind crew, there, of which Mr. Maupin was a member, and a recovery could not be had."

The part of the charge just quoted is made the basis of the second assignment of error, in which it is said that the giving of this charge was error, because the proof showed that there was no rule or regulation requiring the two cars to be kept any distance apart, and because Maupin had never been notified of any such rule or regulation, if it existed, and had never been notified not to allow the cars to run close together. It is our opinion that this assignment of error is well taken.

The plaintiff in error duly excepted to the giving of that part of the charge which we have quoted, and submitted a request to charge, which request pointed out to the court clearly the defect in the charge given. The refusal of this request to charge is made the ground of the third assignment of error. It is not clear that this third assignment is well taken, because the requested charge involves several propositions, the soundness of some of which, and their applicability to the case on trial, may be questioned. Among other things, the request asked the court to instruct the jury that:

"If the brake was defective, and defendant was negligent in requiring plaintiff to use the car, as herein defined, then the plaintiff can recover, notwithstanding the negligence of his fellow servants may have contributed to produce the wreck, provided such defective brake was the proximate cause of the wreck."

From the exception taken to the portion of the general charge specified, and from the terms above quoted of the requested charge, the attention of the court was fully drawn to the rule of law on which the plaintiff relied, and of which he desired the benefit in a proper instruction to the jury. That rule of law is stated in the text books thus:

"The principle is universal that where the negligence of the principal and that of a fellow servant, together, produce injury, the principal is liable therefor." Bailey, Mast. Liab. p. 439.

In *Railway Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266, it is said:

"If the negligence of the company contributed to (that is to say, had a share in producing) the injury, the company was liable, even though the negligence of a fellow servant of Cummings was contributory also. If the negligence of the company contributed to, it must necessarily have been an immediate cause of, the accident, and it is no defense that another was likewise guilty of wrong."

This doctrine is fully recognized in the state courts in Texas. *Railroad Co. v. Zapp* (Tex. Civ. App.) 49 S. W. 673; *Railway Co. v. Hannig*, Id. 116; *Railroad Co. v. Bonatz* (Tex. Civ. App.) 48 S. W. 767.

It is unnecessary to further discuss the errors assigned, as the rulings complained of may not occur on a second trial. On the ground already presented, the judgment of the circuit court is reversed, and the cause remanded to that court, with directions to award the plaintiff a new trial.

to the commission for relief, under the proviso of the fourth section, by which the commission, upon proper application, is empowered to authorize carriers, in special cases, to charge less rates for the longer than for the shorter distance. Accordingly the commission found that the defendant carriers had violated the fourth section of the act, and made an order requiring the defendant carriers "to cease and desist from charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from New York, Boston, Philadelphia, Baltimore, or other Atlantic Seaboard cities, for the shorter distance to Chattanooga, than for the longer distance, over the same line, in the same direction, to Nashville." The order was entered December 30, 1892; but its operation was suspended until February 1, 1893, to enable the defendants to apply to the commission for special authority, under the proviso of the fourth section, to charge the less rate for the longer distance to Nashville. The commission did not definitely decide that the rates to Chattanooga were unreasonable in and of themselves, and they did not decide whether the competition at Nashville was of such a character that, if application had been made to them, they would have made it a special case, and authorized the less charge for the longer distance, though there are sentences in the opinion of Commissioner Knapp from which it is to be inferred that the commission were inclined to think that the rates to Chattanooga were unreasonably high, in violation of the first section, and that the competition at Nashville would not justify making the case an exception to the general operation of the fourth section. The carriers failed to apply to the commission for relief as suggested in the order, or to comply with the order. Thereupon, on March 24, 1893, the interstate commerce commission filed the petition in equity against the defaulting carriers upon which the decree appealed from is founded. The petition set out, by averments and exhibits, the proceedings before it, its findings of fact, its conclusions of law, its order thereon, and the refusal of the defendants to obey, and concluded with a prayer for process, hearing, and enforcement of the order by injunction.

Because of the disqualification of Judge Clark, who had been of counsel, and also because of the pendency of cases in the supreme court, the decision of which it was thought by counsel for both parties would be controlling, the cause did not come on for hearing until December, 1897. Judge Severens decided the case in February, 1898. He held that the commission erred in its view that the defendant carriers were not entitled to rely upon competition of other carriers subject to the interstate commerce law as a condition rendering the fourth section of the act (the long and short haul clause, so called) inoperative without making special application to the commission for relief from its provisions, and thus did not concur in the sole ground upon which the commission expressly based its order. Proceeding to review the whole body of the evidence, however, he found that the competition at Nashville did not render the conditions and circumstances under which defendant carriers conducted transportation thither so unlike those existing at Chattanooga as to take the case out of the long and short haul clause, and that, even if the contention of counsel for the carriers that any real dissimilarity, however slight, in conditions of transportation, took the case out of the fourth section, could be sustained, the discrimination against Chattanooga in the existing rates was so great as to be undue and unjust, within the third section of the act. He therefore concluded that the order of the commission was a proper one on other grounds than that upon which it was based, and entered a decree enjoining the carriers in accordance with its terms. He intimated in his opinion that there was sufficient evidence to sustain a finding that the Chattanooga rates were unreasonably high in and of themselves, but he deemed it sufficient merely to enforce the order of the commission as drawn.

The evidence shows that merchandise consigned from New York and other Eastern Seaboard points (and for the purposes of this case it will hereafter be sufficient to instance the typical case of New York) to Nashville is shipped by a great many different lines, but they are of two classes. One class is made up of east and west trunk lines (so called) lying north of the Ohio river to Cincinnati, and of the Louisville & Nashville Railroad to Nashville. The other is made up of a line, either all rail or by water, to a point in Southern territory, i. e. in Virginia or further south, near or on the seaboard, and thence

by the Southern lines to Chattanooga, and thence by the Nashville, Chattanooga & St. Louis Railroad to Nashville. The business of the east and west trunk lines north of the Ohio river is so great that the rates of freight in force on them are generally much lower (perhaps 33½ per cent.) than those in force on the Southern lines, which embrace, generally, all lines in states south of the Ohio and east of the Mississippi. The Louisville & Nashville Railway Company, though a Southern line, has put in force from Cincinnati to Nashville, a distance of 295 miles, the trunk-line rates, so that freight rates on merchandise coming to Nashville, by way of Cincinnati, are substantially less than they would be were the usual Southern rates of freight charged from Cincinnati to Nashville. Of the Southern lines from New York to Nashville, the chief ones are the ocean lines, either to Norfolk, to Charleston, to Savannah, and to Brunswick, and thence by rail through Chattanooga to Nashville, or the all-rail lines to Hagerstown, Maryland, and Alexandria, Maryland, and thence by the Southern Railway through Chattanooga to Nashville. Eighty per cent. of these all-rail lines are in Southern territory, and all the railroads connecting with the Southern steamship lines are also in Southern territory. If Southern rates on Nashville business were charged on that part of the through lines lying in Southern territory, the total freight rate to Nashville would be much higher than that charged via the trunk lines to Cincinnati, and via the Louisville & Nashville road to the same point. Therefore the Southern lines reduce their charges to such a figure that the total rate becomes the same at Nashville by the Southern lines through Chattanooga, as by the Louisville & Nashville road from Cincinnati and New York. As a result, more than 50 per cent. of the through Eastern business to Nashville is carried over the Southern lines. The Southern lines, however, maintain the Southern rates to Chattanooga.

Chattanooga is 330 miles from Cincinnati, with which it is connected by the Cincinnati Southern Railway, under lease to the Cincinnati, New Orleans & Texas Pacific Railway Company. The latter company does not charge east and west trunk-line rates on through business from New York to Chattanooga, but fixes its rates according to the Southern tariff, though they are less than local rates; and in this way Chattanooga rates, from the East through Cincinnati, are maintained on a Southern basis. The rates in the South at Chattanooga and elsewhere are fixed or agreed upon by the Southern lines through an association known at different times by different names,—at one time as the Southern Railway & Steamship Association, at another as the Southern States Freight Association, and now the Southeastern Freight Association. The association has pursued the policy of grouping towns for the same through rate from the Eastern Seaboard. Chattanooga is for this purpose grouped with many cities to the south. As to this the commission made the following finding:

"As appears from tariffs on file with the commission, the following cities and towns, among others, are grouped with Chattanooga, and take the same rail and water rates on classified traffic, to wit: Dalton, Rome, Atlanta, Americus, Athens, Columbus, Ft. Gaines, and Griffin, in the state of Georgia; Huntsville, Decatur, Sheffield, Tusculumbia, Florence, Gadsden, Oxford, Talladega, Anniston, Birmingham, Opelika, Montgomery, Selma, and Eufaula, in the state of Alabama; and Enterprise and Meridian, in the state of Mississippi. Of these, Dalton, Rome, Atlanta, Americus, Athens, Columbus, Griffin, Anniston, Gadsden, Oxford, Opelika, and Eufaula have higher all-rail class rates than Chattanooga, their all-rail rates on the six numbered classes being as follows:

1	2	3	4	5	6
<u>122</u>	<u>104</u>	<u>91</u>	<u>77</u>	<u>63</u>	<u>51</u>

"The rates to Chattanooga and the above-named common points, both rail and water and all rail, are established by the Southern Railway & Steamship Association, of which the defendant lines herein are members, and all traffic to those points is governed by the classification of that association."

The grouping is illustrated by the following sketch taken from the brief of counsel for the carriers:



With this explanation of the way in which the differing rates have come to be fixed, it is proper to make a definite statement of exactly what the differing rates are, and their effect. For transportation and rate fixing, merchandise is classified. There are six classes. The Southern classifications differ somewhat from the trunk-line or official classification, but the differences are not great enough to be material in this discussion. The commission found as follows:

"The following are the through rates from New York and Boston to Chattanooga, Nashville, and Memphis, respectively:

Classes	1	2	3	4	5	6
To Chattanooga.....	114	98	86	73	60	49
To Memphis, 310 miles further.....	100	85	65	45	38	35
To Nashville, 151 miles further.....	91	78	60	42	36	31

"It thus appears that the rates from New York and Boston are less to Nashville than to Chattanooga, on the six classes, respectively, by 23 cents, 20 cents, 26 cents, 31 cents, 24 cents, and 18 cents; and less to Memphis than to Chattanooga by 14 cents, 13 cents, 21 cents, 28 cents, 22 cents, and 14 cents. These differences prevail in favor of Nashville and Memphis on all goods transported to those cities from Eastern Seaboard points through Chattanooga; the distance to Nashville being 151 miles, and to Memphis 310 miles, further than to Chattanooga. \* \* \*

"The following comparison shows the difference between the local rate from Cincinnati to Nashville, and the amounts added to the trunk-line rate to the former place to make the through rate to the latter from New York:

	1	2	3	4	5	6
Local rate, Cincinnati to Nashville.....	53	48	39	31	25	25
	1	2	3	4	5	6
Additions to trunk-line rate to Cincinnati.....	26	21	16	12	10	9



"A similar comparison between the local rate from Cincinnati to Chattanooga, and the amounts added to the trunk-line rates to Cincinnati to make the through rate from New York to Chattanooga, is shown in the following table:

	1	2	3	4	5	6
Local rates, Cincinnati to Chattanooga.....	76	65	57	47	40	30
	1	2	3	4	5	6
Additions to trunk-line rates to Cincinnati.....	49	41	42	43	34	27

"The proportion of the Nashville through rate charged on a ton of first-class goods from Cincinnati to Nashville via the Louisville & Nashville Railroad, a distance of 295 miles, is \$5.20, while the proportion of the Chattanooga through rate charged from Cincinnati to Chattanooga via the Cincinnati Southern Railway, a distance of 335 miles (only 40 miles further), is \$9.80."

The distances by various routes from New York to Nashville and Chattanooga are shown below:

	Miles.
New York to Cincinnati.....	757
Cincinnati to Nashville.....	295
	1,052
New York to Cincinnati.....	757
Cincinnati to Chattanooga.....	335
	1,092
Via Southern lines, all rail:	
New York to Bristol.....	659
Bristol to Chattanooga.....	242
	901
Chattanooga to Nashville.....	152

#### Distances from Southern ports to Chattanooga:

	Miles.
Norfolk to Chattanooga.....	650
Charleston to Chattanooga.....	448
Savannah to Chattanooga.....	485

The city of Chattanooga is in Southeastern Tennessee, on the river bearing the same name as the state. During the last 10 years, especially, its growth has been extremely rapid, and it has become a manufacturing and commercial point of considerable importance. It competes for the trade of the surrounding country largely in the same territory as Nashville. By reason of the disparity in charges on shipments from the East in favor of Nashville, Chattanooga is placed at serious disadvantage in this competition, and its business materially lessened. The tendency of existing rates to these rival towns is to limit the area in which Eastern merchandise can be profitably distributed from Chattanooga, and to impede the growth and prosperity of that city which would naturally result from the development of its wholesale trade. Under the tariffs now in force, goods may be carried from the East through Chattanooga to Nashville, and back through Chattanooga to points south and east, and there sold at lower prices than Chattanooga merchants can sell for; and this appears to have actually occurred in many instances. On a car load of first-class freight, 40,000 pounds, the charges to Chattanooga, at \$1.14 per 100, amount to \$456; while to Nashville, at 91 cents, the charges are only \$364, making a difference of \$92 in favor of Nashville, the longer haul by 151 miles. On fourth-class freight the advantage in favor of Nashville is \$124 per car, and on sixth-class, \$72.

Only two railroads enter Nashville. These are the Louisville & Nashville Railroad, from the north and south, and the Nashville, Chattanooga & St. Louis Railway, from the east and west. The railroads entering the city of Chat-

tanooga are: (1) The Nashville, Chattanooga & St. Louis Railway, which runs from Chattanooga to Nashville and St. Louis. (2) The Memphis & Charleston road, which runs from Chattanooga to Memphis, where it connects with the Mississippi river, and forms a line thence via New Orleans. (3) The Alabama Great Southern road, which runs from Chattanooga to Birmingham, Ala., and Meridian, Miss., connecting with a road entering New Orleans. (4) The Chattanooga Southern Railway, from Chattanooga to Gadsden, where it makes several connections. (5) The Chattanooga, Rome & Columbus road, which runs from Chattanooga to Rome, where it connects with various rail lines running through Atlanta to the South Atlantic ports and on to Carrollton, where it connects with the Central Railroad of Georgia System. (6) The Southern Railway (south of Chattanooga), which runs from Chattanooga via Rome to Atlanta, and there connects with the numerous lines, either all rail or rail and water, via the South Atlantic ports, and the Southern Railway (east of Chattanooga), which runs from Chattanooga via Knoxville to Bristol, and thence forms lines, all rail, through Hagerstown or Alexandria, or rail and water via Norfolk. (7) The Western & Atlantic Railroad, now under lease to the Nashville, Chattanooga & St. Louis Railway Company, which runs from Chattanooga to Atlanta direct. (8) The Cincinnati, New Orleans & Texas Pacific Railway, which runs from Chattanooga to Cincinnati.

The seaboard traffic which is carried to Nashville through Chattanooga reaches the latter place by several different routes. The most important of these appears to be the East Tennessee, Virginia & Georgia Railway (now the Southern Railway), with its Eastern connections by rail and water. The water portion of this route is by the vessels of the Old Dominion Steamship Company from New York to Norfolk, where they connect with the Norfolk & Western Railroad, which extends to Bristol, Tenn., the Eastern terminus of the East Tennessee, Virginia & Georgia; the rail portion of this route consists of the Pennsylvania System, and possibly other lines, reaching Roanoke, Va., on the main line of the Norfolk & Western, by way of the Shenandoah Valley. All traffic over this route passes through Knoxville, Tenn., the rates to which point are about the same as to Memphis. Another route is by the Clyde Steamship Company to Charleston, connecting at that port with rail lines running through Augusta and Atlanta. A third route is by the Ocean Steamship Company to Savannah, and thence by rail through Macon and Atlanta. A fourth route is by steamer to Brunswick, and thence by Southern Railway to Chattanooga. There is no testimony in the case indicating the relative portion of Nashville traffic via Chattanooga which passes by either of these routes, but the commission found that the greater portion of it went by the all-rail route via Alexandria, Va.

The Louisville & Nashville Railroad Company has not been a member of the associations of lines fixing Southern rates. It owns, however, more than one-half the stock of the Nashville, Chattanooga & St. Louis Railroad Company; which always has been a member of these associations, and it jointly operates the railroad of the Georgia Central Railroad & Banking Company, which is also a member of the association. The Georgia Central Railroad & Banking Company owns all the stock of the Ocean Steamship Company which has also been a member of the associations. The Nashville, Chattanooga & St. Louis Railroad Company is the only railroad connecting Nashville and Chattanooga. It has under lease the Western & Atlantic Railroad, running from Chattanooga to Atlanta. The railroad of the Georgia Central Railroad & Banking Company under the control of the Louisville & Nashville Railroad Company runs from Atlanta to Savannah. And the steamers of the Ocean Steamship Company run from Savannah to New York and Boston. The officers of the Nashville, Chattanooga & St. Louis Railroad Company, it is stipulated, would testify that the company conducts an independent business, and competes with the Louisville & Nashville Company.

The Cumberland river, from Paducah, Ky., to Nashville, is open for navigation nine months in the year. The only steamboats running on it are three or four in number, and are capable of carrying not more than 300 tons of merchandise each. All goods shipped from Cincinnati to Nashville by river, a distance of 617 miles, are transshipped at Paducah, and this is also true of goods shipped by the same route from Louisville and Evansville. A week is con-

sumed in a round trip from Cincinnati to Nashville by steamboat. It is a two-days trip from Paducah to Nashville. The amount of merchandise carried to Nashville by the Cumberland river from Ohio river points, as compared with that carried by the railroad, is very small; and for 20 years no merchandise shipped from New York by the trunk lines to Nashville has been carried from Ohio river points by the Cumberland river, though rates of freight from those points to Nashville by river are certainly 20 to 25 per cent. less than the rates by rail on through business, and from 40 to 50 per cent. less than the local railway rates for the same distance.

The defendant railroad companies introduced evidence of the traffic managers upon the question of the reasonableness of the existing rates to Nashville and Chattanooga. The uniform evidence was that the Nashville rates were not unreasonably low, and the Chattanooga rates were not unreasonably high. The Nashville rates were said to be remunerative, in the sense that they produced a profit over and above the cost of transportation; and the Chattanooga rates were said to be not unreasonably high, because business was done under them and they were not prohibitory, and, further, because on such rates Chattanooga merchants were able to compete with merchants of the cities and towns south of them with which Chattanooga was grouped. No evidence was introduced to show the value of the property necessarily engaged in the business of transportation on any one line, and there was nothing to show that the rates to Nashville did not pay a profit over and above cost of transportation sufficient to meet fixed charges and produce a dividend. Certain of the traffic experts testified that the motive of the Louisville & Nashville Railroad Company in lowering the rates to Nashville was to enable the Nashville merchants to compete with Louisville and Cincinnati merchants in the territory lying between Nashville and the Ohio river, and the same reason is given in the pleadings of some of the defendants and in the briefs of counsel.

W. A. Henderson and Ed. Baxter, for appellants.

L. A. Shaver, for appellee.

Before HARLAN, Circuit Justice, and TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge (after stating the facts as above). The defendant carriers transport merchandise from New York to Nashville through Chattanooga at rates ranging from 25 to 60 per cent. less than those charged by the same carriers for transporting merchandise from New York to Chattanooga over the same tracks and in the same trains, although the distance to Chattanooga is 151 miles less than that to Nashville. If the carriage to the two places is under similar circumstances and conditions, then the defendants have violated the fourth section of the interstate commerce act, and the order of the commission and the judge at the circuit should be sustained. It is contended on behalf of the defendants that the circumstances and conditions of their Nashville business are not similar to those of their Chattanooga business, in that at Nashville they encounter competition which they must meet by lowering their rates in order to secure any business at all, while at Chattanooga such competition does not exist. This competition is said to be of two kinds:

First, the potential, but not actual, competition afforded by the situation of Nashville on the Cumberland river, by which it may be reached nine months in the year by steamboat from Evansville and Cincinnati. This gives Nashville water communication with points on the east and west trunk lines whose rates are 33½ per cent. less

than the Southern rates, and thus, it is said, makes it practically a trunk-line point. The evidence does not sustain the claim that in respect to through rates from New York to Nashville via Ohio river points the river competition has any effect whatever. The witnesses for the defendants admit that no through freight from New York to Nashville is ever carried by the Ohio and Cumberland rivers; and this although the rates by river are from 20 to 25 per cent. less than the proportion of the through New York rate to Nashville, collected by the Louisville & Nashville Railroad Company for carriage from Cincinnati to Nashville. But it is said that, if the rate is increased to Nashville so as to make it the same as that to Chattanooga, then the river lines will become formidable competitors of the Louisville & Nashville Railroad Company in the through traffic; and freight experts have been produced by the defendants who vaguely express the opinion that to increase the additions made to the trunk-line rates from New York to Cincinnati by the Louisville & Nashville Railroad Company, for its part of the through carriage to Nashville, would induce river competition on this traffic. There has been presented to us an able argument to show the powerful effect of potential water competition upon railway rates in cases where comparatively a small percentage of the freight is actually carried by water. The effect of the Erie Canal upon grain rates of freight is cited as a significant illustration. We fully concede much of what is contended on this head, but we find it to have little or no application to the case in hand. It appears by the undisputed evidence that the rates of the Louisville & Nashville Railroad from Cincinnati, Louisville, and Evansville have practically destroyed, not only the New York through business by river, but the local river business from those points to Nashville. The total amount of traffic on the Cumberland river to Nashville is so insignificant, as compared with the local traffic to the same place, that it is not worthy of notice. Now, the local railway rates to Nashville from Ohio river points are about 50 per cent. higher than the through rates on New York shipments between the same points. To make the through New York rate to Nashville the same as that to Chattanooga, the Louisville & Nashville Company will not have to charge as much for its part of the carriage as its local rates. If the local rates have reduced river transportation to a minimum, it is clear that any increase on through rates, under which they would still be less than local rates, cannot affect river competition at all. In other words, the margin of possible increase in the through rates, without affecting river competition, includes all the increase in rates required to comply with the order appealed from, even if the carriers elect to bring about the equality enjoined in the order by increasing the Nashville rate to the Chattanooga rate. We may therefore eliminate Cumberland river competition as a factor in reaching our conclusion.

The next question for our consideration is whether the competition of the trunk lines to Cincinnati, and of the Louisville & Nashville Railroad to Nashville, makes the conditions of defendants' traffic at that place different from those at Chattanooga. It is settled

in the case of Interstate Commerce Commission v. Alabama M. R. Co., 168 U. S. 144, 164, 167, 18 Sup. Ct. 45, 42 L. Ed. 414, that competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar; that the mere fact of competition, however, no matter what its extent or character, does not necessarily relieve the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude consideration of competition in determining dissimilarity of conditions, and that competition may in some cases be such as, having due regard to the interests of the public and the carrier, ought justly to have effect upon the rates. It is then the duty of the commission and the reviewing courts in such cases to consider, not only the extent, but the character, of the competition relied on as a justification for discrimination against the nearer point. It must therefore be relevant to ask why such competition is not also present at the nearer point. If the answer to the question is found in the absence at the nearer point of competing railway lines, of water competition, and of other circumstances naturally creating competition, then the further point may be reasonably held to be merely enjoying in its lower rates its normal advantages, which may and do justly overcome the mere disadvantage of the greater distance of the haul. But when we find that the nearer point has not only the advantage of less haul, but also more railway lines in actual competition, and that there are no other circumstances of substantial advantage in favor of the more distant point, we have a case which the fourth section of the interstate commerce law was passed to meet. It is argued that the fact of competitive lower rates at the more distant point speaks for itself, and that no amount of argument can demonstrate a similarity of condition in the face of such a rate. This is only one of many arguments advanced on behalf of appellants, which, reduced to their last analysis, involve, as a major premise, that the existence of a rate and movement of business under it are a complete justification of it, and foreclose judicial investigation. Such an assumption renders the interstate commerce law nugatory and useless. There are other causes than normal competition that produce discriminatory rates. The interstate commerce law, it is conceded, was intended to encourage normal competition. It forbids pooling for the very purpose of allowing competition to have effect. But it is not in accord with its spirit or letter to recognize, as a condition justifying discrimination against one locality, competition at a more distant locality, when competition at the nearer point is stifled or reduced, not by normal restrictions, but by agreement between those who otherwise would be competing carriers. The difference in conditions thus produced is effected by a restraint upon trade and commerce, which is not only violative of the common law, but of the so-called federal anti-trust act. U. S. v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; U. S. v. Joint Traffic Ass'n, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; U. S. v. Addyston Pipe & Steel Co., 29 O. C. A. 141, 85 Fed. 271. Certainly such a difference in condi-

tions ought not to justify a difference in rates before the commission or the court.

Chattanooga is 151 miles nearer than Nashville to New York by the Southern and most direct routes. It has at least three through competing Southern lines from New York under different managements. These lines reach Nashville over one road from Chattanooga. Chattanooga is connected with Cincinnati, where the stream of traffic of the east and west trunk lines is reached, by a railroad 335 miles in length. Nashville reaches the same city by a railroad 295 miles in length. So far as the record shows, the conditions of railroad transportation between Cincinnati and Nashville are not substantially different from those between Cincinnati and Chattanooga. Both the Louisville & Nashville and the Cincinnati Southern are Southern roads. The Louisville & Nashville does not encounter as much unrestricted competition at Nashville as the Cincinnati Southern at Chattanooga, for the only other line entering Nashville is the Nashville & Chattanooga Company, of which the Louisville & Nashville Company owns more than one-half the stock. But it is said that the Louisville & Nashville Company is vitally interested in building up Nashville by enabling her merchants to compete with those of cities on the Ohio river. Why should the interest of this company be any greater in Nashville than that of the Cincinnati Southern Railroad in Chattanooga? The difference in the Chattanooga and Nashville rates is to be found in something other than the physical conditions existing at the two cities; for, regarding them alone, there is no reasonable ground for any substantial disparity. The evidence shows that the rates to Chattanooga from Cincinnati and from the Eastern Seaboard have always been fixed and agreed upon by an association of the Southern railway and steamship companies. The Louisville & Nashville Company has not been a member of it, but the Nashville, Chattanooga & St. Louis Company, of which the Louisville & Nashville Company owns a majority of the stock, has always been a member; and so has the Georgia Central Railroad & Banking Company, whose road from Atlanta to Savannah the Louisville & Nashville Company jointly operates. The association has grouped Chattanooga with a large number of towns to the south of it for the same rates, and all the members of the association make their rates to Chattanooga accordingly. The Cincinnati, New Orleans & Texas Pacific Railway has been a member of this association, and it is the agreement between it and the other lines at Chattanooga which has prevented the lowering of its New York rate. Without such an agreement, it is not possible to see why normal competition would not give Chattanooga substantially the same rates as Nashville. The result of the agreement is to deny to Chattanooga the natural advantage which direct connection with Cincinnati secures to Nashville, and ought to secure to Chattanooga. The agreement is more than a mere tacit understanding resulting from a praiseworthy desire to avoid rate wars and the carriage of goods at less than cost; for the rates to Nashville are admitted to pay a profit over the cost of transportation, and they are from 25 per cent. to 50 per cent. less than the

Chattanooga rate for a considerably longer haul, with no apparent difference in conditions. We do not perceive that the fact that the competition at Nashville existed before the defendants began to carry merchandise by the Southern route has any material bearing on the issue. It only shows that the cost of transportation on the Southern lines was more slowly reduced than on the Northern lines, but it does not affect the existing situation. It is not important to inquire into the motive actuating the Cincinnati, New Orleans, & Texas Pacific Railway Company in its acquiescence in the Chattanooga rate agreement, though its greater or less dependence on the great Southern railway systems for its north-bound business readily suggests itself as a reason for its willingness to hold up its rates, and to refuse to Chattanooga what normal competition would give her. Nor can it be said that the Louisville & Nashville Company, whose fostering care of Nashville is insisted upon in the evidence and briefs for defendants, and is offered as a motive for its low rates to Nashville, is not a party to the plan by which Chattanooga is prevented from enjoying the natural traffic advantages which her railroads and her situation ought to give her; for through its ownership of a majority of the stock of the Nashville, Chattanooga & St. Louis Railway Company, operating a road from Nashville through Chattanooga to Atlanta, its joint operation of the railroad of the Georgia Central Railroad & Banking Company from Atlanta to Savannah in connection with the Ocean Steamship Company, of which the Georgia Central Company owns all the stock, it is very largely interested in traffic from the Eastern Seaboard to Chattanooga, and through Chattanooga to Nashville, and necessarily exercises an influence in shaping the action of the Southern Traffic Association in fixing rates. By its consent to the discrimination against Chattanooga, it only furthers its purpose to favor Nashville; for it enables Nashville merchants to undersell those of Chattanooga to the north and west of that city. We know that it is stipulated in the record that the officers of the Nashville, Chattanooga & St. Louis Railway Company would testify that it competes with the Louisville & Nashville Railroad Company, and that they are under different managements; but such evidence must be weighed in the light of the history of railroads in this country, and the motives that ordinarily govern in railroad management. One railroad company acquires the controlling interest in another company to control its general policy; and, while it may permit independence in the personnel and the details of management, it needs more than a stipulated statement of this general nature to induce a belief that the company which elects the directors of the other will permit that other to take a course materially detrimental to the interests of the owning company.

We are pressed with the argument that to reduce the rates to Chattanooga will upset the whole Southern schedule of rates, and create the greatest confusion; that for a decade Chattanooga has been grouped with towns to the south and west of her, shown in the diagram; and that her rates have been the key to the Southern situation. The length of time which an abuse has continued does not

justify it. It was because time had not corrected abuses of discrimination that the interstate commerce act was passed. The group in which Chattanooga is placed, shown by the diagram above, puts her on an equality in respect to Eastern rates with towns and cities of much less size and business, and much further removed from the region of trunk-line rates, and with much fewer natural competitive advantages. If taking Chattanooga out of this group and putting it with Nashville requires a readjustment of rates in the South, this is no ground for refusing to do justice to Chattanooga. The truth is that Chattanooga is too advantageously situated with respect to her railway connections to the north and east to be made the first city of importance to bear the heavier burden of Southern rates, when Nashville, her natural competitor, is given Northern rates. The line of division between Northern and Southern rates ought not to be drawn so as to put her to the south of it, if Nashville is to be put to the north of it. And we feel convinced from a close examination of the evidence that, but for the restriction of normal competition by the Southern Traffic Association, her situation would win for her certainly the same rates as Nashville. It may be that the difficulty of readjusting rates on a new basis is what has delayed justice to Chattanooga. It may well be so formidable as to furnish a motive for maintaining an old abuse.

It has been suggested that traffic managers are much better able, by reason of their knowledge and experience, to fix rates, and to decide what discriminations are justified by the circumstances, than courts. This cannot be conceded, so far as it relates to the interstate commerce commission, which, by reason of the experience of its members in this kind of controversy, and their great opportunity for full information, is, in a sense, an expert tribunal; but it is true of the federal court. Nevertheless, courts are continually called upon to review the work of experts in all branches of business and science, and the intention of congress that they should revise the work of railway traffic experts, whether railway managers or commerce commissioners, is too clear to admit of dispute.

We conclude that the defendants are violating the fourth section of the interstate commerce act, in charging a higher rate from New York and other Eastern cities to Chattanooga than to Nashville. The order that enjoined them from doing so is therefore right. The decree of the circuit court affirming the order of the commission is affirmed, with costs.

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#### MANHATTAN LIFE INS. CO. v. HENNESSY.

(Circuit Court of Appeals, Fifth Circuit. January 9, 1900.)

No. 821.

#### 1. LIFE INSURANCE—ASSIGNMENT OF POLICY—INSURABLE INTEREST.

It is sufficient, to entitle an assignee of a life insurance policy to recover thereon, that he had an insurable interest in the life of the insured at the time the assignment was made, although it may have ceased prior to the latter's death.



**2. ASSIGNMENTS FOR BENEFIT OF CREDITORS—CONDITION FOR RELEASE IN FULL—EFFECT OF ACCEPTING DIVIDEND.**

In the absence of statutory provision, the participation by a creditor in the benefits of a general assignment by his debtor, conditioned that those accepting its benefits shall release their claims in full, does not operate as a discharge of the unpaid part of the debt, there being no consideration therefor.

**3. LIFE INSURANCE—ASSIGNMENT OF POLICY—INSURABLE INTEREST.**

A creditor, to whom his debtor has assigned policies of insurance on his life as collateral, does not cease to have an insurable interest in such life by reason of his accepting the benefits of a general assignment made by the debtor conditioned that all creditors participating shall accept the dividends paid in full satisfaction of their debts, where his claim is not in fact paid in full, as, even if the transaction operates as a legal discharge of the debt, the moral and equitable obligation to pay the remainder still rests upon the debtor, and is sufficient to give the creditor an insurable interest in his life.

**4. SAME—ACTION ON POLICY—DEFENSE OF PAYMENT TO ASSIGNEE.**

A debtor obtained policies of insurance on his life, which he assigned to his creditor as collateral security, with the assent of the insurance company, and the creditor thereafter paid all premiums on such policies. The debtor subsequently made a general assignment conditioned that all creditors accepting its benefit should release their claims in full. The creditor proved its claim under such assignment, and received dividends, but the amount of its debt remaining unpaid largely exceeded the amount of the policies. The debtor made no effort to reclaim the policies, but notified the company to cancel the same. The creditor, however, continued to pay, and the company accepted, the premiums thereon for more than 20 years, and until the death of the insured, when the creditor proved its claim thereunder, which was paid by the company. *Held*, that such payment was authorized, and constituted a defense to an action against the company on the policies on behalf of the estate of the insured, any claim of the estate to the amount collected in excess of the premiums paid being one which could only be asserted in an action against the assignee.

**In Error to the Circuit Court of the United States for the Eastern District of Texas.**

This is a suit by Ellen Hennessy, of the state of Texas, against the Manhattan Life Insurance Company, incorporated under the laws of the state of New York, for \$9,000, being the amount of two insurance policies on the life of Patrick H. Hennessy, deceased. The Manhattan Life Insurance Company issued one of the policies on April 1, 1872, for \$5,000, and the other on January 23, 1874, for \$4,000. Each policy was payable to the "said assured, his executors, administrators, or assigns, within ninety days after due notice and satisfactory evidence of the death of the said Patrick H. Hennessy." Patrick H. Hennessy and M. P. Hennessy were partners in business, in Texas, under the firm name of P. H. Hennessy & Fro. This firm owed the J. L. Mott Iron Works, a corporation chartered under the laws of the state of New York, about \$42,000, for which debt each member of the firm was individually liable. Patrick H. Hennessy assigned one of these policies as follows:

"The State of Texas, County of Galveston.

"Know all men by these presents, that whereas, the Manhattan Life Insurance Company, of the city of New York, state of New York, has heretofore, to wit, for value received, issued to me their policy of insurance in writing, bearing date April 1, A. D. 1872, whereby they insured my life in the sum of \$5,000: Now I, Patrick H. Hennessy, of the city and county of Galveston, state of Texas, for and in consideration of my indebtedness to the J. L. Mott Iron Works, of the city of New York, state of New York, have sold, assigned, transferred, and set over, and by these presents do sell, assign, transfer, and set over, unto the said J. L. Mott Iron Works, all my right, title, and interest in and to the said policy of insurance, and all sum and sums of money, interest, benefit,

and advantage whatsoever now due, or hereafter to arise, or to be had or made, by virtue thereof; to have and to hold the same unto the said J. L. Mott Iron Works, executors, administrators, and assigns, forever, as collateral security to the said J. L. Mott Iron Works. Witness my hand and the use of scroll for seal, at the city of Galveston, this April 18, A. D. 1872.

"P. H. Hennessy. [L. S.]"

The other one he assigned in these words:

"The State of Texas, County of Galveston.

"For value received I, the undersigned, having a policy on my life in the Manhattan Life Insurance Company, of New York, said policy being numbered 36,943, dated January 23, A. D. 1874, for the term of life from that date, for the amount of \$4,000, annual premium \$120.64, do hereby grant and transfer all my right, title, and interest in and to the same unto the J. L. Mott Iron Works of New York, and their assigns and successors. Witness my hand and scroll for seal this April 17, A. D. 1874.

P. H. Hennessy. [L. S.]"

Both assignments were duly acknowledged by Patrick H. Hennessy before William R. Johnson, notary public for Galveston county, Tex. Both policies were delivered to the J. L. Mott Iron Works, and remained in its possession. Due notice of each of these assignments of the policies was given by the said Patrick H. Hennessy to the Manhattan Life Insurance Company, which assented to the assignments. The firm of P. H. Hennessy & Bro., on August 23, 1875, executed a general assignment, which states "that it conveys all the property of the firm and its members not exempt by law." In this instrument the debt to the J. L. Mott Iron Works is estimated at over \$42,000 principal. This assignment provides that the proceeds shall be distributed pro rata by the assignee to all the creditors who shall accept this assignment and sign a release in full of all claims and demands against the firm of P. H. Hennessy & Bro., and to those only. On November 1, 1875, the J. L. Mott Iron Works proved their claim with the assignee for \$48,309, principal and interest, and received a dividend thereon on November 11, 1875, of 7 per cent., \$3,381.63, and another and final dividend on March 22, 1876, of 3½ per cent., \$1,811.58; leaving unpaid \$43,115.79. On the policy for \$5,000 the J. L. Mott Iron Works paid the annual premiums from April 1, 1876, to April 1, 1896, amounting in the aggregate to \$2,388.75. On the policy for \$4,000 the J. L. Mott Iron Works paid the annual premiums from January 23, 1876, to January 23, 1897, amounting in the aggregate to \$2,156.07. Previous to these payments the premiums on the policies were paid by Patrick H. Hennessy. On January 18, 1879, Patrick H. Hennessy wrote to the Manhattan Life Insurance Company, stating that he was informed that the J. L. Mott Iron Works was keeping up the policies on his life "given them to secure the indebtedness to them of the late firm of P. H. Hennessy & Bro.," and that this firm was dissolved on August 25, 1875. Hennessy, in his letter, adds: "The assignment referred to provided that the creditors accepting it should take the property specified therein, and therefor give a discharge from all indebtedness. The J. L. Mott Iron Works accepted the assignment, received their pro rata under it, and thereby any further claim of theirs became canceled. They took the property for their claim, and their claim was thereby satisfied. This communication is to notify you of the facts as stated, and to demand, as the J. L. Mott Iron Works hold no insurable interest in my life, that the policies on my life in your company in their favor, or if assigned by them to others, be canceled, and rendered null and void." Patrick H. Hennessy made his last will on December 19, 1890. He gave all his property to his wife. He mentioned in the will that he had made provision for his children by a policy in the Aetna Life Insurance Company, but the policies involved in this litigation are not mentioned. His wife is made sole executrix. Patrick H. Hennessy died on February 13, 1897. The Manhattan Life Insurance Company was notified by the J. L. Mott Iron Works that it claimed the amount of the two policies as the assignee of Patrick H. Hennessy, and it also had notice that Ellen Hennessy claimed the policies as the executrix and sole legatee of her husband, Patrick H. Hennessy. In the course of the correspondence that ensued, the Manhattan Life Insurance Company, on March 11, 1897, wrote to the attorneys of Mrs. Ellen Hennessy as follows: "We also beg to notify you that the papers

on file in the office of this company indicate that the J. L. Mott Iron Works, of this city [New York], as the assignee of both policies, is entitled to payment thereof when by the terms thereof the payment is due, namely, ninety days after receipt of proof of loss, to wit, May 30 next. The company desires to make payment of the policies upon their due date upon the surrender of the policies with satisfactory proof of ownership by the lawful claimant." On May 11, 1897, the Manhattan Life Insurance Company wrote to the same attorneys: "As the whole of the proceeds of both policies is claimed by adverse claimants, Mrs. Ellen Hennessy, as executrix and wife, and by the J. L. Mott Iron Works, and [as] this company stands indifferent between the parties, we would be glad to have an opportunity to pay the money into court, that the respective rights of the claimants may be adjudicated." After the death of Patrick H. Hennessy, the J. L. Mott Iron Works and Ellen Hennessy each made due proof of loss on the two policies. The Manhattan Life Insurance Company paid the amount of the two policies, when they became due, to the J. L. Mott Iron Works on the surrender of the policies and the assignments of them. Ellen Hennessy sued the Manhattan Life Insurance Company for the amount of the two policies. She claims to be the owner of them as legatee and as executrix of Patrick H. Hennessy. The Manhattan Life Insurance Company, for defense, denied her ownership, and pleaded the payment to the J. L. Mott Iron Works. The court instructed the jury to find for the plaintiff, Ellen Hennessy, for the full amount of both policies, \$9,000, with interest from May 30, 1897, and the defendant, the Manhattan Life Insurance Company, duly excepted. The jury rendered the verdict as directed, and judgment was entered on it, and the Manhattan Life Insurance Company sued out a writ of error to review the decision in this court. It is assigned as error that the court directed a verdict for the plaintiff.

George E. Mann and Edgar H. Farrar (B. F. Jonas and E. B. Kruttschnitt, on the brief), for plaintiff in error.

F. Chas. Hume (S. S. Hanscom, John Lovejoy, Alexander Sampson, and M. L. Malevinski, on the brief), for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

An insurance policy is a chose in action, and, if without restrictive words, is assignable under the general principles of law. The policies in question here are assignable by their terms, because the underwriter has contracted with and promised to pay the "assured, his executors, administrators, and assigns." It was in the contemplation of the parties to the contract that it might be assigned, and in that event the express contract is to pay the amount of the policies to the assignee. This would not, of course, authorize an assignment, or make one valid that was against public policy and in conflict with principles opposed to wagering or speculative insurance. To make the assignment invulnerable to proper attack, the assignee must have an insurable interest in the life of the insured. The J. L. Mott Iron Works was a creditor of Patrick H. Hennessy to the amount of \$42,000 when the policies were assigned to it. The policies in the aggregate amounted to only \$9,000. Unquestionably, the creditor has an insurable interest in the life of his debtor to the amount of his debt. As the creditor himself may insure the life of his debtor, he can, on the same principle, accept an assignment of a policy on his life. The assignments of these policies, therefore, were not, at

their inception, open to the objection that the transaction was against public policy.

No question is raised as to the insurable interest of the J. L. Mott Iron Works in the life of Patrick H. Hennessy at the time of the assignment of the policies, but it is claimed that it had no insurable interest at the date of Hennessy's death. If it be assumed that the debt of Hennessy had been discharged or released by the acceptance by the J. L. Mott Iron Works of the benefit of the general assignment, would that affect the decision of this case? The doctrine once prevailed in England that in life as well as in fire and marine insurance there must be an insurable interest at the time of the loss as well as at the time of the insurance to support the policy. *Godsall v. Bolde-ro*, 9 East, 72. But the later English cases hold that this rule is not good as applicable to life policies. The English rule now is that, if the insurable interest in the life existed at the time of the insurance, the contract is valid, and enforceable, even if there was no interest at the time of the loss. *Dalby v. Assurance Co.*, 15 C. B. 365; *May, Ins.* (3d Ed.) § 115. In this country there is much conflict in the cases on this point, many of them refusing to adopt the later English rule. *May, Ins.* (3d Ed.) § 117. Justice seems to favor the view that the policy is good if an insurable interest existed when the contract of insurance was made, because otherwise, in cases like the one here under consideration, actual loss would result to the holder of the policy without fault on his part. If the debt of Hennessy to the J. L. Mott Iron Works had been paid, as claimed, there is no pretense that the premiums paid by the latter to the insurance company have ever been returned. The sum of the premiums would be a complete loss if the assignment of the policy is to lose all validity by the payment of the debt. Justice could only be reached by permitting a recovery by the assignee on the policy, so that he could be indemnified for the premiums paid by him. As to what claim the representatives of the insured would have on the fund in excess of the premiums, the debt having been paid, is not a question in this case. If the debt were in fact paid, the premiums not having been returned, the assignment would stand to secure the assignee for this outlay. The assignment, in that event, would at least be a designation by the insured of a person to receive the amount of the policy from the insurance company. *Warnock v. Davis*, 104 U. S. 775, 781, 26 L. Ed. 924. The assignee could retain what was due him, but would be liable to account to the representatives of the insured for the remainder. *Page v. Burnstine*, 102 U. S. 664, 26 L. Ed. 268. In *Insurance Co. v. Bailey*, 13 Wall. 616, 619, 20 L. Ed. 501, there is an approval of the later English doctrine. After stating that, to recover in fire and marine insurance, the insured must have had an interest in the property at the time of the loss, the court said:

"Life insurances have sometimes been construed in the same way, but the better opinion is that the decided cases which proceed upon the ground that the insured must necessarily have some pecuniary interest in the life of the cestui que vie are founded in an erroneous view of the nature of the contract; that the contract of life insurance is not necessarily one merely of indemnity for a pecuniary loss, as in marine and fire policies; that it is sufficient to show that the policy is not invalid as a wager policy, if it appear that the relation,

whether of consanguinity or of affinity, was such between the person whose life was insured and the beneficiary named in the policy as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured."

The court adds (the italics are ours) the following:

"Insurers in such a policy contract to pay a certain sum, in the event therein specified, in consideration of the payment of the stipulated premium or premiums, and it is enough to entitle the insured to recover if it appear that the stipulated event has happened, and that the party effecting the policy *had an insurable interest*, such as is described, in the life of the person insured *at the inception of the contract*, as the contract is not merely for an indemnity, as in marine and fire policies."

In *Insurance Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251, the case of *Dalby v. Assurance Co.*, supra, is cited with approval. The court said:

"But supposing a fair and proper insurable interest, of whatever kind, to exist at the time of taking out the policy, and that it be taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained; and there is then no good reason why the contract should not be carried out according to its terms. \* \* \* In our judgment, a life policy, originally valid, does not cease to be so by the cessation of the assured party's interest in the life insured."

These expressions of the supreme court seem very pertinent to the question here examined, but neither case on the facts was exactly in point. In each case the insurable interest involved depended on the relationship between the insured and the beneficiary in the policy, but did not involve a question of debtor and creditor. The principles stated, however, sustain the view that an insurable interest existing at the time of the issuance of the policy is sufficient to sustain the contract. In *Crotty v. Insurance Co.*, 144 U. S. 621, 624, 12 Sup. Ct. 750, 36 L. Ed. 568, the policy sued on was made payable to a named creditor if living, and, if he should die, to the executors, administrators, or assigns of the insured. Suit on the policy was brought by the creditor, alleging in his declaration the existence of the debt at the time of insurance and at the time of loss. The court held that to recover he must prove the continuance of the relation of debtor and creditor and the amount of the debt. In the course of the opinion the court said:

"If a policy of insurance be taken out by a debtor on his own life, naming a creditor as beneficiary, or with a subsequent assignment to a creditor, the general doctrine is that on payment of the debt the creditor loses all interest therein, and the policy becomes one for the benefit of the insured, and collectible by his executors or administrators. \* \* \* But whatever doubts may exist as to the law applicable to such cases, or the rights of action on such a policy, the plaintiff in this case put his own construction on the contract, and tendered an issue which was accepted by the company. He alleged that he was a creditor at the time of the contract and at the time of the death. Upon the issue thus presented the case went to trial. The promise of the policy is to pay to Michael Crotty, his creditor, if living; and it is contended that this is an admission on the part of the company sufficient to justify a verdict against it. If an admission at all, it is good only as an admission of the date at which it was made, to wit, the date of the policy. The relation of debtor and creditor is not a permanent one, like that of parent and child, but one which may vary from day to day, changing both in fact and amount, according to the successive business transactions between the parties."

In the case last quoted the policy was made payable on its face to Michael Crotty, his creditor, if living, and, if he should die, then to the executors, administrators, or assigns of the insured. On the trial no evidence was furnished of the plaintiff's interest in the policy except the policy itself. There was no evidence that the creditor had paid any premiums on the policy, or that the debt equaled in its sum the amount of the policy, or that the debt in fact ever existed. The creditor suing on the policy alleged the existence of the debt at the time of the contract and at the time of the death. Issue was joined on these allegations, and the plaintiff failed for want of evidence. We do not find in the result of this case any departure from the doctrine of *Dalby v. Assurance Co.*, *supra*, which was previously cited with approval by the supreme court.

In the present case the assignment of the policies was made in good faith. The assignee's claim against Hennessy was much greater than the amount of the policies. The policies were delivered to the assignee. The underwriter was notified and assented. The assignee paid the annual premiums for a period of 20 years, paying in the aggregate \$4,544.82. The assured, claiming that his debt to the assignee was discharged by law (it certainly had not been paid in fact), asserted no interest in the policy, but demanded its cancellation. The underwriter continued to receive the premiums from the assignee. On the death of the insured the assignee proved loss, and offered to deliver the assignments and policies on payment of the policies. On these facts the underwriter could surely be forced by suit to pay the assignee. The insurance company had agreed to pay him, and had received annual premiums for a number of years, paid on the faith of this agreement. In such case the law will enforce payment to the assignee, and, if others have equitable claims,—a question not for decision here,—they must be asserted in a suit to which the assignee is a party. *Smith v. Insurance Co.*, 4 Dill. 353, Fed. Cas. No. 13,083; *Insurance Co. v. Flack*, 3 Md. 341; *Cheeves v. Anders*, 87 Tex. 287, 28 S. W. 274; 2 May, Ins. (3d Ed.) § 459d; *Insurance Co. v. Armstrong*, 117 U. S. 591, 6 Sup. Ct. 877, 29 L. Ed. 997; *Investment Co. v. Baum*, 29 Ind. 236; *Swick v. Insurance Co.*, 2 Dill. 160, Fed. Cas. No. 13,692. The decisions of the New York court of appeals are to the effect that the assignee of the policy can collect and hold the proceeds even when he never had an insurable interest in the life of the insured. *St. John v. Insurance Co.*, 13 N. Y. 31; *Olmsted v. Keyes*, 85 N. Y. 593. But the supreme court does not approve this doctrine. The rule established by the latter court is that the assignee must have an insurable interest. His position must be such that the policy could have been legally issued payable to him. *Warnock v. Davis*, 104 U. S. 775-782, 26 L. Ed. 924. On the undisputed facts we think that the assignee of these policies could have collected them by suit against the insurance company. The law that would enforce the payment to the assignee would be unjust and illogical if it failed to protect the insurance company in such payment against the claim of the assignor. The insurer has made no promise to pay twice. The appellee does not claim that the debt of Hennessy to the J. L. Mott Iron Works was actually paid. It is claimed that the acceptance by the latter of the

benefit of the general assignment was equivalent to payment. This general assignment was executed on August 23, 1875. The J. L. Mott Iron Works proved its debt, amounting to \$48,309, and received dividends on the same on November 11, 1875, of \$3,381.63, and on March 2, 1876, \$1,811.63. This left due on the debt \$43,115.79. But the deed of assignment provided that those who accepted the benefit of it should release their claims in full. The validity of state laws permitting assignments on such terms is recognized. *Livermore v. Jenckes*, 21 How. 126, 144, 16 L. Ed. 55. But, in the absence of statutory provision, it is a rule of the common law that the payment of a less sum at the time and place where a greater undisputed sum is due is not a satisfaction of the greater sum, even though accepted as such, because there is no consideration for giving up the rest. In the absence of a statute to the contrary, this rule prevails in Texas. *Lanes v. Squyres*, 45 Tex. 382, 385; *Bennett v. Butterworth*, 11 How. 669, 674, 13 L. Ed. 859. No Texas statute is called to our attention prior to the law of March 24, 1879, which is subsequent to the date of the assignment and the receipt of the dividends. *Cunningham v. Norton*, 125 U. S. 77, 81, 8 Sup. Ct. 804, 31 L. Ed. 624. This statute could not affect the transactions here considered. But such statutes, when applicable, serve only as a defense when pleaded. Their application does not constitute payment in the full sense. The equitable obligation of the debtor to the creditor would not be discharged. Even after discharge in bankruptcy, there remains a moral obligation to pay the debt that will sustain a new promise of the bankrupt. The fact that the debtor may be armed with a legal defense against the creditor does not destroy the insurable interest of the latter in the life of the former. The debtor may be an infant, and yet the fact that the plea of infancy might be interposed would not make the life policy in favor of his creditor void. 1 May, Ins. (3d Ed.) § 108. If the debt be barred by the statute of limitations, it nevertheless constitutes an insurable interest. *Rawls v. Insurance Co.*, 27 N. Y. 282; 1 May, Ins. (3d Ed.) § 108.

The undisputed facts in the present case show that the J. L. Mott Iron Works had a continuing insurable interest in the life of Hennessy. Payment of the amount of the policies to the J. L. Mott Iron Works was, we think, a valid defense to this action. The circuit court erred in directing a verdict for the plaintiff. The jury should have been directed to find for the defendant. The judgment of the circuit court is reversed, and the cause remanded.

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IN RE MUSSEY.

(District Court, D. Massachusetts. January 15, 1900.)

No. 1,388.

**1. BANKRUPTCY—JURISDICTION—PENDENCY OF INSOLVENCY PROCEEDINGS.**

The pendency of proceedings in insolvency under a state law, on the debtor's voluntary petition, begun before the passage of the bankruptcy act, will not be ground for dismissing the debtor's subsequent voluntary petition in bankruptcy, although he has contracted no new debts, when it

appears that one or more of the creditors scheduled by the bankrupt are citizens of states other than that in which the insolvency proceedings were instituted.

**2. SAME—FORM OF DISCHARGE.**

Upon a bankrupt's application for discharge no issue can be raised or determined as to the effect of the discharge, if granted, upon debts created by the bankrupt's fraud, or upon claims proved in pending insolvency proceedings; and consequently the court will not, at the instance of creditors, so frame the discharge as to except such debts or claims from its operation, but will grant a discharge in the usual form, leaving its scope for future determination when the question shall properly arise.

**In Bankruptcy.** On review of decision of referee in bankruptcy overruling a motion to vacate the adjudication and dismiss the petition of the bankrupt.

W. P. French, for bankrupt.

Joseph Willard and Edwin A. Bayley, for creditors.

**LOWELL, District Judge.** This was a voluntary petition filed July 3, 1899. On October 27, 1897, the bankrupt had filed a voluntary petition in insolvency, upon which proceedings are now pending. It was alleged in the creditors' motion, found by the referee, and admitted at the argument that among the creditors whose names appeared in the bankrupt's schedule were one or more creditors residing in the United States outside of Massachusetts. None of the debts scheduled by the bankrupt were incurred since the filing of the petition in insolvency. Certain of the bankrupt's creditors, scheduled by her in insolvency as well as in bankruptcy, moved that the adjudication in bankruptcy be vacated, and the bankrupt's petition dismissed. Under the circumstances above stated, the creditors' motion must be denied. If there were no foreign creditor in the bankrupt's schedule, or if those creditors had come into or should hereafter come into the proceedings in insolvency, the result might or might not be different. Upon those questions no opinion is here expressed, and none upon the form of discharge, if any, to be granted to the bankrupt in this case.

On a subsequent hearing in this case, January 19, 1900, on the bankrupt's application for discharge, the following opinion was delivered:

**LOWELL, District Judge.** This was a voluntary petition filed July 3, 1899. On October 27, 1897, the bankrupt had filed a voluntary petition in insolvency, upon which proceedings are now pending. She has now applied for her discharge in bankruptcy, and certain creditors who proved their claims in the insolvency proceedings ask that the discharge granted her shall expressly exempt from its operation all claims proved in insolvency, or within the jurisdiction of the insolvency court, and also such claims as were created by her fraud. It was held in *Re Rhutassel* (D. C.) 96 Fed. 597, that the only issue tendered by the petition for a discharge is the right to the discharge, and that the only facts properly pleadable in opposition thereto are those which show that the bankrupt is entitled to no discharge whatsoever. "The issue upon the effect of a discharge will arise when a creditor seeks to enforce a judgment or claim, and the debtor pleads



his discharge in bar thereof." See, also, *In re Thomas* (D. C.) 92 Fed. 912. The discretion of this court cannot determine the effect of a discharge in bankruptcy upon debts proved in insolvency. These debts are either barred by the discharge as matter of law, or else, as matter of law, remain unaffected thereby. The question of law is raised upon the creditors' suit to enforce these debts more conveniently than upon the petition for discharge, and so it is more convenient that the discharge shall be in the usual form, and that its scope shall be left for future determination. The same considerations apply to debts created by the bankrupt's fraud. Alleged fraud raises an issue of fact, which will be determined upon the creditors' suit to enforce the debt alleged to be created by fraud more conveniently than upon the bankrupt's application for his discharge. The discharge will therefore be granted in the usual form.

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In re LEWENSOHN.

(District Court, S. D. New York. January 27, 1900.)

**1. BANKRUPTCY—PROOF OF DEBT—REMEDY UNDER STATE LAW.**

Where the state law gives a remedy for the collection of debts fraudulently contracted, by the arrest of the debtor, proof of a claim against the estate of a bankrupt for goods sold and delivered will not prejudice the right of the creditor to proceed against him by suit in the state courts on a complaint alleging that the sale of the goods was procured by the false representations of the defendant.

**2. SAME—DEBTS AFFECTED BY DISCHARGE—FRAUD.**

A judgment in an action for the value of goods sold and delivered to defendant, where it is alleged and found that the sale was procured by his false representations, is a debt which will not be released by the defendant's discharge in bankruptcy.

**3. SAME—EXEMPTION OF BANKRUPT FROM ARREST—LIMITATION OF TIME.**

Bankr. Act 1898, § 9a, subd. 2, providing that a bankrupt shall be exempt from arrest on civil process issuing from a state court, upon a debt or claim from which his discharge in bankruptcy would not be a release, "when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this act," is not to be restricted to the particular occasions when the bankrupt is physically in attendance in court, or actually engaged in performing a required duty, but is extended by general order 12 to the whole period of time during which his performance of the duties imposed by the act may be ordered; that is, until the final adjudication on his application for discharge, or until the time limited for such application has expired.

**4. SAME—PROTECTION AGAINST ARREST—IMPOSING TERMS.**

Under general order No. 12 (18 Sup. Ct. vi.), providing that a bankrupt may receive "a protection against arrest, to continue until the final adjudication on his application for a discharge, unless suspended or vacated by order of the court," the court may impose terms on granting such protection, and hence, in a proper case, may require the bankrupt to furnish a bond, with sureties, conditioned that during its continuance he will obey all orders of the court, and not meanwhile depart from its jurisdiction.

**In Bankruptcy.**

Meyers, Goldsmith & Bronner, for bankrupt.  
Blumenstiel & Hirsch, opposed.

**BROWN, District Judge.** Four creditors, after having proved their claims before the referee in bankruptcy for the sale and delivery of goods, commenced suits in the state court against the above-named bankrupt, alleging that the goods so sold were obtained by false representations, and, in accordance with the state procedure, obtained warrants directing the sheriff to arrest the defendant and to hold him to bail to answer any final process against his person. Before any arrest under these warrants, the bankrupt procured in this court a temporary stay upon an order to show cause why they should not be vacated. The affidavit on which this order was issued states the above facts; that the adjudication of the defendant as a bankrupt was had under a voluntary petition on October 26, 1899; a meeting of creditors and the election of a trustee in December, and proof of claims, as above stated; that the bankrupt was then under examination, which had been adjourned from time to time and not then concluded; that witnesses would also be subpoenaed to attend before the referee, at which the bankrupt's interests require that he should attend; that there will be great difficulty in giving bail upon all the above warrants, and that he will be liable to be committed in close custody and be prevented from giving the time and attention necessary to the proper liquidation of his estate in bankruptcy.

1. There is no essential difference between the claims proved, and the claims sued upon in the state court. The claims proved were for goods sold and delivered, nothing being said about the false representations by which they were procured. In the suits, the sale and delivery of the goods are alleged, and the specific false representations by which they were procured are stated, and judgment asked for the value of the goods. The state practice requires that in order to subject the defendant to arrest on final process, the complaint shall state and the judgment find fraud. In cases of this kind, no purely technical considerations as to the precise form of action should be regarded, where, as in this case, there is an essential identity in the claims. In *re Kimball*, 1 N. B. R. 197, 14 Fed. Cas. 474. All those claims were provable debts, and proof of them before the referee in no way prejudiced the creditors' remedy under the state law by arrest, on account of the fraud by which the sale and delivery of the goods were procured. *Loveland*, Bankr. 626; In *re Robinson*, 2 N. B. R. 341, Fed. Cas. No. 11,939; In *re Rosenberg*, 2 N. B. R. 236, Fed. Cas. No. 12,054; In *re Migel*, 2 N. B. R. 481, Fed. Cas. No. 9,538.

2. Nor is there any doubt that if the charges of false representations are sustained, these debts would be barred from the operation of the discharge by subdivision 2 of section 17, or by subdivision 4, of the bankruptcy act. Different views have been entertained of the scope of these paragraphs. Paragraph 4 may be regarded as merely a brief substitute for section 5117, Rev. St., and thus applicable to frauds generally; and section 2, as respects frauds, to be designed merely to remove the doubts which arose under the act of 1867, whether a judgment for such frauds, by merger of the original debt, did not make the discharge operative upon it. On the

other hand subdivision 2 might be construed as requiring that for all frauds other than official or fiduciary ones, judgments should be obtained in order to prevent their being barred; and the frauds referred to in subdivision 4 deemed limited to those committed by a person acting in an official or in a fiduciary capacity. *Loveland, Bankr.* 625; *Coll. Bankr.* 135, 172; *Low. Bankr.* 307, 308; *In re Thomas* (D. C.) 92 Fed. 912; *In re Rhutassel* (D. C.) 96 Fed. 597; *Howland v. Carson*, 16 N. B. R. 372, 28 Ohio St. 625.

It is immaterial here which of these views is adopted. If a judgment is necessary to prevent the discharge from barring the debt, a prosecution of the suit to judgment should be allowed; since the essential nature of the claim, if the charges of false representation are sustained, makes it one which evidently was not designed to be barred.

3. By section 9a, subd. 2, the bankrupt is declared entitled to be exempt from arrest on civil process, except upon a debt or claim from which his discharge would not be a release. This imports that the bankrupt shall not be exempt from arrest where the debt or claim would not be released by his discharge, except to the limited extent provided; namely, when the bankrupt is "in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by the act."

This latter exception is new; there was no similar provision in the act of 1867. How far does this exception extend? Is it to be construed as applying to the whole period during which the bankrupt has duties to perform, or only to the particular occasions when he is actually performing them? Section 7 imposes numerous duties upon the bankrupt which continue at least up to the time of the hearing on his discharge. In most important cases his attendance for examination is required on numerous occasions from time to time, not merely upon his original examination and on his examination upon the application for a discharge, but on many other questions that frequently arise with reference to his assets or to disputed or doubtful liens or claims against the estate.

For the bankrupt it is contended that a liberal construction should be given to this exemption, in order to avoid the perpetual embarrassments in the bankruptcy proceedings which would be caused by his incarceration under state process. Opposed to this it is urged, that the exemption should be limited to the particular occasions when the bankrupt is actually in attendance in court, or actually performing a required duty, differing little from the ordinary right of a witness to exemption while in attendance on the court, to which exemption he was held entitled under the act of 1867 without any express provision. *In re Kimball*, 1 N. B. R. 193, 14 Fed. Cas. 474.

In general order 12 (18 Sup. Ct. vi.) the supreme court, in prescribing the precise extent of the bankrupt's protection from arrest, seems virtually to have given its own construction to this section, by providing that the bankrupt shall attend before the referee on a day named; "and from that day shall be subject to the orders of the court in all matters relating to his bankruptcy, and may receive from the referee a protection against arrest to continue until the final adjudication on

his application for a discharge, unless suspended or vacated by order of the court."

General order 30 (18 Sup. Ct. viii.), being presumably limited in its operation to the same period of time (Loveland, Bankr. 514), becomes thereby practically compatible with section 9a, subd. 2. In the case of *In re Baker* (D. C.) 96 Fed. 954, the exception in section 9a, subd. 2, is not considered.

The construction apparently given to that section by general order 12, does not seriously interfere with the creditors' right to arrest in cases where the discharge is not a bar. It merely suspends the exercise of that right for a certain limited period. The bankrupt is not entitled to postpone his application for a discharge beyond a year from the adjudication, and no extension of time would be granted by the court merely to prolong his freedom from arrest.

As this court may suspend or vacate the protection from arrest provided by rule 12, the court may grant it on terms, and hence under section 2, subd. 15, may require security that the bankrupt during its continuance will obey all orders of the court and not meanwhile depart from its jurisdiction. Upon the bankrupt's giving a bond to that effect, with approved security, the stay should be continued for a period not exceeding 12 months from the date of adjudication, unless an application for discharge be then pending, and in that case, until the final determination of that application.

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In re BLAIR et al.

(District Court, S. D. New York. January 25, 1900.)

**1. BANKRUPTCY—JURISDICTION IN PARTNERSHIP CASES—DOMICILE OF PARTNERS.**

A petition in involuntary bankruptcy against a partnership, alleging that, during the greater part of the preceding six months, the several partners had their respective domiciles within the district where the petition is filed, will be dismissed on motion of the respondents, unless amended on leave, where it is shown that none of the members of the firm had his domicile or resided within the district long enough to support the jurisdiction of the court.

**2. SAME—PLACE OF BUSINESS OF FIRM.**

Where a partnership has had its only place of business within a given judicial district for a period of more than three months before the filing of a petition in bankruptcy against it in such district, the court therein will have jurisdiction of the petition, although, during a part of that time, the only business carried on was in the way of winding up the affairs of the firm by two of the partners, the others having retired.

**3. SAME—ALLEGATION OF INSOLVENCY.**

In a petition in involuntary bankruptcy against a firm, it is not sufficient merely to allege that "the partnership is insolvent," but there should also be an averment as to the solvency or insolvency of each one of the partners.

**In Bankruptcy.** On motion to dismiss petition in involuntary bankruptcy against the firm of Blair, Stem, Passano & Rosston.

Hayes & Bitterman, for petitioner.

Seward, Guthrie & Steele and C. A. De Gersdorff, for bankrupts, opposed.

BROWN, District Judge. The petition in the above case was filed on November 20, 1899, against the four defendants above named. It states that they composed the co-partnership doing business under the name and style of the Anglaise-Americaine Soap Company; that during the greater part of the six months next preceding the defendants had their respective domiciles in the county of New York within this district and also had property therein; that the co-partnership being insolvent on October 5, 1899, suffered a judgment to be recovered against it, under which a portion of its property was sold by the sheriff under execution, whereby the judgment creditors would obtain a preference; and the petition asks that said "co-partnership may be adjudged to be a bankrupt."

The subpoena was served personally on Stem in this district; the other defendants were served by order in Baltimore and Richmond. On January 9th the defendant Passano appeared specially for the purpose of moving to dismiss the petition for want of jurisdiction, and upon an affidavit obtained an order to show cause why the petition should not be dismissed. The affidavit states in brief that none of the defendants had their residence or domicile at any time within this district; that Blair during all the period referred to had his domicile and resided at Richmond, Va., and the other three defendants at Baltimore, Md.; that Passano had left the firm from three to four months before the petition was filed, and Rosston a month later; and that at the time of the preference alleged, the firm consisted of Blair and Stem only.

Upon the return of the order to show cause and on hearing, a reference to a commissioner was ordered to take proof and report the facts as to the place of business as well as the residence or domicile of all the parties.

From the report of the commissioner, it appears that the business of the Anglaise-Americaine Soap Company was started at Baltimore, where it was continued until about August 11th or 12th, when it was removed to this district; that on July 22, 1899, Passano withdrew from the firm, transferring his interest to the other three partners, who by agreement assumed all the co-partnership liabilities; that on August 11, 1899, Rosston also retired from the firm, whereupon the business was removed to this district by Blair and Stem, the remaining partners, as above stated; that Blair and Stem, from that time, continued the business under the same name and under the name and style of "Blair-Stem Company, Selling Agents for Anglaise-Americaine Soap Company"; that they continued the business in this district until on or about November 1, 1899, after which date and until the petition was filed November 9th, they were engaged in winding up the affairs of said company; and that they had no other place of business subsequent to August 12, 1899; that Blair, between the 12th and 18th of August, removed to New York from Baltimore, where he continued to reside until the 1st day of November, when he went to Richmond to reside; that Stem did not reside or have his domicile here, at any time prior to November 7, 1899.

These findings are supported by the evidence. They show, therefore, that the petition cannot be sustained upon its averment of domicile within this district, since neither of the four partners had his domicile or resided here long enough to support the jurisdiction of the court.

Further inquiry concerning the place of business of the several partners was had in view of the possible allowance of an amendment to the petition, setting up a place of business within the district for the requisite period. Section 5c of the act provides that in cases of partnership "the court which has jurisdiction of one of the partners may have jurisdiction of all"; and by section 2, subd. 1, the court is authorized to adjudge bankrupt persons "who have had their principal place of business, resided, or had their domicile within its jurisdiction" for the greater portion of the six months preceding the petition. The above facts show that two of the partners, Blair and Stem, had their only place of business within this district for a little over three months prior to the petition, if the period from November 1st to November 20th be deemed a period of doing business, during which the firm of Blair and Stem was in liquidation, in charge of Mr. Stem; otherwise not. Under the circumstances above stated, I think the period from November 1st to November 20th cannot be excluded from the period during which Stem at least had his principal place of business in New York. The circumstances are altogether different from those in the case of *In re Little*, 2 N. B. R. 294, Fed. Cas. No. 8,391.

It is urged that the business conducted by Blair and Stem in New York, was not the original partnership business of the four partners above named, but the business of a new firm; and that the provision of section 5c should be held applicable only to cases where the partner is transacting the same firm's business within the particular jurisdiction, and not where he is simply transacting an independent business of his own. But in this case Stem and Blair were in fact liquidating the old firm's business during this time. Nor do I perceive any sound reason for limiting, as suggested, the ordinary meaning of the language used in sections 5c and 2, subd. 1. Whatever doubts may have been raised under the act of 1867 (*Cameron v. Canieo*, 9 N. B. R. 527, 4 Fed. Cas. 1,128), the proceeding may certainly now be commenced in any district in which either partner resides; the present act leaves no doubt on this point (*Lowell*, Bankr. 360; *Loveland*, Bankr. 191; *In re Murray* [D. C.] 96 Fed. 600); and the same was held by *Story, J.*, under the act of 1841. The reasons for the broad option given by the present act were probably reasons of convenience, and to authorize the proceedings to be had in any district wherein a partner was ordinarily to be found, whether by residence, domicile, or place of business.

If the petition were amended, therefore, by averring that Stem's place of business was here during the requisite period, the jurisdiction of the court should be sustained. The petition must, however, further show whether any of the individual partners are solvent. As it stands, it is ambiguous in this regard. It avers that the "partnership is insolvent"; but other statements seem to intimate that

by that averment it is intended only to state that the joint assets are not sufficient to pay the joint obligations. No doubt a firm is sometimes said to be insolvent when only a deficiency of joint assets is meant. But as each partner is liable in solido for the debts of the company, so that they are debts of each individual member as much and as truly as they are debts of the firm, a partnership cannot with strictness be said to be insolvent while any one of the partners is able to pay all the firm's liabilities. *Lowell, Bankr.* 359; *Hanson v. Paige*, 3 *Gray*, 239, 242; *In re Bennett*, 2 *Low.* 400, 3 *Fed. Cas.* 209. By the express provision of section 5h, moreover, the firm assets cannot be administered in bankruptcy if one of the partners is not adjudged bankrupt, unless by his consent. *Bank v. Meyer* (D. C.) 92 *Fed.* 896; *In re Meyer* (C. C. A.) 98 *Fed.* 976. It is therefore required by rule 1 of this court that the petition shall state whether any partner, not joining in the petition, is solvent or insolvent. Form 2, moreover, prescribed by the supreme court (18 *Sup. Ct.* xviii.), requires for an adjudication of "the firm" as bankrupts, a statement in the petition that "the partners owe debts which they are unable to pay in full." This necessarily includes the individual responsibility of each, as well as their joint responsibility; and that form evidently contemplates that an adjudication of the firm imports an adjudication of all its members as well. To avoid any ambiguity, and any delay or complication in the subsequent proceedings, the insolvency of each member of the firm should be alleged in the petition if an adjudication against the firm and an administration of the firm assets in bankruptcy are sought, in order that issue on that point, if disputed, may be at once taken and heard along with any other issues, and the scope of the proceeding determined without further delay.

The petition may be amended, if desired, within 10 days; if not so amended, it will be dismissed.

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In re TINKER.

(District Court, S. D. New York. January 27, 1900.)

**1. BANKRUPTCY—DISCHARGE—JUDGMENT FOR TORT—JURISDICTION.**

Although the only debt scheduled against the estate of a bankrupt is a judgment of a state court in an action against him for criminal conversation, the court of bankruptcy has jurisdiction of his application for discharge, and will grant him a discharge if he is otherwise entitled to it, without any final determination of the question of the effect of the discharge on such judgment.

**2. SAME—DEBTS AFFECTED BY DISCHARGE—JUDGMENT FOR CRIM. CON.**

Semble, that a judgment against the defendant in an action for criminal conversation is not a judgment "for a willful and malicious injury to the person or property of another," within the meaning of *Bankr. Act* 1898, § 17, subd. 3, providing that such judgments shall not be released by a discharge in bankruptcy.

**In Bankruptcy.** On bankrupt's application for discharge and opposition thereto by creditor.

Nelson Smith, for bankrupt.

Thomas McAdam, opposed.

BROWN, District Judge. An adjudication of the above bankrupt was made on September 13, 1899, the only debt scheduled being a judgment against him for \$50,653.98 damages and costs, recovered in the supreme court of this state in an action of crim. con.

On the return day of the application for a discharge, the judgment creditor has objected (1) that the judgment is for a "willful and malicious injury to the person or property of another," and therefore will not be released by a discharge; (2) that this being the only debt scheduled, there are no debts to be discharged, and that the court therefore has no jurisdiction to grant any discharge.

The gist of the action in which this judgment was recovered is the loss of the comfort, society and assistance of the wife. 2 Greenl. Ev. § 51, and cases there cited; 5 Enc. Pl. & Prac. 616; Barnes v. Allen, 1 Abb. Dec. 117. The violation of these rights springing from the marital relation, though a heinous personal wrong to the husband, can only with difficulty be said to be an "injury to his person" (Ryall v. Kennedy, 52 How. Prac. 517), and though the husband has a legal right to the aid, service and assistance of the wife, the deprivation of this right can hardly be said to be an "injury to his property." See *In re Haensell* (D. C.) 91 Fed. 355, and cases there cited. Under the common-law system of pleading, indeed, the plaintiff in actions of crim. con. might maintain trespass *vi et armis*; but the assault pleaded in such cases was an assault upon the wife, not upon the plaintiff; and the loss alleged was "the loss of comfort, fellowship, aid and assistance of the wife." The action, however, might equally be brought in trespass on the case, in which, after alleging the wicked and unjust acts, the same loss and damage were pleaded as in trespass *vi et armis*. See 2 Chit. Pl. \*642, 856.

Another requisite element to prevent the operation of the discharge is, that the injury shall be "malicious," which seems to require a malevolent intent towards the plaintiff. In actions of a similar nature it has been held that "malice" cannot be predicated, and discharges were therefore granted. *Livergood v. Greer*, 43 Ill. 213; *Howland v. Carson*, 28 Ohio St. 625, 16 N. B. R. 372; *In re Sullivan*, 1 Nat. Bankr. N. 380; *Anderson v. How*, 116 N. Y. 342, 22 N. E. 695; *Com. v. Williams*, 110 Mass. 401.

The ordinary course of procedure in adjudging discharges, where the court has jurisdiction of the petition, is to grant the application, if the bankrupt is otherwise entitled to the discharge, without determining in any way its effect in releasing any particular debt, and that course should, I think, be pursued here. Coll. Bankr. 135. There may be other debts of the bankrupt owing to creditors who, though not named in the schedules, yet by reason of their actual knowledge of these proceedings would be barred by the discharge, even though the judgment scheduled should not be released by it. Bankr. Act 1898, § 17, subd. 3. It cannot be said, therefore, that in the latter case the discharge would be of no possible use, or that the court has no jurisdiction to grant it. On the other hand, if not granted, its force and effect could not be adjudicated in the ordinary way by being set up as a bar to any further proceedings upon the judgment; while the granting of the discharge in this proceeding



would not necessarily be res adjudicata as respects its effect as a release from this judgment. The discharge should, therefore, be granted, without any attempt at a final determination of its effect upon the judgment.

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In re ABLOWICH et al.

(District Court, S. D. New York. January 26, 1900.)

**BANKRUPTCY—DISCHARGE DENIED—CONCEALMENT OF BOOKS AND ASSETS.**

On an application for discharge in bankruptcy it appeared that the bankrupts failed in 1895, and gave a bill of sale to certain creditors, under which the latter took possession of the bankrupts' store, and removed the stock. The bankrupts stated that their books of account were at that time in a safe in the store, and that the inventory of property and schedule of debts which they filed with their petition in bankruptcy was made from their books on the night before the sale to said creditors, when one of the bankrupts had the ledger at his house. It did not appear that the bankrupts ever went to the store for the books, or made any effort to recover them. There was a very large shrinkage or disappearance of assets, which, in the absence of the books, was entirely unexplained. *Held* sufficient evidence that the bankrupts had destroyed or concealed their books of account with intent to conceal their true financial condition, and the discharge should be refused.

**In Bankruptcy.** On bankrupts' application for discharge and opposition thereto by creditors.

Arthur Furber, for bankrupts.

James, Schell, Elkus & McGuire, for creditors opposed.

**BROWN, District Judge.** Upon the objections to the discharge of the bankrupts in the above matter, the referee reports as follows:

"The first specification charges that the bankrupts in contemplation of bankruptcy and with fraudulent intent have concealed or destroyed their books of account, so that their true and actual financial condition could not be ascertained.

"I find from the evidence before me, that the bankrupts kept full books of account of all their business, and that they failed in business in 1895, and that about October 1st of that year they gave a bill of sale of their merchandise to Viotor & Achells, who were creditors, and that said firm took possession of their store and premises and removed the stock.

"That the books of account were kept in a safe in the store, and were left there when Viotor & Achells took charge, and that none of the bankrupts ever went back to the store to get the books and never made any attempt to get them; but they were, nevertheless, able to make an inventory of their property and a schedule of their creditors and amount of their liabilities when they filed their petition in 1899, which they say were made from their books on the night before the sale to Viotor & Achells, at which time one of the bankrupts had the ledger at his private residence.

"I do not consider that the bankrupts, either at the time of their failure in 1895, or since filing the petition herein, have made any earnest effort to secure their books of account, and am of opinion that they either destroyed them or fraudulently concealed them; and this view is emphasized by the fact that on January 1, 1895, the firm stated that they had a surplus of assets over liabilities of \$150,000, and on October 1, 1895, they made a bill of sale to Viotor & Achells of all their merchandise to pay their debt to them, and some other creditors, and assigned their book accounts to other creditors and confessed judgments in large amounts, and still their liabilities on October 1, 1895, exceeded their assets by more than \$100,000, thus showing a shrinkage in ten months of \$250,000, which they are absolutely unable to explain.

"They sold \$175,000 worth of goods in 1895, some at cost and some at a profit, and they had no unusual loss in business that year, and still they are unable to account for the enormous shrinkage of assets or any part of it.

"An examination of the books was most important, as it could not fail to disclose the disposition of the assets, and to aid the creditors in tracing them.

"In view of all the facts, I am clearly of opinion that the bankrupts either had possession of their books and purposely concealed them, or that they willfully allowed them to be carried away and disposed of, in order to avoid a discovery of their true condition. Ernest Hall, Referee in Charge.

"Dated January 11, 1900."

I am not wholly satisfied that the books were returned to the store by the bankrupts as they allege; in all other respects, I think the only rational conclusion from the evidence is that reported by the referee. Any jury of merchants would, I think, so find, and that the bankrupts have made no real efforts to obtain the books, but have virtually concealed them to prevent a disclosure of assets, and that a large amount of assets disappearing at the time of their failure have been fraudulently concealed from their creditors and from the trustee. The discharge should, therefore, be denied.

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CHATTANOOGA NAT. BANK v. ROME IRON CO. et al

(Circuit Court, N. D. Georgia. October 20, 1899.)

No. 1,085.

1. BANKRUPTCY—SUITS AGAINST TRUSTEE—JURISDICTION OF COURT OF EQUITY.

A circuit court, or other court of equity, has jurisdiction of a suit against a trustee in bankruptcy to establish the validity and lien of a pledge made by the bankrupt of property which has come into the hands of the trustee.

2. SAME.

Whether a court of equity has jurisdiction to restrain a trustee in bankruptcy from paying out to creditors a fund in his hands, pending the determination of a suit in such court to establish a lien on such fund, or whether the complainant must resort to the court of bankruptcy for such an order, *quære*.

This is a suit in equity to establish and enforce a pledge against the trustee in bankruptcy of the pledgor. On objections to jurisdiction.

Fouche & Fouche and King & Spalding, for plaintiff.

Neel & Neel and Dean & Dean, for defendants.

NEWMAN, District Judge. The Chattanooga National Bank, of Chattanooga, Tenn., brings its bill against the Rome Iron Company, a Georgia corporation, and against Halstead Smith, trustee in bankruptcy of said Rome Iron Company. The averments in the bill show that the Rome Iron Company is indebted to the Chattanooga National Bank in the sum of \$25,500, with interest and attorney's fees, and that to secure its notes the Rome Iron Company pledged to the bank its equity in certain pig iron stored in yard No. 48 of the American Pig-Iron Storage Warrant Company, in Rome, Ga. The facts further set out are: That the Rome Iron Company had pledged the pig iron in the yard named, to the American Pig-Iron Storage Warrant Company, to secure certain warrants, and that it had an equity in said iron to a considerable amount over and above the sum secured by the warrants.

On the 23d day of February, 1899, a petition for involuntary bankruptcy was filed against the Rome Iron Company, and subsequently the company was adjudged bankrupt, and on the 11th of April, 1899, Halstead Smith, Esq., was appointed trustee in bankruptcy of said company. That said Smith, as trustee, took possession, among other things, of the iron in the yard No. 48 at Rome, and has been proceeding to dispose of the same, and to pay off the warrants referred to. The averment further is that Smith, as trustee, has in his hands \$30,000, or other large sum, over and above the amount necessary to pay off said warrants. On the back of the notes of the Rome Iron Company held by the bank is the following indorsement: "The within note is secured by the pledge and deposit of the following securities, to wit, equity in iron in yard #48, Rome, Ga.,"—signed by "L. S. Colyar, Prest. Treas." The purpose of the bill is to have a decree that the Chattanooga National Bank has a valid pledge of, and equitable lien upon, the said equity of the Rome Iron Company in the iron in yard No. 48 at Rome, securing its said debt, and that it be decreed that the sum in the hands of the trustee derived from said equity is subject to said equitable lien and pledge, and is not subject to be generally distributed by the trustee among the creditors of the Rome Iron Company who have proved their debts in bankruptcy; and there is a prayer to this effect. There is a further prayer for injunction to restrain Halstead Smith, trustee, from paying out the money to the creditors who have proved their debts, and that he be required to pay the same over to complainant.

The question raised on this hearing is as to the jurisdiction of the circuit court, where the bill is filed, to entertain the same. The contention on behalf of the trustee in bankruptcy is that this proceeding should have been brought in the district court, and as ancillary to the proceeding in bankruptcy. As I understand the decisions of the circuit court of appeals for this circuit in *Bernheimer v. Bryan*, 35 C. C. A. 592, 93 Fed. 767, and *Camp v. Zellars*, 36 C. C. A. 501, 94 Fed. 799, a construction is given to clause "b" of section 23 of the bankrupt act which would give the circuit court jurisdiction in this case to the extent, at least, that the complainant might have the validity of its pledge, and question of an equitable lien, determined. It is true that the cases named are not like the case at bar as to the character of the proceeding, but the view of our circuit court of appeals, as gathered from these cases, seems to me to be against the jurisdiction of the bankrupt court, and to favor the jurisdiction of other competent courts, in controversies like the one at bar. How much additional relief the complainant in this case is entitled to, further than to have a decree in favor of or against its equitable lien against the equity in the iron, need not now be decided, and ought not to be decided, in view of the fact that, before the case reaches a stage where it will be necessary to do so, there may be additional and authoritative rulings which will control the question of jurisdiction, and the extent of jurisdiction. The jurisdiction of the circuit court to entertain the bill to the extent indicated will be sustained.

I am in doubt as to whether the injunction issued on this bill, restraining the trustee from paying out to other creditors the funds in

his hands arising from the equity in the iron, should be continued, or whether the complainant should apply in the district court for an order restraining the trustee until its case in the circuit court can be determined. For the present, however, I shall direct that the injunction restraining the trustee in this respect, heretofore granted, be continued until further order of the court.

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In re WASHBURN et al.

(District Court, D. Connecticut. January 22, 1900.)

No. 35.

**BANKRUPTCY—FILING PETITION.**

Where a voluntary partnership petition in bankruptcy was signed, verified, and presented by all the members of the firm, and was accompanied by schedules of the firm's assets and debts, but not by any individual schedules, and no adjudication was made thereon, but subsequently the petition was in part withdrawn, and a new petition was filed, with parts of the old petition pasted thereon, and individual schedules of all the partners added by way of amendment, and thereupon an adjudication was made, *held*, that the petition was "filed," within the meaning of the bankruptcy act, on the later date, and not the earlier.

In Bankruptcy. On petition of certain attaching creditors and interveners to set aside a voluntary petition in bankruptcy and discontinue the proceedings thereon.

Joseph P. Tuttle, for attaching creditors.

John W. Coogan, for bankrupts.

TOWNSEND, District Judge. The only action taken by the petitioner herein, on which the alleged bankruptcy proceedings are founded, was to file, on December 7, 1898, with the clerk of the district court, a single partnership petition, signed and sworn to by all three members of the firm of Washburn Bros., and accompanied by schedules of the firm creditors and firm assets, but unaccompanied by any individual petitions or individual schedules, either of creditors or assets. The clerk claimed that individual schedules should be filed before any proceedings were had, which claim was not then complied with, nor was any adjudication then had thereon, nor any reference to a referee. Before these proceedings, on September 13, 1898, these petitioners, creditors of said Washburn Bros., had brought actions in the court of common pleas for Hartford county against said Washburn Bros., and attached their property, which suits were then pending and undisposed of. June 8, 1899, more than four months after said attachment, the original petition was in part withdrawn, and a new petition was filed, with certain portions of the old petition pasted thereon, and the individual schedules of creditors and assets of all the members of the firm were added by way of amendment, and thereupon an adjudication of bankruptcy was made, and the usual reference issued. In these circumstances, I do not find that there is sufficient ground to set aside the petition as finally amended, or to discontinue the proceedings thereon, but I do find that the bank-

ruptcy papers were not properly filed in this case until they were sufficiently amended and perfected for a basis for an adjudication, which was not until the date last named, June 8, 1899, and the clerk is instructed to make such entry.

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NEW YORK ASBESTOS MFG. CO. v. AMBLER ASBESTOS AIR-CELL  
COVERING CO. et al.

(Circuit Court, E. D. Pennsylvania. January 24, 1900.)

No. 61.

1. TRADE-MARKS—VALIDITY—DESCRIPTIVE TERMS.

Terms which are descriptive of products, and identify the manufactured article to which they are applied, rather than the manufacturer, cannot be appropriated as trade-marks.

2. SAME—SUIT FOR UNFAIR COMPETITION.

A preliminary injunction against alleged unfair competition will not be granted on ex parte affidavits unless a clear case is made out where it would result in serious damage to defendant, though the bill should ultimately be dismissed.

This is a suit in equity for infringement of a trade-mark and for unfair competition. On motion for preliminary injunction.

Schreiter & Matthews, for complainant.

Joseph C. Fraley, Henry N. Paul, Jr., and H. La Barre Jayne, for respondents.

DALLAS, Circuit Judge. That either "air-cell" or "fire-board," as used by the plaintiff, constitutes a valid trade-mark, is at least open to very serious doubt. The impression now made upon my mind is that those terms are descriptive of certain products; that they identify the manufactured articles with which they are associated, not the manufacturer thereof; and no more need be said upon the subject of trade-mark, separately considered, upon this motion. *New York Asbestos Mfg. Co. v. New York Fireproof Covering Co.* (Sup.) 62 N. Y. Supp. 339; *Vitascope Co. v. U. S. Phonograph Co.* (C. C.) 83 Fed. 32.

Neither has it been made satisfactorily to appear that the defendant's competition with the plaintiff has been unfair to the latter, or misleading to the trade or the public. In *Lare v. Harper & Bros.*, 30 C. C. A. 373, 86 Fed. 482, it was said:

"It is a wholesome doctrine that equity will restrain unfair competition in trade; but it should be applied with caution, lest, through possible misapplication, healthful and honorable competition be defeated." And, further, that "it is a rule, subject to few exceptions, that a preliminary injunction should not be awarded on ex parte affidavits, unless in a clear case. This rule has full application in a case like the present [a suit for unfair competition], where, though the bill should ultimately be dismissed, great damage would result from such an injunction," etc.

These observations are quite as pertinent to this case as to the one in which they were made. In *Van Camp Packing Co. v. Cruikshanks Bros. Co.*, 33 C. C. A. 280, 90 Fed. 814, the court of appeals for this

circuit, which also decided *Lare v. Harper & Bros.*, supra, affirmed an order refusing a preliminary injunction, which had been sought to restrain the alleged imitation by the defendant of the plaintiff's boxes and the stamps and letters upon them, because in a "state of uncertainty" the writ ought not to be awarded. In each of these cases the evidence in support of the motion was, in my opinion, more nearly convincing than it is in the present one. Preliminary injunction refused.

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NATIONAL FOLDING-BOX & PAPER CO. v. MUNSON & CO. et al.

(Circuit Court, D. Connecticut. January 20, 1900.)

No. 988.

PATENTS—INFRINGEMENT—PRELIMINARY INJUNCTION.

The Marburg patent, No. 291,615, for improvements in paper slide boxes, considered on an application for a preliminary injunction; and the showing as to infringement held insufficient, in view of the limitations upon the scope of the patent by the prior art, to warrant the granting of an injunction.

This is a suit in equity for infringement of a patent.

W. D. Edmonds, for complainant.

Beach & Fisher, for defendants.

TOWNSEND, District Judge. On motion for preliminary injunction. The bill alleges infringement by defendant corporation, and by defendants Harvey S. Munson and Edward B. Munson individually and as officers of said corporation, of patent No. 291,615, granted January 8, 1884, to T. Marburg. Complainant's counsel admits that the alleged invention "relates to a humble art, \* \* \* and is an inconspicuous step forward," but contends that "the circumstances surrounding it seem to entitle it to credit as being more than a mere obvious expedient." Complainant's patent, referring to certain defects in the paper slide boxes of the prior art, states as follows:

"The present invention consists in providing a box-slide whose end or ends carry tucking-flaps, but whose body consists of free, unattached parts, with incisions dividing its bottom from its sides for a distance sufficient to admit the said end or ends to be folded back to expose the contents, as will most fully hereinafter appear."

The four claims cover such incisions severing the sides from the bottom. Two of said claims cover a flap "severed at a"; the third covers "the severings, a"; the fourth covers "sides \* \* \* severed from the bottom." All the drawings show the incisions or severings, a, in the folding line between the bottom and sides. Defendants manufacture their boxes under patent No. 602,664, granted to Harvey S. Munson April 18, 1898, for a box in which there are two slits in opposite sides of the bottom, practically at right angles to each other, and neither of which is in the line of the severings, nor divides the side of the box from the bottom. The specific limitations upon the scope of complainant's patent, the affidavits and pat-

ents of defendants showing the state of the prior art, the fact that defendants are manufacturing a different box under their subsequent patent, and the admission of complainant's expert that Marburg's invention consisted "of a judicious selection of a certain location for the cuts," leave the question of infringement in such doubt that the motion for a preliminary injunction must be denied.

The chief contention of complainant's counsel in his briefs and argument was that the individual defendants and defendant corporation were estopped to deny the validity of the Marburg patent, because said individuals sold said patent to complainant, organized the defendant corporation, own much more than a majority of its capital stock, and control its business. The conclusion reached dispenses with the necessity of considering either the question of patentable novelty or of estoppel. The motion is denied.

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CHILDS v. JOSEPH STELWAGON CO.

(Circuit Court, E. D. Pennsylvania. January 12, 1900.)

No. 5.

PATENTS—INFRINGEMENT—ROOFING MATERIAL.

The Childs patent, No. 429,885, for an improved roofing material, consisting of an upper and lower layer of paper or other fabric, between which is interposed a layer of bituminous or other similar material, construed, and held not anticipated; also held infringed.

This was a suit in equity for infringement of a patent. On final hearing.

Charles G. Coe, for complainant.

E. Hayward Fairbanks and William C. Strawbridge, for respondent.

MCPHERSON, District Judge. This suit is brought to restrain the alleged infringement of letters patent No. 429,885, issued to the plaintiff in June, 1890. The subject of the patent is an improved roofing material, and the claim is as follows:

"The fabric above described, consisting of an upper and lower layer of paper or other fabric, between which is interposed a layer of bituminous or other similar material, such material being unwoven, held in place by cords, ribbons, or other filamentous material of a thickness uniformly equal to that of the central layer, as set forth."

In view of the prior state of the art, some reference to which is found in the specification of the patent, it is clear that the claim is to be construed narrowly. The specification and the history of the application make it plain that the patent is to be confined to a roofing material in which the interposed bituminous layer is of a "definite" thickness, and the cords, ribbons, or other filamentous material are "precisely" as thick as the layer. But even words so positive as are here used must have a reasonable interpretation, especially when it is considered that, according to the usual method of manufacture, the thickness of the layer would always be expressed in a very small fraction of an inch. The layer of the patent is little

more than a film, but, as no greater thickness is needed, none is used. When, therefore, it appears that the difference in thickness between the bituminous layer in the fabrics manufactured respectively by the plaintiff and the defendant is so slight that it can scarcely be detected by the aid of a strong magnifying glass, and that a delicate instrument of precision is needed to decide whether the wire used by the defendant differs in diameter from the wire used by the plaintiff, it seems to me that a point has been reached when the minute differences that may exist can be fairly disregarded, and the court may justly say that both parties are using the same "definite" thickness of bituminous material and the same size of wire, and that the wire in each case is "precisely" of the same thickness as the layer. Is, then, the result produced by the use of this material and the manner of producing the result the same in both instances? I think the question must be answered in the affirmative. There is the usual conflict of expert opinion in the testimony, resulting in the usual doubt in the mind of the court whether such a thing as scientific truth can be said to exist when a question of infringement is being fought out. So far as I can judge, however, the defendant's theory is not sound. I think there must be a layer—although, no doubt, it is a thin layer—of bituminous material between the inclosing sheets of felt in the defendant's fabric; for the sheets are already saturated with similar material before the liquid bitumen is applied, and can absorb little, if any, more. The bituminous material must, therefore, exist as a separate and definite layer between the inclosing sheets. Neither are the wires imbedded in these sheets, but are imbedded in the bituminous layer,—as, indeed, the defendant expressly declares to the public in some of its advertisements,—and the wires perform in the layer the same pocketing function that is performed by the wires in the plaintiff's fabric. This is true also of the sinuous wire used by the defendant. Some effort was made to treat the wires used by the defendant as a coherent structure, and to class it as a "gauze," or a "woven" fabric, because the sinuous wire crosses two other wires once or twice in 8 feet, and extends upward and downward far enough to reach sometimes—but not to cross—the upper and lower wires of the four that extend longitudinally in the defendant's fabric. I do not think the effort was serious, but, in any event, it was not successful. The direction of the sinuous wire is, on the whole, longitudinal, as is the direction of the other wires; and, so far as I can see, it performs the same function as the others. I do not regard these five wires as a gauze, or a woven fabric or structure, in any proper sense of these words. I see no escape from the conclusion that the defendant's fabric infringes the patent in suit.

Without discussing in detail the patents that are declared to anticipate the plaintiff's invention, I may say in a word that I have examined and considered them all, without being able to sustain the defendant's position upon this point. A decree may be entered for an injunction and the usual accounting.



## NATIONAL CASH-REGISTER CO. v. NAVY CASH-REGISTER CO.

(Circuit Court, N. D. Illinois, N. D. January 6, 1900.)

No. 25,351.

**PATENTS—EVIDENCE OF ASSIGNMENT—PATENT-OFFICE RECORDS.**

Certified copies of patent-office records of assignments are not primary evidence of such assignments, and are only admissible to prove title to a patent where proper foundation is laid by showing the existence of the original instruments, and that they are lost or destroyed, or that it is out of complainant's power to produce them.

This is a suit in equity for infringement of a patent. On motion for preliminary injunction.

Edward Rector, for complainant.

Offield, Towle & Linthicum and Thos. W. Flynn, for defendant.

KOHLSAAT, District Judge. Defendant insists that complainant's title is not properly established in this case, as no proper foundation was laid for the introduction of certified copies of the record of assignment in the patent office. In this I concur. My views of this question coincide with the opinions of the circuit courts of appeals of the First and Second circuits, as stated in *Paine v. Trask*, 5 C. C. A. 497, 56 Fed. 233, and *City of New York v. American Cable Ry. Co.*, 9 C. C. A. 336, 60 Fed. 1016, respectively, and also with the dissenting opinion of Judge Woods in the *Crane Elevator Case*, 22 C. C. A. 549, 76 Fed. 767. Certified copies of patent-office records of assignments are not made evidence by any United States statute, and, if competent at all, must conform to the rules relating to primary and secondary evidence, and are only admissible when proper grounds are laid; i. e. upon showing the former existence of the original instruments of assignment, and the fact that they are lost, or that it is out of complainant's power to obtain the same for introduction in evidence, or that no better evidence is in existence. Even where copies of the records of deeds are by statute made evidence in this state, it is a requisite that good reason be shown for the nonproduction of the original before the certified copy is admissible. I know of no reason why the best evidence should not be required in patent matters whenever it is possible to obtain the same, nor any rule which dispenses in patent litigation with the safeguards placed around the reception of secondary evidence in other suits. Until competent proof of complainant's title is shown, the court cannot entertain the motion for a preliminary injunction herein, and therefore I deem it unnecessary to pass upon the other questions involved. The motion for a preliminary injunction is denied, with leave to renew application.

## NOONAN v. CHESTER PARK ATHLETIC CLUB CO. et al.

(Circuit Court of Appeals, Sixth Circuit. January 2, 1900.)

No. 668.

## 1. PATENTS—SUIT BY ASSIGNEE AGAINST PATENTEE FOR INFRINGEMENT—EXTENT OF ESTOPPEL BY ASSIGNMENT.

The estoppel created by the assignment of a patent does not prevent the assignor from denying infringement, and, in a suit against him therefor, the court will not assume in favor of the assignee anything more than that the invention presented a sufficient degree of utility and novelty to justify the issuance of the patent, and will apply to such patent the same rule of construction, with such limitation, which would be applicable between the patentee and a stranger.

## 2. SAME—CONSTRUCTION OF CLAIMS—EQUIVALENTS.

Where the validity of a patent rests entirely upon the novelty of the specific combination of means to carry the idea of the inventor into practical execution, the means themselves being old, the range of equivalents allowable to the combination must be so narrowed as to include nothing which is not substantially identical with the means used by the patentee. The use of other known means, though equivalent in function, does not constitute infringement.

## 3. SAME—EQUIVALENT COMBINATIONS.

Where the devise shown by a patent consists of a combination of old elements, it is entitled only to a very limited application of the doctrine of equivalents, and is not infringed by combination of different elements, also old, to accomplish the same purpose, unless the substitutions are merely colorable.

## 4. SAME—INFRINGEMENT—PLEASURE RAILWAYS.

The Thompson patents, No. 332,762, for improvements in gravity switch-back railways, and No. 367,252, for improvements in elevated gravity and cable railroads, the latter being for an improvement on the structure of the former, which consists mainly in adding a cable as a motive power for carrying the cars up the ascending grades, with a device for automatically releasing them when they start upon a descending grade, when construed and limited as required by the prior art, are neither of them infringed by the electric pleasure railway of the Lilley patent, No. 549,700.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

This is a bill to restrain the infringement of patents No. 332,762 and No. 367,252, both issued to La Marcus A. Thompson. The first is for certain improvements in gravity switch-back railways, and the second is for improvements in elevated gravity and cable railroads. The complainant, Noonan, is the assignee of Thompson of the exclusive right under said patents of a limited territory, which includes the county of Hamilton, in the state of Ohio. The defendants are the Chester Park Athletic Club Company, a corporation of the state of Ohio, La Marcus A. Thompson, the patentee under whom complainant claims, C. M. Lawson, Luke Lilley, and John Devere, all of whom are stockholders and managing officers of the defendant corporation. The defendants denied infringement, and upon this issue the circuit court dismissed the bill, and the complainant appealed.

George J. Murray, for appellant.

W. W. Wood, E. E. Wood, and Thomas L. Pogue, for appellees.

Before TAFT, LURTON, and DAY, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

1. The evidence by which it is sought to connect the defendants Lilley and Devere with the purchase by complainant of an interest under the Thompson patents involved, for the purpose of estopping them, and through them the corporation of which they are members, is insufficient to in any way affect the disposition of any question involved in the case.

2. Thompson, the inventor and assignor of complainant, is the president of the defendant corporation, and is undoubtedly affected by the estoppel growing out of his assignment. Without deciding, we shall, for the purposes of this case, assume that the corporation is affected by the estoppel which prevents Thompson from denying the validity of the patents which he has assigned, and apply to it the same principles which would affect him if he were the sole defendant. It seems to be well settled that the assignor of a patent is estopped from saying his patent is void for want of novelty or utility, or because anticipated by prior inventions. But this estoppel, for manifest reasons, does not prevent him from denying infringement. To determine such an issue, it is admissible to show the state of the art involved, that the court may see what the thing was which was assigned, and thus determine the primary or secondary character of the patent assigned, and the extent to which the doctrine of equivalents may be invoked against an infringer. The court will not assume against an assignor, and in favor of his assignee, anything more than that the invention presented a sufficient degree of utility and novelty to justify the issuance of the patent assigned, and will apply to the patent the same rule of construction, with this limitation, which would be applicable between the patentee and a stranger. *Babcock v. Clarkson*, 11 C. C. A. 351, 63 Fed. 607; *Ball & Socket Fastener Co. v. Ball Glove-Fastening Co.*, 7 C. C. A. 498, 58 Fed. 818; *Cash-Carrier Co. v. Martin*, 14 C. C. A. 642, 67 Fed. 786; *Chambers v. Orichley*, 33 Beav. 374; *Construction Co. v. Stormberg* (C. C.) 66 Fed. 550; *Clark v. Adie*, 2 App. Cas. 423, 426. This was the rule applied by the court below, and is the principal ground of objection to the decree finding that the assigned patents, when limited by the previous state of the art, had not been infringed.

3. The defendant Thompson, in 1897, constructed for the complainant an elevated gravity and cable railway, according to the claims of his patent No. 367,252, and assigned to him the exclusive right under that patent, as well as under patent No. 332,762, within three counties in the state of Kentucky and two in the state of Ohio. Subsequently, Thompson, with others, organized the Chester Park Athletic Association, and sought to obtain from the complainant a license to construct and operate a similar railway upon the property of the association which was within the territory assigned to complainant. The parties could not agree upon terms, and thereupon a railway of similar general character and uses was constructed under plans devised by the defendant Luke Lilley, who subsequently applied for and obtained a patent for his structure, being patent No. 549,700, of March 30, 1897. The contention is that this "Lilley Electric Pleasure Railway," as it is styled in the patent to Lilley, infringes the com-

binations covered by the two patents to Thompson so assigned to complainant.

At the time Thompson assigned the patents here involved to the complainant, he was the inventor and patentee under two other patents involving the same general subject-matter, and this fact was known to complainant. These additional patents were No. 310,966, for a roller-coaster structure, and No. 348,796, for a pleasure cable railway. These patents Thompson declined to assign to complainant, though solicited to do so. These two unassigned patents become of material importance when we come to determine the scope of the inventions covered by the two patents which were assigned. The earlier of the two patents assigned is No. 332,762. The claims said to be infringed by the Lilley patent are Nos. 1 and 2, and are as follows:

"(1) In a gravity switch-back railway, the combination, with the trestlework so constructed as to form a series of descending and ascending planes, of the longitudinal stringers for the reception of the rails, the guardways or stringers for preventing the cars from jumping the tracks, and the brake-sliding ways or stringers, substantially as and for the purposes described.

"(2) In a gravity switch-back railway, the combination, with the undulating trestlework having thereon the longitudinal trackways and rails, of the guard-stringers, and brake-slide stringers contiguous thereto, of a car having brake shoes which engage with said brake stringers through the operation of a lever, substantially as and for the purposes set forth."

The first two of the elements in claim No. 1 are the undulating trestle with longitudinal stringers upon which the rails are mounted. These elements constitute the entire subject of the earliest patent to Thompson, being patent No. 310,966, for a roller-coasting structure. Such structures were not new. Two patents are exhibited covering the same class of pleasure railways,—one to T. Alexander, of December 26, 1882, for an artificial sliding hill, No. 269,554, and another to J. Pusey, for a coasting course, No. 318,026. The other elements in the first claim cover means for stopping and controlling the cars. These elements are guard stringers inside the track rails for preventing the cars from jumping the track, and "brake-sliding ways or stringers" for the car brakes or shoes to slide upon for aiding in the stoppage of the car. The second claim is identical with the first, except that it includes, as another element, "a car having brake shoes which engage with said brake stringers through the operation of a lever."

In both patents No. 310,966 and No. 332,762, gravity alone was relied upon for carrying the cars over the undulating track, and the patents differ from each other only in so far as the later patent provides a means for stopping and controlling the cars and preventing accidents. Devices for stopping railway cars, and for confining them to the fixed track, were confessedly old. Thompson used stringers laid inside the track-rails, so as to leave just space enough for the flange of the wheel, a pair of brake-sliding ways or stringers each abutting the guard stringers, and a rocking brake shoe which engaged these guard stringers. The undulating structure upon which his rails were laid was old. His devices for guarding against derailment and for stopping his cars were, at most, an adaptation of old devices to a new use, or rather to a new combination for new but

analogous purposes. The structure resulting from the combination of elements was one which involved little more than ordinary mechanical skill. All he did was to adapt old things for a special purpose so nearly analogous to the former uses of the same devices as to require little skill in their modification.

His patents must rest upon the novelty of the specific combination of means to carry his idea into practical application. He is not entitled to a monopoly of analogous means found in the old art. Subsequent improvers are equally free to accomplish the same general result by different means, if not purely colorable changes. The range of equivalents allowable to the combination must be so narrowed as to include nothing which is not substantially identical with the means employed by Thompson. *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059; *Wright & Colton Wire-Cloth Co. v. Clinton Wire-Cloth Co.*, 14 C. C. A. 646, 67 Fed. 790; *Wells v. Curtis*, 13 C. C. A. 494, 66 Fed. 318.

The appellees use no brake stringers and no inside guard rails, but only the old and well-known form of an outside guard rail commonly used on curves, bridges, and trestles of commercial and street railways. The brakeslide stringers they wholly omit, their brake being the ordinary flat brake directly engaging the track rail. Construed in the light of the old art, defendants do not infringe patent No. 332,762.

4. Patent No. 367,252 is subject to the same limitations growing out of the state of the art. It is for an improvement upon the structure covered by patent No. 332,762. This improvement mainly consists in adding a positively driven cable as a power for carrying the cars up and over the ascending grades, when the car is automatically released, and allowed to pass over the descending grades by gravity alone. A positively driven cable, with appliances for clutching and releasing the cable, was a well-known power used for propelling street cars, and for ascending and descending the tracks of inclined railways. What Thompson did was to adapt that well-known means to the peculiar necessities incident to switch-back railways, so that the cable might be automatically clutched when an ascent was begun, and automatically dropped when a descent was to be made. The novelty consists solely in the means adopted for utilizing the power of the positively driven cable for the purpose of making an ascent, and for automatically dropping it when gravity was to be resorted to.

The fourth claim of the patent is the broadest of those supposed to be infringed. If that is not infringed, none is. That claim is in these words:

"In an elevated gravity and cable railway, the combination with cables and motive power, arranged substantially as described, for propelling the same, of a car provided with a gripping device, and mechanism, substantially as described, for actuating the same, as and for the purposes set forth."

This claim includes, as necessary and indispensable elements, a positively driven cable, and a car provided with appliances for clutching and dropping the cable automatically, both substantially as described. The structure of the appellee includes neither the cable nor the car provided with appliances for seizing and dropping a cable. In

other words, all of the actuating elements of the patent have been omitted, and a wholly different set of instrumentalities have been substituted. The use of a positively driven cable in the operation of vehicles used upon amusement structures of the class to which all the combinations under consideration belong was not new. The sliding cars described in the Alexander patent for an artificial sliding hill were actuated by a cable. The same power is suggested as a means for carrying such cars up the ascending grades of Pusey's artificial coasting course, patent No. 318,026, and its actual use is shown by Thompson's patent, No. 348,796, for a pleasure cable railway. These uses in the precise art here under consideration would forbid any broad construction of Thompson's adaptation of the power derived from such a positively driven cable in the subsequent patent now under consideration.

The argument of counsel for appellant is that the substitution of the electric motor and proper appliances for using the current on ascending grades, and for cutting it off on descending grades, for the cable and gripping appliances of Thompson's patent, is but the employment of well-known equivalent means for accomplishing the same result, and therefore infringement.

In *Burr v. Duryee*, 1 Wall. 531-573, 17 L. Ed. 658, Mr. Justice Grier, speaking of a similar mode of argument to show infringement, said:

"The argument used to show infringement assumes that every combination of devices in a machine which is used to produce the same effect is necessarily an equivalent for any other combination used for the same purpose. This is a flagrant abuse of the term 'equivalent.' Without attempting to define this abstract term by other abstract terms, we may give examples which will best show its application to machines, as, where a simple lever is used in one, and the other substitutes a cam, or toggle joint, or wedge for a cam, and many other cases where one mechanical power is substituted for another in a machine. In the case of *McCormick v. Talcott*, 20 How. 405, 15 L. Ed. 931, we have said: 'If the invention claimed be itself but an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form, or combination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not colorable invasions of the first.' But it has been argued that, though not a colorable invasion of the patentee's claim, it is an evasion of his patent, which is equally injurious. If so, it is *damnum absque injuria*. Every man has a right to make an improvement in a machine, and evade a previous patent, provided he does not invade the rights of the patentee."

If the structure resulting from the combination of old elements included in this fourth claim of the Thompson patent was an invention of primary character, so as to entitle the patent to a generous application of the doctrine of equivalents, there might be room to say that the substitution of the electric motor with the appliances necessary for the control of the electric current for the positively driven cable, with its peculiar clutching mechanism, would be but the use of means which, in the propulsion of street cars, were well-known equivalents for each other. But the Thompson patent is not entitled to a broad construction, nor to a liberal application of the doctrine of equivalents. In addition to the omission of the cable and essential gripping devices, the defendant's adoption of the electric motor involved

certain necessary structural changes in the general plan of its railway. Grades possible in a cable and gravity railway were not practical in an electric and gravity railway. A grade of 5 or 6 per cent. was the limit practical in a structure where the ascents were to be made through the power derived from a motor. This required Lilley to use towers at certain intervals, up which, by a winding railway, his cars were carried, in order to attain a height sufficient to give them the necessary velocity to carry them down the undulating descending grades to the foot of the next ascending grade. This substitution of the electric motor for the positively driven cable of the Thompson patent, and the structural changes necessary to utilize the motor, involved something more than colorable alterations, and implied inventiveness quite as marked as that which distinguished Thompson's gravity and cable railway from his earlier pleasure cable railway. Thompson's patent, No. 367,252, when properly construed and limited, as required by the history of the art, is not infringed by the structure of the defendant, and the decree of the circuit court is affirmed.

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ANTHONY et al. v. GENNERT.

(Circuit Court, D. New Jersey. January 2, 1900.)

1. PATENTS—INFRINGEMENT—PHOTOGRAPHIC SHUTTERS.

The Green patent, No. 362,211, for a photographic shutter, construed, and *held* valid, but limited by the stated purpose of the invention, which was to adapt the shutters previously in use to cameras having small-sized front boards, by constructing them in two pairs, each pair of which, when opened, should fold back into the case side by side, and thus lessen the space required for their operation, and, as so limited, not infringed by shutters which, while arranged in two pairs, do not fold side by side.

2. SAME.

The Perry patent, No. 287,858, for a photographic shutter, *held* to be limited by the amendments made in its claims to meet objections of the patent office to the specific combination therein described, and, as so limited, not infringed.

This was a suit in equity for the infringement of certain patents for photographic shutters. On final hearing.

Edmund Wetmore, for complainants.

Louis C. Raegenar and S. Lewis Moody, for defendant.

GRAY, Circuit Judge. This action is brought for infringement by the defendant of two patents for photographic shutters, owned by complainant, viz. No. 362,211, of May 3, 1887, to George F. Green, and No. 287,858, of November 6, 1883, to Henry B. Perry. The bill alleges conjoint infringement of these patents, together with another patent, afterwards withdrawn from consideration in this suit.

"Photographic shutters are designed to be combined with either one end or the other of the lens tube of the photographic camera, so as to close such tube against the entrance of light to the interior of the camera containing the sensitized plate, until such time as it is desired that light should be admitted thereto, when the shutter opens for this purpose, then closes accordingly, as the mechanism is manip-

ulated by the operator." The specifications state that the invention relates to that class of shutters which are operated by a pneumatic engine, and particularly to the shutter for which letters patent No. 342,693 were granted to the same inventor, on the 25th of May, 1886. The previous patent here referred to was one which provided for a two-winged shutter to close the orifice containing the lens of a photographic apparatus. Two wings were pivoted on the lower edge of the circular orifice, and were operated by the stroke of a piston communicated to a projection from each wing, constituting the short ends of levers of the first order; thus giving to the wings a rapid and almost instantaneous closing motion from the sides towards the center, where they slightly overlapped, to exclude all possibility of the entrance of light. These wings necessarily operated in parallel, but different, planes, in order that one might close over the other, and were made of light and thin material, like Taggers' iron. When the lens was opened, these wings, of course, were moved back inside the frame, and occupied, each of them, a space something wider than one-half the orifice. They accomplished the purpose of rapid and almost instantaneous opening and closing of the photographic lens, which had become so desirable in modern photography, in which such highly sensitized plates are used. But the space occupied by the wings in the frame, on each side of the orifice, made necessary a broader "front board," as it was called, than was convenient in cameras that were intended to be packed and carried about. The patentee, Green, devised a way in which to overcome this inconvenience, by dividing the two wings of his shutter, so as to make a pair of wings, instead of one wing, on each side, that should be actuated from pivots on one side by an air engine, as in the case of the two-winged shutters, each wing of the pair having a different range of motion, and moving in parallel, but different, planes, so that they could overlap each other when stowed away in the sides of the frame, and also when moving beside each other when closing or opening the lens. The wing of each pair which served to close the center of the orifice must, of course, move with a quicker motion from its place of rest than the other wings whose office it was to close the sides of the orifice. This was arranged by the different position of the pivots and slots in the lower side of the orifice, and was a matter of not difficult mechanical arrangement. The end had in view by the patentee, as set forth in his specification, was thus achieved. It is thus stated: "The object of this improvement is to adapt my shutter to cameras which have small-sized front boards, and which therefore cannot apply a shutter which requires so much lateral space as those heretofore in use. It is also adapted for use in the front of the tube, and will not then be so large as to be objectionable." Though the principle upon which this was done was simple, and only involved the cutting in two, so to speak, of each wing of the two-winged shutter, so that the two narrower wings thus formed should fold against each other side by side, like the sticks of a lady's fan, yet it will not do on this account to say that it did not involve invention. It is characteristic of the well-developed inventive faculty to receive suggestions from what are oftentimes the most ordinary and familiar objects in nature or in art. The folding



device, by which the double pair of shutters could be packed away more closely, is certainly similar to the contrivance by which the sticks of a lady's fan or the pinions in the wing of a bird are folded away when closed. The suggestion thus made, if suggestion it was, was new and useful in its application to the subject of the patent in suit, and was a real and valuable exercise of the inventive faculty. The question here raised, then, must be as to the scope of the invention described in the specifications and stated in the first claim, and whether, properly interpreted, that scope covers the contrivance of the defendant in this suit.

As we have seen, the object had in view by the patentee of the Green patent was a shutter, so divided into four wings, instead of two, that each pair of wings would stow or pack away in the opposite sides of the lens opening, and take up nearly one-half less room laterally in the frame of the front board than was occupied by the two-winged shutters. The diminution of lateral space required for the stowing of the shutters when the lens was open seems to have been the primary object of the invention. How the patentee sought to accomplish this is set forth in claim 1, which is as follows: "(1) A photographic shutter provided with four wings, AA, BB, overlapping each other, and having different ranges of movement, whereby they are enabled to fold back into the case side by side, substantially as set forth." As the other claims have only to do with the specific mechanism, the first is the only claim with which we are concerned in the question of infringement. This claim, then, is the measure of the monopoly granted to the patentee, and this monopoly cannot be extended beyond what is demanded in the claim, although it may be limited by the state of the art. The claim is not for four wings having different ranges of motion, but for a combination of these, when so constructed and arranged, as to enable the wings to fold back into the case side by side. The claim is not broadly for a four-winged shutter, but is limited by the designation of these wings by letters, and by reference to the drawings and words, "substantially as set forth." The words, "fold back into the case side by side," must be given what would seem to be their ordinary and first-blush meaning. That meaning, plainly, is not only, or chiefly, that the two pairs of wings should, on opening the lens, move back side by side, but that, when in the state of rest, they should lie side by side in the space on each side of the lens opening. To accomplish the object of diminishing the lateral space necessary to hold the shutter wings, which we have seen was the object of the invention, it was essential that the wings should lie superimposed, the one upon the other, or side by side. It was not essential that, in the act of moving back to the place of rest, they should move side by side. The words, "to fold back into the case side by side," refer, it is true, to the act of folding, but contemplate the completion of that act when the wings are folded back into the case side by side. The folding back, then, of the four wings, AA, BB, with different ranges of movement, so that they should lie side by side, seems the essential feature of the invention. Not only does the claim thus interpreted not permit of a broader

scope, but the state of the art would forbid a claim resting on the mere division of the two single shutters into four.

Comparing the claim thus interpreted with defendant's four-winged shutter, we find that the latter is a photographic shutter provided with four wings, one pair of which are on one side of the lens opening, and the other pair on the opposite side. As arranged in practice, one pair is on the upper side, and the other pair on the lower. The upper pair are narrower than the lower pair, and they have different ranges of movement. The four wings also overlap each other somewhat, when the lens is closed, with the obvious purpose of insuring the exclusion of light. This feature is given to other forms of shutters, and notably so in the case of the two-winged shutter of the first Green patent; but, when the lens is open, the shutters do not fold back into the case side by side, as do the shutters of the Green patent. The shutters of the Green patent are pivoted on one side of the lens, and fold back alongside of each other, until they close, like the sticks of a fan, on each side of the lens opening. In the defendant's shutter, the wings above and below, while overlapping when closed, retreat from each other to opposite sides of the lens, and do not, in any sense, fold back side by side, or lie side by side when they are folded back. It is true that, when the lens is open, the tips of the lower wings slightly overlap the tips of the upper wings, or vice versa; and on this account, as well as on account of the overlapping when the lens is closed, they move in different, though parallel, planes, so that they should not meet edge to edge in the center or when folded back. But the overlapping of the points of the wings, when folded back, does not constitute a "folding back into the case side by side," as set forth in the claim, nor do the "wings, BB, close back in the same space occupied by the wings, AA." In the act of unclosing the wings of defendant's shutter, instead of folding back side by side, they retreat from each other. They are closer together when the lens is closed than when it is open. It would be quite possible to cut off the points that overlap when the shutter is open, so that the wings should not touch at all, without destroying the essential features of the defendant's device.

The defendant's shutter, therefore, seems to lack the essential feature of the Green patent, viz. the folding back of the two pairs of wings, side by side, when the lens is open. It is not clear what the object of the defendant's four-winged shutter was. The evidence does not disclose it, and the counsel for defendant says that it can only be conjectured. But, whatever it was, the means employed in defendant's shutter are two sets of wings, having different ranges of movement, it is true, but they are not the combination of two sets of wings, AA, BB, adapted to fold back into the case side by side. As has just been said, the object of defendant's form of shutter is not apparent, but it could hardly have been to diminish the space occupied by the shutters when the lens was open; for, whatever economy may have been gained as to the lateral space, it was more than lost in the increase of vertical space required for the stowing of the upper and lower pairs of shutters. The contention of defendant

seems correct, that the object of the Green patent, as gathered from the specifications and claim, was not an economy of space laterally at the expense of an increase of space vertically. As is well said by defendant, if this had been so, it could have been accomplished by pivoting the two-winged shutters at one side, so that they would be stowed above and below when the lens was open. And this contention as to the object of the invention is strongly supported by the language from the specifications already quoted, and which may be here repeated: "The object of this improvement is to adapt my shutters to cameras which have small-sized front boards, and which therefore cannot apply a shutter which requires so much lateral space as those heretofore in use. It is also adapted for use on the front of the tube, and will not then be so large as to be objectionable." It is plain that a construction which narrowed the width, but increased the length, of the front board, would not accomplish the object as thus stated. As, therefore, there is not found in defendant's structure a combination consisting of substantially the same means, having substantially the same functions, and adapted to attain substantially the object, proposed by the complainant's patent, there is no infringement.

The other patent, of which a conjoint infringement with the Green patent, just discussed, is alleged in the bill, is that granted to Henry B. Perry, hereinafter called the "Perry Patent," being 287,858, of May 3, 1887. The claim of this patent reads as follows: "The combination of the frame, A, slides, BB, having stud, b', links, B', and lever, C, with the cylinder, D, having piston, d, connected to the lever, and the air bulb, E, and its tube, e, all constructed and arranged to operate substantially as and for the purpose set forth." The patent shows and describes a shutter comprising two slides, lettered, BB, provided with openings which, in one position of the slides, may coincide with and uncover the lens opening of the camera, but which, in a different position of the slides, are moved out of coincidence, so as to close the lens opening. These slides are separately shown in Figs. 3 and 4 of the patent drawing. The original purpose of the inventor is shown by the file wrapper and contents, and it was, in the language of the specifications, to "expose the lens to the light at the center first, and close it at this point last." The original application contained three claims, the first of which was as follows: "(1) In a shutter for cameras, the combination of two perforated slides, moving in opposite directions, whereby the exposure is from the center towards the edges, substantially as and for the purpose set forth." The first claim was objected to upon reference to the British Journal of Photography Almanac for 1880 (page 123), and was erased by the applicant. The original second claim read as follows: "In a photographic shutter worker, a frame containing two oppositely moving perforated slides, connected together and operating simultaneously, in combination with an air cylinder, provided with a piston and an air bulb and conductive tube, substantially as described and shown." This claim was rejected upon reference to the Spurge and Whitcher patent, and was then amended to read as follows: "In a photographic shutter, a perforated frame containing two oppositely moving

perforated slides, connected together and operating simultaneously, the perforations of the frame and slides registering with each other, in combination with an air cylinder, provided with a piston and an air bulb and conductive tube, substantially as shown and described." This amended claim was rejected upon reference to the state of the art, and upon further reference to volumes 26 and 28 of the British Journal of Photography (pages 555, 126). The applicant, without further contention, erased this original second claim, and the patent was then allowed upon the original third claim, which is now the only claim of the patent, and has been recited above.

It is thus apparent that the patentee supposed, when he made his application, that he had invented a photographic shutter which would "expose the lens to the light at the center first, and close it at this point last," and particularly the means for constructing and operating such a shutter. It is a matter of record that the rejection of these claims was acquiesced in by the applicant, and that he consented finally to confine his monopoly to the narrow limits set forth in the single claim contained in the patent as issued. It seems to the court, then, that his monopoly must be measured by the particular mechanism and combination described in the claim. And this conclusion seems all the more necessary, by reason of the fact that in the claim the separate parts of the combination are designated by the specific letters of reference used in the drawings. "When a patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions, for the purpose of obtaining his patent, he cannot, after he has obtained it, claim that it shall be construed as it would have been construed if such limitations and restrictions were not contained in it." *Roemer v. Peddie*, 132 U. S. 317, 10 Sup. Ct. 99, 33 L. Ed. 383. In this patent, therefore, we have a combination of three things: First, two oppositely moving perforated slides; second, a mechanism for moving them in opposite directions at the same time, which consists simply of a lever of the first order, pivoted or fulcrumed in the middle, each arm of which is connected with one of the slides by means of a connecting link and stud, so that when power is applied to move one end of the lever in one direction, and moving the slide with it, the other end moves in the opposite direction, and communicates that motion to the other slide; third, a pneumatic engine, which actuates the mechanism by moving a piston attached to one end of the lever.

A careful examination of the testimony of the experts in that regard clearly demonstrates that there was nothing new in the device of the two perforated slides moving in opposite directions; nor is there anything new, or that required invention, in the use of a lever for transmitting the motion given by the piston of the pneumatic engine in one direction to the other end of the lever in an opposite direction, nor was the pneumatic engine new in the art. Without stopping to inquire whether these old devices so co-operated in combination as to produce a new result in a new way, and whether the combination involved patentable invention, it will be sufficient, for the purposes of this case, to inquire whether this particular combina-

tion is found in the alleged infringing structure of the defendant. The defendant's structure is a two-winged shutter, pivoted on one side of the lens opening, with short ends or ears below the pivot or fulcrum, to which the power is applied, to give motion in opposite directions by means of a lever connected with a piston of a pneumatic engine. It is true that these wings thus pivoted constitute levers of the first order, to the short ends of which the power is applied, and they move slowly through a small arc of a circle, in opposite directions, by means of another lever, to which the power is directly applied. The shutter wings thus constituting the long ends of the lever move consequently, also, in opposite directions, and over longer arcs, and towards their ends, with a much swifter motion. This seems an obvious utilization of the principle of the lever. The power is applied at the ends where the distance to be traveled is small, and the motion comparatively slow; while the other ends, constituting the wings of a shutter, have no force to exert, but attain the swift movement necessary for the opening and closing of the lens. This is an ingenious and useful application of the principle of the lever, but different in its operation from that of the Perry patent. In the latter, we have shutters or slides moving in straight or right lines, on supporting ways or bearings; while in the former we have the wings of the shutter moving in curved lines, upon pivots or pivotal supports. In the opinion of the court, these two methods of opening and closing the lens are not sufficiently identical in principle and operation to support the allegation of infringement. In view of the fact that the single claim of the Perry patent was so narrowed as to be confined to the specific structure described, it is not difficult to come to this conclusion. The combination there claimed was of two perforated slides, moving in opposite directions, across the lens opening; the movement in opposite directions being effected by means of a lever of the first order, actuated at one end by a pneumatic engine. These slides, pushed in straight lines along supporting grooves, are, in the opinion of the court, a different mechanism from the fan-like shutters of the defendant's device; so that, even if the claim of the patent had not been so narrowed, it would still be true that the one device was not the mechanical equivalent of the other. The mechanism of the lever, as one of the primary mechanical powers, cannot, of course, be appropriated in the monopoly of a patent, although it may, like the principle of the screw or the wedge, be so used or applied in combination as to achieve useful, novel, and patentable results. The absence, then, of the slides described in the Perry patent, is sufficient to destroy the identity of the combination in the defendant's structure with that of the Perry patent. The bill, therefore, must be dismissed, with costs.

## SOUTH SHIELDS STEAM SHIPPING CO., Limited, v. FORBES et al.

(District Court, S. D. New York. January 16, 1900.)

## 1. SHIPING—CONSTRUCTION OF CHARTER—OPTION—DREADING CLAUSE.

A charter by which the charterer was to furnish a cargo of 4,071 tons of heavy grain, with privilege of loading 750 tons of general cargo "in lieu of a like quantity of grain, \* \* \* total freight to be equivalent to full cargo of grain," must be construed as giving him the right to substitute such general cargo for a like weight of grain, and requires the ship, to be entitled to recover freight for a full cargo, to supply sufficient cargo space for 750 tons of general cargo, besides the space required for the remainder of a full cargo of grain.

## 2. SAME—FULL CARGO—PLIMSOLL MARK.

Under a charter requiring the charterer to furnish a cargo of a given tonnage, "ten per cent. more or less, at steamer's option," the owners cannot require payment of freight on more than such weight, on the ground that the ship was not loaded to her Plimsoll mark, as contemplated by the charter, where the specified amount was furnished, and the master made no call for additional cargo at the time of loading.

## 3. "ADDITIONAL EXPENSES."

Various charges for dunnage, shifting berths, bagging, and mode of stowage considered.

In Admiralty. Suit to recover additional freight under a charter.

Convers & Kirlin (Geo. W. Betts, Jr., of counsel), for libellant.

Butler, Notman, Joline & Mynderse and F. M. Brown, for respondents.

BROWN, District Judge. The libellant claims certain balances alleged to be due to it for freight upon the transportation of a cargo of grain and general merchandise per steamer Glenmoor from Norfolk to Hamburg in February, 1897. The material parts of the contract under which the cargo was shipped, dated September 10, 1896, are as follows:

"Engaged from Mess. R. W. Forbes & Son of New York, for shipment in steamer Glenmoor from Baltimore, or Norfolk and/or Newport News to Leith, Hull, Newcastle-on-Tyne, Avonmouth Dock, Rotterdam, Amsterdam or Hamburg, one port only, nineteen thousand (19,000) quarters of heavy grain, ten per cent. (10%) more or less at steamer's option, at the respective rates of two shillings and ten pence half-penny (2/10½) if ordered to Leith, Hull, Newcastle-on-Tyne or Rotterdam; two shillings and eleven pence farthing (2/11¼) if ordered to Avonmouth Dock; three shillings (3/—) if ordered to Amsterdam or Hamburg, all per quarter of 480 lbs."

"Full cargo insurance to apply."

"Shippers to have privilege of shipping not exceeding seven hundred and fifty (750) tons of general cargo in lieu of a like quantity of grain, they paying all additional expense at port of loading above what grain cargo would cost, and total freight to be equivalent to full cargo of grain at the respective rates of two shillings and ten pence half-penny (2/10½) two shillings and eleven pence farthing (2/11¼) and three shillings (3/—) per quarter as above."

"Owners to have privilege of substituting another first-class steamer to fulfill this contract."

"The name of steamer which will fulfill this contract to be declared not later than first (1st) January, 1897."

Under the above contract, as appears from the pleadings and evidence, the Glenmoor was loaded at Norfolk with 3,280 tons of maize,

—"a heavy grain,"—equal to about 15,306½ quarters, and 880 tons, less a small fraction, of general merchandise, equivalent to 3,871½ quarters, making in all the equivalent of 19,178 quarters of grain. This cargo filled completely the space capacity of the ship, but not her full allowed draft down to her winter Plimsoll mark, as a full cargo of grain alone would have done, the libellant alleging a shortage of five inches, and the respondents admitting but one inch. For not loading the ship to her dead-weight capacity, in consequence of filling up with the bulkier general cargo instead of grain, the libellant claims freight upon the ship's whole dead-weight capacity, alleged to be 19,800 quarters. A second subject of dispute relates to the "additional expense at the port of loading" in taking the general merchandise above what it would have cost to take all grain.

1. The above brief form of agreement, though said to be considerably used, differs from the ordinary charter party. It does not in express terms bind the respondents to load a full cargo, nor does it in so many words bind the owners to give to the respondents the whole cargo space of the ship. Both these obligations, however, must be necessarily inferred from the express requirement, "total freight to be equivalent to full cargo of grain." For it is not credible that the respondents would agree to pay freight for a full cargo, without having the benefit of the ship's full cargo space and her full draft capacity; nor that the libellant should require payment by respondents of freight for a full cargo, and at the same time expect to reserve any of the ship's capacity for the carriage of other goods. The dispute on this head arises from the fact that the Glenmoor (aside from any question as to the manner of loading), while able to load to her dead-weight capacity with an all grain cargo, had not cargo space sufficient to do so, when 750 tons were of general cargo, which is bulkier and lighter.

I have no doubt that, as ruled upon the trial, the meaning of the clause "freight equivalent to a full cargo of grain" is, that the shippers, on receiving the benefit intended by the option granted them, should pay freight on her dead-weight capacity, since she could certainly take grain enough to load her down to her Plimsoll mark; and nothing less, therefore, would be equivalent to "a full cargo of grain." But this stipulation is a part of the option given shippers, called the "dreading clause," and is conditioned upon their having the benefit of it; viz., to load not exceeding 750 tons of general cargo in lieu of a like quantity of grain. The libellant concedes that this means in lieu of a like weight of grain. This clause, therefore, plainly requires the ship to supply sufficient cargo space for the 750 tons of general cargo as contracted for, besides the space required for the residue of a full cargo of grain. As the general cargo is to be in lieu of a like weight of grain, the necessary space required for the 750 tons of general cargo must be supplied in lieu of the space required by the 750 tons of grain; since otherwise the shippers could not load 750 tons of general cargo in lieu of 750 tons of grain, but only in lieu of 800 or 900 tons of grain, as the case may be, which is manifestly contrary to what was intended.

It is the same as if the ship being loaded to her Plimsoll mark with grain, the owners had agreed that the shippers might remove 750 tons of grain and, instead of that, load 750 tons of general cargo. In that case unless the ship could supply the sufficient space for the exercise of the option given, she could not recover the agreed consideration for it.

The contract does not differ in legal effect, as I view it, from what it would have been had it read: "Engaged a cargo of 4071 tons" (the equivalent of 19,000 quarters) "ten per cent. more or less at steamer's option; viz. general cargo at shippers option not exceeding 750 tons; the rest of the cargo to be of heavy grain." In both forms alike, the full dead-weight capacity could not become due to the ship unless she had space capacity enough to load her down to her allowed draft.

The libellant claims that the right to load 750 tons of general merchandise, was a mere privilege without any corresponding obligation on the part of the ship to supply the additional space required. I do not think this a reasonable construction, since it would impose an unreasonable burden upon the shippers, and would deprive them of one of the presumed objects of their option. Nor do I see any reason for distinguishing between this option given to the shippers, and the 10 per cent. option given to the ship, as respects the counter obligations imposed. The object of the latter option was to fill the steamer to her dead-weight capacity on the master's call, if necessary, for not exceeding 10 per cent. above the 19,000 quarters, and thereby earn full freight. This bound the respondents to make good any such call, or to pay for their failure. In like manner the option given to the respondents was to enable them to carry not exceeding 750 tons of general merchandise, which on the average is a lighter cargo than heavy grain, and for that reason would ordinarily take more room than grain, and if shipped alone would be required to pay a higher rate per ton. It is to the advantage of the shipper who has both heavy and light cargo for transportation, to combine them in the same vessel, in order that he may have the benefit both of the draft capacity of the ship and of her full cargo space. A full cargo of iron would leave much of the cargo space unoccupied. A cargo of light merchandise only, filling the entire cargo spaces, would not nearly load the ship to her draft capacity, and for that reason, as above stated, it must ordinarily pay a higher price per ton. By combining both heavy and light weights in the same cargo, and properly adjusting their relative proportions, the shipowner may secure payment for the whole weight capacity of his ship, while the shippers get the benefit of her whole space capacity for light weights at the rate stipulated. The respondents had both kinds of cargo, and the option given them was presumptively given for the above purpose. The ship thereby became obligated to supply cargo space sufficient to load her to her Plimsoll mark with the particular kinds of cargo agreed on, of which one part was to be not exceeding 750 tons of general merchandise at shipper's option. The limitation to 750 tons was in



her own interest, in order that too much additional cargo space above what a cargo of grain alone would need, might not be required of her.

So far, therefore, as the failure of the ship to be loaded to her full winter draft was owing to a lack of sufficient cargo space for 750 tons of general cargo and for the residue of her dead weight tonnage in grain, the deficiency was caused by the ship's insufficiency to answer the obligations of her contract; and to that extent she could not recover for this item.

Some comment has been made in regard to the manner in which the vessel was loaded, which it is urged was not as economical of space as it might have been in the distribution of the general cargo and of the grain. The same point is made in reference to the difference of expense, under the second head, as respects the number of bags necessary to be used. It appears, however, that the manner of loading and distributing the cargo, was a subject of fair consultation and agreement between the representatives of both parties, and for that reason should not now be deemed open to criticism by either.

Upon the above view of the contract, no liability for freight on the part of the respondents beyond the amount shipped would result, had the shippers observed the stipulation that the general cargo should not exceed 750 tons. The amount of general cargo loaded was in fact about 80 tons in excess of the 750 allowed them. The space occupied by this excess of 80 tons of general cargo, computed according to the average of the whole, could not have admitted more than 100 tons of grain, i. e. 20 more than of general merchandise, and probably less. It is stated that in the settlement made with the ship she had credit, however, for one inch slack draft, equivalent to 28 tons of grain; if this is correct, nothing would remain due to the ship under this claim.

I have considerable doubt, moreover, whether in any event the ship can be entitled to call upon the respondents to pay for any failure to load to her full draft, except upon a distinct notice and a call by the master under the steamer's option for more than 19,000 quarters, inasmuch as the amount actually loaded and paid for exceeded the equivalent of that amount, being as above stated, 19,138 quarters. In the absence of any such notice or call, 19,000 quarters under this agreement must be deemed *prima facie* to be a "full cargo"; because that amount is evidently fixed by the agreement as approximately a "full cargo," and because there is nothing in the agreement requiring the shippers to load more than 19,000, unless there is a call for more under the option reserved, or something equivalent to a call. In the present case there was no such call, nor was any statement made at the time of loading of the full draft capacity of the ship.

The determination of the question whether a vessel is fully loaded to her Plimsoll mark, is not so simple as might be supposed. The ship may not be, and in this case was not, loaded upon an even keel; she may not be perfectly level; the observation of the Plimsoll mark

itself, except in perfectly still water, cannot be exactly correct; there is not only a difference between the ship's draft in salt water and in fresh, but for a similar reason there is a difference, at places like Norfolk, according to the time of the tide at which the observation is taken, and these differences themselves vary with the size of the vessel. For vessels of the size of the Glenmoor, the difference between the draft at Norfolk and the open sea is stated by the experts of both parties to be about an inch and a half, and the difference between high and low water, about half an inch. Considering the nature of these differences and that no subsequent opportunities for examination can be had, evidently all questions as to actual draft ought to be settled, if possible, at the time and place of loading; and where the master does not call for additional cargo under the option, nor make protest at the time, the amount loaded should be deemed to be accepted as a "full cargo."

The practice, as stated by the libellant's witness, is to make the call for more, if desired, towards the end of the loading. The excuse given in this case for not doing so is, that the ship was filled up at the close by the general cargo, so that it was useless to call for more. It is to be observed, however, that the general cargo loaded, being 80 tons in excess of the 750 allowed, was received by the master without any protest or objection, or any expression of dissatisfaction, other than the remark that the general cargo would not bring the ship down to her Plimsoll mark. On the day before the vessel sailed, however, there being some difference as to the actual depth of her loading, an appointment was made by the master with the respondents' representative to meet on the following morning for the purpose of having an exact survey of the draft. Before the latter arrived, the ship sailed between 6 and 7 a. m., so that no joint survey was made. The respondents' representative testifies that the hour assigned was 7:45 a. m. and that he arrived at 7:40; the captain says the time fixed was 6 a. m. I have no doubt that the former witness is correct, for the reason that his residence at the time was such that he could not possibly arrive at the hour stated by the captain, but did come by the earliest regular conveyance. The respondents' representative, however, had endeavored the previous afternoon to take the draft accurately with the aid of one of the ship's men; and this measurement, allowing an inch and a half for fresh water, would make the ship's draft but an inch less than her Plimsoll mark, and this conclusion I deem best sustained by the testimony. The master's reckoning allows three inches for fresh-water difference. My conclusion is that the master either intentionally avoided a joint survey, or regarded the respondents' measurements as sufficiently correct.

2. Under the clause requiring the shippers to pay "all additional expense at port of loading above what grain cargo would cost," the respondents must pay whatever extra charges were caused by the general cargo after deducting therefrom such expenses as were saved to the ship by not loading all grain. Of the various items on each side of this debit and credit account, no objection is made, as I un-

derstand, to the charge against the respondents for stevedoring the general cargo.....\$285 00  
 Tally clerk..... 35 00  
 And wharfage on lard..... 1 00

Making .....\$321 60  
 which should, therefore, be allowed. The item of dunnage, \$132, is also proved, and there is no contrary evidence showing that it would have been needed for grain; that item is, therefore, allowed. Wharfage for four additional days is claimed; I find that three days only should be allowed, amounting to \$59.49.

Eighty-one dollars is also claimed for towage on two moves of the ship for the general cargo from the elevator where the grain was loaded to Pinner's Point and Lambert's.

By the contract, however, the charterers had a right to two ports of loading, Norfolk and Newport News; and by the custom at Norfolk, testified to by the respondents, and not disputed, the shippers were entitled to one removal of the ship at her expense for each 300 tons. Pinner's Point and Lambert's were within the port of Norfolk, and very much nearer than Newport News; and I find that the respondents are not chargeable with these expenses, both on the ground of custom, and also that they were a substitute for the right to send the ship to Newport News for a part of her cargo, and much less burdensome for the ship. The debit items allowed amount to \$513.09. Against this should be charged as saved to the ship, the expense of elevating, trimming, etc., also the bagging and sewing saved and the hire of 1,732 bags at about 3 cents per bag. The evidence shows that under an existing contract the shipowners would have been obliged to pay only at the rate of about 3 cents a bag. What might have been the current price of bags otherwise, is, therefore, immaterial.

As respects the bags it is also urged that a portion of the general cargo might have been placed on top of the grain in bulk, instead of the five tiers of bags that were used, and that the ship should, therefore, give credit for a saving of bags which might in that manner have been made, but which were not in fact saved to the ship through her own improper failure to make use of the general cargo instead of bags for that purpose. This counter charge should not be allowed, for the reason previously stated, namely, that the distribution of general cargo was made deliberately upon a substantial agreement of the parties at the time upon consultation, and to their mutual satisfaction. The master testifies that the precise point was spoken of between him and Mr. Graham, the respondents' representative, and it was considered best not to put any part of this general cargo on top of the grain. The parties can probably agree upon the amount saved for elevator and bagging and sewing charges; if not, a reference may be taken upon those points.

Decree accordingly.

THE SAMUEL S. THORPE.<sup>1</sup>

(District Court, E. D. Pennsylvania. January 5, 1900.)

No. 26.

## 1. INJURY TO SEAMAN—NEGLIGENCE—HANDLING OF ROPES.

Where a seaman, in performing a duty, assumes a dangerous position through his own negligence, directly leading to his injury, he cannot recover.

## 2. SAME—VOLUNTEER.

Whether the voluntary undertaking of a duty delegated to another will bar a recovery for injury received in performing it, *quære*.

In Admiralty. The libellant, an able seaman, undertook to pay off a rope which another seaman had been ordered to cast off, and in doing so unnecessarily exposed himself, and was severely injured. No negligence on the part of the ship's officers was shown. Libel dismissed.

Jos. Hill Brinton, for libellant.

Curtis Tilton, for respondent.

MCPHERSON, District Judge. The libellant is an able seaman, and in January, 1898, was employed on the schooner Samuel S. Thorpe. On the 13th day of that month the ship was starting upon a voyage from Philadelphia to an Eastern port, and was being moved from her dock into the stream of the Delaware river. She was in tow of a tug, upon a short hawser of the length usually employed in drawing vessels from shore into the channel, and had reached a point in the stream where it was desirable to lengthen the hawser, in order that towing down the river might be easier. When such change of length is to be made, it is usual for the tug to slow down to half speed, and signal to the tow to let out the hawser, and it is the duty of the tow to obey this order promptly. In the present case the speed was thus diminished, the signal was given, and the mate of the schooner—who was directing the letting out of the hawser, the captain being aft near the wheel—ordered the hawser to be cast off the port bitt, round which it was fastened by three or four turns. The customary and proper practice is to cast the hawser off the bitt entirely, and let it run out freely, until the necessary length has been attained. The seaman to whom the mate's order was addressed did not obey at once,—perhaps because, being a foreigner, he did not quickly apprehend the English order,—and the libellant undertook to do the work. Unfortunately, he was not in a safe place. He was standing on the main deck, which was about four feet below the forecastle deck, and the bitt was in front of him, its top being about as high as his head. The hawser was lying in coils on the main deck to his right, within a foot or two of his feet. Immediately beside the bitt, on the port side, three or four steps led to the forecastle deck; and, if he had mounted these steps, he would have been in a place of safety, and could have performed the work with little likeli-

<sup>1</sup> Reported by Arthur G. Dickson, Esq., of the Philadelphia bar.

hood of injury. He chose to stay on the main deck, however, and in that situation attempted either to cast off the turns, or to pay the hawser out hand over hand. In some manner not clearly explained, he became entangled in a bight of the rope, was drawn up against the bitt, and suffered a severe injury to his leg, which compelled amputation below the knee.

The negligence complained of is in ordering the hawser to be paid out with only two turns around the bitt,—two being insufficient to control the hawser,—and while the tug was moving at full speed. These averments have not been proved. The tug was moving at half speed only, as was usual and proper, and the libelant was not ordered to pay out the hawser at all. On the contrary, the order was to cast off, and not to pay out, and it was given to another seaman, and not to libelant. He voluntarily undertook to execute it, but if he was attempting to cast off he should have gone upon the forecastle deck, and if he was attempting to pay out he was acting upon his own responsibility. He was hurt either by accident or by his own carelessness, probably by kicking at the hawser to straighten it out, and thus becoming entangled in a bight. I lay no weight on the voluntary character of the libelant's act, but I see no negligence of the ship, even if the mate was a vice principal.

The libel is dismissed, but without costs.

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ANDERSON et al. v. PACIFIC COAST CO.

(District Court, N. D. California. January 5, 1900.)

1. ADMIRALTY—ALLOWANCE OF SET-OFF—SEPARATE DEMANDS.

In a suit by an assignee to recover freight earned under a charter party, a claim, set up in the answer, for coal, which it is alleged was furnished by defendant to libelant's assignor, after the making of the charter party, "solely in reliance on the said contract of affreightment, and with the intention, expectation, and anticipation" that the price of such coal would be retained from the freight earned under such contract, but without alleging any agreement to that effect, does not constitute a set-off which can be entertained by a court of admiralty, the rule permitting a set-off for advances made upon the credit of the particular debt or demand sued on being limited to cases where there was an agreement that they should be so paid.

2. SAME—PLEADING.

An averment that coal was furnished with "the intention, expectation, and anticipation" that the price therefor should be deducted from certain freights is not equivalent to an allegation that such was the mutual agreement of the parties.

In Admiralty. On exceptions to answer.

Andros & Frank, for libelants.

Sidney V. Smith, for respondent.

DE HAVEN, District Judge. This action is one brought by the libelants, as assignees of the Alaska Yukon Transportation Company, to recover from the defendant the sum of \$6,944.50 on account of freights earned by the Alaska Yukon Transportation Company under a charter party entered into between that company and

the defendant. The defendant, in its answer, pleads a set-off in an amount equal to the sum sued for by the libelants, and as grounds for such set-off alleges that, after the making of this charter party, and before the freights sued for were earned thereunder, and prior to the date of the assignment under which the libelants claim, it sold and delivered to their assignor, the Alaska Yukon Transportation Company, on board of vessels owned by that company, and for use in the navigation of such vessels, coal of the value of \$6,944.50, and that no part of this sum has been paid. The answer further alleges that the defendant "was induced to sell and furnish said coal to said Alaska Yukon Transportation Company, and to its vessels," by reason of the existence of the charter party referred to, and "that, if it had not been for the existence of said contract of affreightment, this respondent would not have given credit to the said Alaska Yukon Transportation Company for the price and value of said coal, or for any part thereof, and would not have sold said coal to said Alaska Yukon Transportation Company except for cash, and that in so selling and delivering said coal to the said Alaska Yukon Transportation Company and to its vessels this respondent acted solely in reliance upon the said contract of affreightment, and with the intention, expectation, and anticipation that it would so be able to repay itself for the price of said coal by applying the freight to be paid by this respondent under said contract of affreightment to and on account of the said price and value of said coal." The libelants have excepted to the sufficiency of the answer, the particular ground of exception being that it does not appear from the facts alleged that the set-off claimed by defendant arises out of, or has any connection with, the cause of action stated in the libel.

1. I do not think the answer can be properly construed as alleging that the defendant sold to the Alaska Yukon Transportation Company the coal which is the subject of the set-off claimed under an agreement that the price therefor should be deducted by the defendant from the amount of freight earned by the Alaska Yukon Transportation Company under the prior charter party which is the foundation of the cause of action stated in the libel. The allegation that the defendant, in making the contract for the sale of the coal mentioned in the answer, "acted solely in reliance upon the said contract of affreightment, and with the intention, expectation, and anticipation that it would so be able to repay itself for the price of said coal by applying the freight to be paid by this respondent under said contract of affreightment to and on account of the said price and value of said coal," is not equivalent to an averment that there was a mutual agreement or understanding of the parties to such contract of sale that the freights earned under the charter party should be applied to the payment of the price of the coal. *Bank v. Kennedy*, 17 Wall. 28, 21 L. Ed. 554; *Maryland v. Baltimore & O. R. Co.*, 22 Wall. 112, 22 L. Ed. 713; *Legal Tender Cases*, 12 Wall. 548, 20 L. Ed. 287. In the absence of such an averment, the charter party and the contract for the sale of the coal are to be treated as separate and independent contracts. They were not made at the same time; the subject-matter of the one is different from that of the other; and,

being thus independent, it must be held that the defendant is not entitled to have the amount due to it on account of the contract for the sale of the coal set off against the claim of the libelants for the freight earned by their assignor under the charter party. In 2 Pars. Shipp. & Adm. p. 433, it is said:

"The admiralty has no jurisdiction of an independent set-off, and those usually allowed are where advances have been made upon the credit of the particular debt or demand for which the plaintiff sues, or which operate by way of diminished compensation for maritime services on account of imperfect performance, misconduct, or negligence, or as a restitution in value for damages sustained in consequence of gross violations of the contract."

This rule, which is the same as was stated by Mr. Justice Story in the case of *Willard v. Dorr*, 3 Mason, 161, Fed. Cas. No. 17,680, has been often approved, and, so far as it is possible for any rule to become settled by the decisions of courts, must be now regarded as definitely settled. *Dexter v. Munroe*, 2 Spr. 39, Fed. Cas. No. 3,863; *The Hudson, Olcott*, 396, Fed. Cas. No. 6,831; *The Tom Lysle* (D. C.) 48 Fed. 690; *The Frank Gilmore* (D. C.) 73 Fed. 686. The language of Mr. Parsons, above quoted, that a set-off is permitted "where advances have been made upon the credit of the particular debt or demand for which the plaintiff sues," has reference only to cases in which advances have been made under an agreement, express or implied, that they should be allowed as a set-off as against the particular demand sued on, and does not apply to a claim of set-off like that of the defendant here, not based upon such an agreement, and arising out of a contract in no way connected with that under which the libelants claim. The exceptions will be sustained.

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#### THE ASHBOURNE.

#### THE ROBERT HADDON.

(District Court, S. D. New York. December 28, 1899.)

#### **COLLISION—LIABILITY FOR DAMAGES—PERFORMANCE OF SALVAGE SERVICES.**

Tugs which voluntarily undertook to rescue a vessel from a burning wharf, and in doing so, by reason of their not being able, under the circumstances, to handle the vessel safely, inflicted injury by collision upon other vessels lying at the wharf, although there was no other means of effecting the salvage, and their services were meritorious, are liable in the first instance for the damages to such vessels, which may be considered a loss or expense necessarily incident to the salvage service.

In Admiralty. This was a suit against the steam tugs *Ashbourne* and *Robert Haddon* to recover damages for collision.

Carpenter & Park and Mr. Symmers, for libellant.

James Armstrong, for the *Ashbourne*.

Cowen, Wing, Putnam & Burlingham, for the *Haddon*.

**BROWN**, District Judge. At about 6:20 p. m. of the 7th of September, 1899, as the tugs *Ashbourne* and *Haddon* were pulling the burning ship *Buceros* away from a wharf on fire in the Erie Basin, she came in contact with the libellant's canal boats *Columbus* and *Cum-*

berland, lying in the same slip, near the exit from the basin. The above libel was filed to recover the damages.

Upon all the evidence submitted, I am of the opinion that the tugs can hardly be found chargeable with negligence as respects the manner of towing the ship out of the slip after they had once started. There was a strong wind blowing across the wharf and towards the libelant's canal boats and the exit from the basin. There were also other craft anchored not far distant which restricted free maneuvering. No aid in steering the ship could be had from her own helm, because the after-part of the ship was ablaze and no persons could stay there, and for the same reason no other tugs, had there been any, could have gone aft to work on her quarter. The two defendant tugs were the only ones available to save the ship, and they were not really sufficient to manage the ship with perfect control or so as to prevent her sagging across the slip in the high wind. I consider the damage to the libelant's boats, therefore, to have been an inevitable incident of the salvage service rendered by the two tugs under the circumstances of their attempt.

This finding, however, does not relieve the defendant boats from responsibility. The damage was not an unavoidable accident as respects the libelant's boats, since the defendant tugs were under no constraint to undertake the salvage service. The service was voluntarily undertaken for their own profit, and for the benefit of the ship in her great extremity. The service was necessary in order to save her; but it was undertaken without the necessary means of handling the ship with safety to other vessels in the basin, and with the evident risk of inflicting damage on the boats moored near the exit. In the sense of having undertaken the service without sufficient means or equipment to do it safely, the tugs are legally chargeable with negligence as respects the boats damaged, since this damage might have been foreseen to be likely to occur; and it is no defense as respects the boats damaged, that the tugs undertook, without means adequate for safety to others, a most deserving and meritorious salvage work.

From another point of view the injury might be regarded as legally equivalent to damage voluntarily and necessarily inflicted on the libelant's boats in the course of an urgent salvage operation, otherwise meritorious. As respects the Buceros, the vessel salvaged, the tugs are not chargeable with any negligence, for the reason that there were no other tugs at hand to give assistance, and the urgency of immediate action was extreme. I regard the damage, therefore, as under the circumstances a necessary incident of a salvage service, which having been voluntarily undertaken by the salvors, is a charge which they must bear in the first instance, as they would bear any other loss or sacrifice incurred by them in the course of their salvage work, and for which they must look to the salvage award for compensation.

Decree for the libelant with costs.



ATHERTON MACH. CO. v. ATWOOD-MORRISON CO.

(Circuit Court, D. New Jersey. January 18, 1900.)

**JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION—SUIT TO DETERMINE OWNERSHIP OF PATENT.**

A suit in equity to determine the ownership of a patent claimed by both parties under assignments from the patentee is not one arising under the patent laws of the United States, so as to give a federal court jurisdiction where the parties are citizens of the same state.<sup>1</sup>

In Equity. On demurrer to bill.

E. Q. Keasbey, for complainant.

Frederick P. Fish, for defendant.

KIRKPATRICK, District Judge. The parties to this suit, both complainant and defendant, are corporations organized under the laws of the state of New Jersey, and therefore to be regarded as citizens of that state. The bill sets out that in July, 1896, one Jean Schweiter filed an application in the United States patent office for the grant of letters patent, and that prior to the issuance thereof he assigned his invention and application to one Schrader, who in turn assigned the same to the Schrader Improved Quilling-Machine Company. There is no allegation in the bill that the assignment from Schweiter to Schrader was ever filed with the patent office, though it is set out that the assignment from Schrader to the Schrader Improved Quilling-Machine Company was so filed on May 1, 1897, and that in it there was a recital of the previous assignment. Notwithstanding the filing of such assignment, the patent for Schweiter's invention was on January 4, 1898, issued to him. On August 18, 1898, the Schrader Improved Quilling-Machine Company executed an assignment of said patent to the complainant. The bill charges that the defendant is using the machine described in the patent issued to Schweiter, and, having been by it requested to stop such use, has claimed to be the owner of said patent by virtue of an assignment thereof made by said Schweiter to it. The prayer of the bill is "that the pretended assignment from Schweiter to the defendant may be declared to be of no effect, and to be subject to the rights and title of the complainant." To the bill the defendant demurs. It does not thereby deny the validity of the patent, nor defendant's use of the patented machine. It admits that the complainant has a claim of title to the patent acquired as stated in the bill of complaint, and that the defendant holds a claim of title thereto by an assignment from the patentee, as the bill recites. One of the grounds of demurrer is "that the said bill of complaint, in so far as it relates to the assignment from said Schweiter to the defendant, and the defendant's rights thereunder, is not 'a suit at law or in equity arising under the patent or copyright laws of the United

<sup>1</sup> For jurisdiction of federal courts in cases involving federal questions, see note to *Bailey v. Mosher*, 11 C. A. 308, and, supplementary thereto, note to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.

States,' and therefore this court has no jurisdiction of the case." In my opinion, this objection must prevail. To determine whether the complainant is entitled to the relief it seeks does not involve the consideration of any law of the United States. The title to the patent rests solely in contract, to the interpretation of which the general principles of equity and common law are applicable, and which are in no way changed because the contract relates to a patent granted by the United States. The question presented here came before the circuit court of the United States for the Northern district of Illinois, where, in a well-considered opinion, Judge Blodgett held the court to be without jurisdiction, because "the controversy was not as to the construction, validity, or infringement of a patent, but was a controversy as to its title or ownership." Reference was made by the learned judge to the cases of *Wilson v. Sandford*, 10 How. 99, 13 L. Ed. 344; *Hartell v. Tilghman*, 99 U. S. 547, 25 L. Ed. 357; *Albright v. Teas*, 106 U. S. 613, 1 Sup. Ct. 550, 27 L. Ed. 295. To the same effect are the cases of *Trading Co. v. Glaenzer* (C. C.) 30 Fed. 387, and *Manufacturing Co. v. Hyatt*, 125 U. S. 46, 8 Sup. Ct. 756, 31 L. Ed. 683.

The parties to this action being residents of the same state, and the suit not being one arising under the patent laws of the United States, this court is without jurisdiction. Judgment should be for the defendant on the demurrer. Let a decree be prepared dismissing the bill.

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LAKE ST. EL. R. CO. v. ZIEGLER et al.

ZIEGLER et al. v. LAKE ST. EL. R. CO.

(Circuit Court of Appeals, Seventh Circuit. January 17, 1900.)

Nos. 536, 552.

1. REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—JOINDER OF FORMAL PARTIES.

A corporation brought a suit in equity in a state court against persons alleged to be the holders of certain of its stock and bonds, who were all citizens and residents of other states, to obtain an accounting, and the surrender of such stock and bonds, on the ground that they had been obtained by one of the defendants, who was a director of complainant, in fraud of its rights. The bill also alleged that defendants had made a demand on the trustees in the trust deed securing the bonds in suit, with others, for the foreclosure of such trust deed, and made the trustees, one of whom was a citizen of the same state as complainant, parties defendant for the purpose of obtaining an injunction restraining such foreclosure. *Held*, that the trustees were not indispensable, but merely formal, parties, having no interest in the controversy, and that their joinder did not deprive a federal court of jurisdiction of the suit, which was removable by the individual defendants.

2. EQUITY—HEARING—RIGHT OF PARTIES TO DECISION ON THE MERITS.

Where both parties to a controversy are before the court, and a full hearing has been had upon their respective claims, the suit should be determined on the merits, and it is error to dismiss it without prejudice against the wishes of both parties.

3. RAILROAD CORPORATIONS—STATE REGULATION—ISSUANCE OF STOCK.

The provision of Const. Ill. art. 11, § 13, that no railroad corporation shall issue any stock or bonds except for money, labor, or property ac-

tually received and applied to the purposes for which such corporation was organized, and that all stock dividends and other fictitious increase of the capital stock of any such corporation shall be void, does not render invalid stock issued by a railroad company, directly or indirectly, in payment for the construction of its road; nor can a court hold it invalid on a determination that the consideration so received was not equal to the par value of the stock.

4. SAME.

The issuance of stock by a railroad corporation in violation of such provision is ultra vires, and the stock void in the hands of all holders, and the corporation cannot maintain a suit against the person to whom it was issued to require an accounting for its proceeds.

5. SAME—RIGHTS OF MINORITY BONDHOLDERS.

A court of equity will not, at the suit of a corporation, compel its minority bondholders to assent to a reorganization scheme by which they are required to scale their bonds, accepting in lieu thereof new bonds for a smaller amount, without additional security; the benefits of the scheme, if any, inuring solely to the stockholders.

Appeal and Cross Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

On December 31, 1895, the Lake Street Elevated Railroad Company, a corporation of the state of Illinois, the appellant in the first and the appellee in the second of these causes, filed its bill, and on the 16th day of January, 1896, filed its amended bill, in the circuit court of Cook county, Ill., against the appellants, William Ziegler and 12 other individual defendants, each being a citizen of a state other than the state of Illinois, the Farmers' Loan & Trust Company, a corporation of the state of New York, and the American Trust & Savings Bank, a corporation of the state of Illinois, the two last-named corporations being trustees in the trust deed executed by the appellant. This bill sought to charge William Ziegler, one of the defendants, and who was a director of the Lake Street Elevated Railroad Company, with certain bonds and stock received by him from the contractors who constructed the road, upon the ground that he, being a director, was interested in the contract which the company, with his participation, had made with the contractors, and which was improvident; and that he was interested with the contractors in the profits to be made. These charges having been, at the hearing, abandoned by the complainant below, it is not necessary to state them in detail. The other individual defendants were charged to have received bonds from Ziegler with notice of the facts charged in the bill, or to hold them in secret trust for him. The amended bill charged that Ziegler and the other individual defendants had demanded of the trustees that, by reason of default in payment of interest upon the bonds held by them, respectively, they should take possession under the trust deed, or proceed to foreclose it, which the complainant feared would be done by the trustees upon such demand by reason of their ignorance of the facts stated in the bill. The prayer of the bill was that an accounting might be had between the complainant and the individual defendants, and that, upon payment by the complainant of the amount paid by Ziegler to the contractors for the bonds and stock now held by him and the other individual defendants, such bonds, stock, and other property, if any, should be surrendered to the complainant, it offering to pay the amounts paid by Ziegler therefor. The bill also prayed for an injunction pendente lite restraining disposition of the bonds and stock held by the individual defendants, and from commencing suit at law or in equity upon the bonds or coupons pertaining thereto, and from collecting the interest due thereon; and that the trustees might be enjoined from taking possession of the road and from foreclosure of the trust deed at the request of the individual defendants. At the commencement of the suit a temporary injunction was allowed as prayed, but process was not served upon the defendant. On the 22d day of January, 1896, the individual defendants filed their petition for the removal of the suit into the circuit court of the United States for the Northern district of Illinois upon the ground that the suit was a controversy wholly between citizens of different states, to wit, a controversy between the complainant, an

Illinois corporation, on the one hand, and Ziegler and the other individual defendants, citizens of states other than the state of Illinois, on the other hand, and which could be fully determined as between them. An order was thereupon entered by the state court, removing the cause into the federal court. The individual defendants, other than Ziegler, answered, setting forth their respective holdings and bonds, and asserted themselves to be bona fide holders, for value, and without notice of the facts set forth in the amended bill. The defendant Ziegler also answered fully, denying the equity of the bill, and asserting his holdings and the sources thereof.

The facts, so far as they are necessary to be stated to present the questions submitted to the court, are these: The Lake Street Elevated Railroad Company was incorporated in the month of August, 1892, with a capital stock of \$5,000,000, for the purpose of constructing and operating an elevated railway some seven miles in length, and within the city of Chicago. Prior to December, 1892, the company had issued \$3,500,000 of its stock. It had constructed one mile of its railway. It had issued \$812,000 of bonds, the proceeds of which presumably had been used in the construction of the one mile of road. The company was in straitened circumstances, and unable to proceed further with the construction of the railway. The enterprise was moribund. Under these circumstances the directors applied themselves to the task of devising plans for the completion of the road. On December 23, 1892, William Ziegler, a resident of New York, was elected a director of the road, and took his seat as director at a meeting of the board on the 2d day of February, 1893. On September 1, 1892, one Miller, a law clerk, financially irresponsible, subscribed for \$1,500,000 of unissued stock. On February 3, 1893, this subscription was approved by the directors, who agreed to receive in payment thereof the notes of Miller, dated September 23, 1892, payable at six months and one year from their date, upon the condition that those who should become contractors for the construction of the road would agree to take these notes of Miller in part payment of the work to be done. This condition was afterwards carried into effect, the notes were delivered to the company and received in payment by the contractors, and the stock was issued to Miller; and presumably this stock passed to the contractors from Miller, the transaction being a device for the issue of stock, and being resorted to, probably, because the subscription of Miller antedated by some months the letting of the contract. Negotiations were entered upon in the fall of 1892 with Underwood and Green for the construction and equipment of the road. At a meeting of the directors of the company held on February 3, 1893, the committee of the board having the matter in charge reported, and proposals were submitted to and considered by the board. On the 4th day of February, 1893, a contract was agreed upon with Underwood and Green as follows: They were to build and equip the road, and were to receive in payment thereof \$11,710,000, of which \$6,500,000 was to be in the capital stock of the company at par, \$5,150,000 in the first mortgage bonds of the company at par, and \$60,000 in cash,—an amount received by the company from one Wheeler upon subscription to stock, which was to be considered as a part of the fund provided to be paid for the expenses of the company during the time of construction, but the directors might use any part of it to pay bills for the construction of the road. It was further arranged that an underwriting agreement should be made to aid the contractors in their work. By this agreement bonds and stock were to be deposited in trust and monthly estimates should be had as the work progressed, and a proportionate amount of bonds and stock delivered to the contractors upon such estimate. Underwood and Green were to procure subscribers to this underwriting agreement, by which the subscribers were to take from the contractors the bonds of the company at 90 per cent. of their par value, and also such amount of stock, as, taken at par, would equal the number of bonds so purchased. To enable the company to carry out the contract, the shareholders agreed to an increase of the capital stock so that the capital stock of the company should amount to \$10,000,000. Ziegler, prior to his connection with the company, had loaned to Underwood and Green the sum of \$30,000 upon their note. After the maturity of the note, and after the contractors had received from the company bonds in payment of the work done in the construction of

the road, he received from the contractors payment of the note in such bonds at ninety per cent. of their par value. He also subscribed the underwriting agreement for \$250,000 of the bonds of the company upon the terms of that agreement. Afterwards, at the solicitation of the president and attorney of the company and of the contractors, and in order that the subscription might be completed within the time limited, and the contractors be enabled to comply with their contract and build and equip the line as therein agreed, he subscribed for an additional \$250,000 worth of bonds upon the agreement by the contractors that, in consideration thereof, they would give to Ziegler an additional bonus in stock received by them in payment of the construction of the road of \$125,000 at its par value. These facts were known to the president and attorney of the company at the time, and the proposition therefor was made in their presence, and they knew, and Ziegler was at the time assured, that the contractors had offered such terms to others, who had and would accept thereof, and so the underwriting agreement would be fully executed within the time limited. This was a matter wholly between the contractors and Ziegler, and in no way affected the rights of the company under the contract. The underwriting agreement was thereby completed, and the contractors enabled to proceed with the construction of the road. The stock received by Ziegler under the underwriting agreement was sold by him in July, 1894, at 18 cents upon the dollar,—a price above its market value. Ziegler at the time of suit owned 400 bonds of the company, of which 8 had then recently been purchased by him in the open market, 145 purchased by him of the company in the year 1894 at 52 cents on the dollar, and the remaining 247 were part of the 500 bonds received by him under the underwriting agreement at 90 cents on the dollar. The bonds purchased of the company were not the bonds delivered by the company to the contractors, but were part of those reserved by the company, all of which were sold by the company to different parties at the same price. At that price Ziegler purchased them at the solicitation of the officers of the company, and at a price not less than, if not greater than, their market value at the time. The other individual defendants purchased their bonds of Ziegler, being part of those received by him from the contractors under the underwriting agreement. They were bona fide purchasers thereof, for value, without notice.

On April 7, 1893, the company executed to the two corporations defendants, as trustees, its trust deed upon its road, to secure \$6,500,000 of bonds, of which \$5,150,000 were to be issued to Underwood and Green under their contract. This trust deed was in the usual form, except that it provided that the holders of bonds should have no right of action at law or in equity upon the bonds, except only in case of the refusal of the trustees to act. It further provided that, upon default in interest continuing for six months, the trustees might, upon request of the holders of one-fourth in interest of the outstanding bonds, and shall, if requested by the holders of a majority in interest of the outstanding bonds, declare the principal matured. It further provided that upon default in the payment of interest, and upon request of a majority in interest of the outstanding bonds, the trustees, on being indemnified, should take possession of the road. These provisions were not in curtailment of the power of the trustees upon default by the company, and of their own motion, to institute such proceedings as they might deem necessary in protection of the trust. The railroad was completed by the contractors, and on the 4th day of March, 1894, the directors of the company, by resolution, accepted possession, without prejudice to any claim that the work was not in compliance with the contract, and the company has since continued in the possession and operation of the railway. In October, 1894, the company had a settlement with the contractors, and for the balance then found due gave them its promissory notes due in January and February, 1895, and upon maturity of the notes made further claims against the contractors with respect to alleged defects in their work; whereupon a further, complete, and final adjustment was made in March, 1895, and mutual releases passed between the company and the contractors. The company paid the interest upon these bonds up to January 1, 1895, paying the interest then due on the bonds held by the individual defendants below in October, 1895. On January 8, 1895, the president of the company reported to a meeting of its stockholders that the

company could not pay the interest upon its mortgage debt, there being a deficit therein of \$146,725.75; that to meet the interest upon its bonds would require an increase of 90 per cent. in the traffic of the company, which was impossible within its territory; that the situation was serious and pressing; and he requested that a committee of stockholders be appointed to confer with a committee of bondholders to devise some plan of readjustment by which foreclosure would be avoided. A committee was accordingly appointed, and in March, 1895, a plan was devised and proposed to the bondholders that they should scale their bonds to 60 per cent. of their face value. The plan contemplated a deposit of the bonds by the bondholders with a trustee, the holders to receive the debentures of the company for 60 per cent. of the par value of the bonds. Ultimately, and upon the assent to the plan of all bondholders, the debentures were to be surrendered, 40 per cent. of the face value of the bonds was to be canceled, and the owners to receive back their bonds at 60 per cent. of their face value; also to receive an income bond of the company for 15 per cent. of the face value of their bonds, the interest upon which was noncumulative, and was payable only out of the income, and after the payment of all fixed charges upon the road. The debentures were to be guarantied by the Northwestern Elevated Railroad Company, which guaranty was to be extended upon surrender of the debentures to the bonds so scaled to 60 per cent. The proposed guarantor was a company having a franchise, but no road or equipment, and then indebted to an amount not disclosed; the guaranty to be given in consideration of a right of way over a portion of the complainant's railway. The plan involved no contribution by stockholders, nor any scaling or surrender of stock. Until this plan should receive the assent of all, the bonds of assenting bondholders were to be held simply as security for the debentures to be issued, but was to be effective, and the debentures were to be issued upon the assent of the holders of 3,800 of the 7,474 bonds. More than the necessary number assented to warrant the issue of the debentures, the officers of the company owning or controlling the larger number of the bonds. Holders of bonds in the amount of \$6,694,000 assented to the plan, and deposited their bonds as proposed, and received the debentures of the company; but holders of bonds to the amount of \$780,000, including the individual defendants, declined to or have not assented to the plan. The company paid the interest on the debentures due July 1, 1896, but made default in the payment of interest upon the bonds of holders not assenting to the plan. On January 27, 1896, the complainant below filed its motion to remand the cause to the state court upon the ground that the court was without jurisdiction to hear and determine the cause, because there is not in the suit a controversy which is wholly between citizens of different states, and which can be fully determined as between them; and that no process was issued in the suit by the state court, and there was no controversy therein by the defendants, or either of them, and they had not submitted themselves to the jurisdiction of the state court. This motion was, on March 16, 1896, overruled by the court. The cause came on for final hearing on the 12th day of July, 1896, when a decree was passed dismissing the bill without prejudice to the complainant's right to assert the matters alleged in its amended bill by way of defense, or by cross bill to the bill exhibited by the Farmers' Loan & Trust Company against the Lake Street Elevated Railroad Company and others since the commencement of this suit, for the foreclosure of the trust deed executed by the complainant. From this decree both parties appeal, the complainant below assigning for error that the court erred in entertaining jurisdiction and in refusing to remand the cause to the state court, and also that the court erred in dismissing the bill and in declining to enter a decree for the complainant. The defendants assign for error that the court erred in dismissing the bill without prejudice, and in not dismissing it for want of equity.

Charles H. Aldrich, for complainant.

John J. Herrick, I. K. Boyesen, and Levy Mayer, for defendants.

Before WOODS and JENKINS, Circuit Judges, and SEAMAN, District Judge.

JENKINS, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

The question which must first engage our attention touches the jurisdiction of the court below and the propriety of the removal of the cause from the state court. The complainant was a citizen of the state of Illinois. All of the defendants were citizens of other states, with the exception of the American Trust & Savings Bank, one of the trustees under the trust deed, which was a citizen of the state of Illinois. By section 2, Act March 3, 1887 (24 Stat. 552, c. 373, § 2, cl. 3), as amended by Act Aug. 13, 1888 (25 Stat. 434, c. 866), it is provided that any suit of a civil nature of which the courts of the United States are given jurisdiction by the act, brought in the court of any state, the defendants being nonresidents of the state in which the suit is brought, may be removed into the federal court of the proper district; "and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district." Several cases have arisen in which the supreme court has passed upon and construed this statute. The summing up of the whole contention is, we think, well and accurately stated in Mr. Carter's recent work on the Jurisdiction of Federal Courts as Limited by Citizenship and Residence of the Parties.

"In the case of mere formal parties, if the action can be maintained as between the other parties to the suit, the fact that formal parties are joined as complainants or defendants, between whom and the opposing parties the requisite diversity of citizenship does not exist, will not oust the court of jurisdiction. In cases of this character the only question is as to who may be considered merely formal parties. In chancery proceedings the supreme court has divided parties into three classes: (1) Formal parties, who have no interest in the controversy between the immediate litigants, but have such an interest in the subject-matter as may be conveniently settled in the suit and thereby prevent further litigation; (2) necessary parties, who have an interest in the controversy, but whose interests are separable from those of the parties before the court, and will not be directly affected by a decree which does full and complete justice between them; (3) indispensable parties, who not only have an interest in the subject-matter of the controversy, but an interest of such a nature that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. Formal parties may be made parties or not, at the option of the complainant. Necessary parties must be made parties if practicable, in obedience to the general rules which require all persons to be made parties who are interested in the controversy, in order that there may be an end to litigation; but this general rule in the national courts is subject to the exception that, if such parties are beyond the jurisdiction of the court, or if making them parties would oust the jurisdiction of the court, the suit may proceed to a final decree between the parties before the court, leaving the rights of the absent parties untouched and to be determined in any competent forum. Indispensable parties must, of course, be made parties, and the court cannot proceed without them."

The bill here affected certain bonds and stock of the complainant company, which were alleged to be held by the individual defendants, and which it was charged were obtained by Ziegler in fraud

of the duty which he owed to the complainant as a director, and under the circumstances stated in the bill. The validity of the trust deed and of the contract with Underwood and Green were not attacked, nor was the validity of the stock and bonds in question impugned. But it was said that, because of the supposed violation of duty by Ziegler, who acquired the stock and bonds of the contractors and certain of the bonds from the company while he was a director of the company, he, and the other individual defendants who received their bonds from him with notice of the circumstances, ought justly to account to the company for the bonds and stock held by them, respectively, and to surrender to the company such bonds and stock upon repayment to them by the company of the amount respectively paid by them therefor. The trustees under the trust deed, one of whom was a citizen of the state of Illinois, of which state the complainant was also a citizen, were made parties defendant to obtain against them an injunction pendente lite restraining them from taking possession of the road and from commencing suit at law upon the bonds or in equity to foreclose the trust deed by reason of default of the company in the payment of interest upon the affected bonds at the solicitation or upon demand of the individual defendants. No decree was sought against the trustees, or other relief demanded against them. It is quite clear that these trustees were not necessary parties to the suit, because they had no interest in the controversy, and certainly no interest separable from that of the individual defendants. They were either indispensable parties or merely formal parties. These trustees were appointed in the interest of all the bondholders to protect the mortgage security, and upon default to take measures to subject it to sale in payment of the amount which should be found due upon the bonds. They were not the holders or owners of the bonds and stock in controversy, nor had they any interest therein. It was matter of indifference to them whether the complainant or the individual defendants should be adjudged entitled to these bonds. If the complainant should, by decree, become the owner of the bonds and stock upon repayment to the individual defendants of the amount they paid therefor, the bonds and stock would be valid bonds and stock in its hands, the bonds still secured by and entitled to the protection of the trust deed, and both bonds and stock subject to resale by the company. The controversy, therefore, in no way affected the validity of the bonds, and in no way lessened the legal estate in the property which, by the trust deed, was vested in the trustees. They had no possible interest in the controversy, and were not indispensable parties to it. They were merely formal parties, made such to prevent them by injunction pendente lite from complying with the demand of the individual defendants to proceed to execute the trust because of the default of the company. They were under no obligation to comply with such demand, because, under the terms of the trust deed, the individual defendants were not the holders of a sufficient number of bonds to require the trustees to put into execution their powers. They might, of their own motion, proceed to foreclose for the default, but that duty was not rendered impera-



tive by the demand of the individual defendants, and they are only sought to be enjoined from compliance with that demand, and not from exercise of their discretion. The controversy could be wholly determined without their presence. They were merely formal parties, and the community of citizenship of the bank, trustee, with the complainant cannot oust the federal court of jurisdiction.

This conclusion, we think, is supported by the decisions of the ultimate tribunal. In *Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963, a bill was filed against the principal defendant to reform a deed executed to a deceased person, and to declare a trust with respect to the land conveyed. The executors of such deceased person, who were citizens of the same state with the complainant, were also made defendants, that they might be compelled, upon decree declaring the trust, to convey the title derived by them from such deceased person. It was held that they were merely formal parties to the suit, and, jurisdiction as between the complainant and the principal defendant being undoubted, that jurisdiction could not be defeated by the joinder of formal parties whose citizenship was the same as that of the complainant. In *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514, a citizen of Minnesota and a citizen of Indiana brought suit against citizens of New York, Massachusetts, and Wisconsin, and a land company, a citizen of Minnesota. An accounting was sought with respect to moneys received by the individual defendants upon the sale of certain lands, in which it was claimed the ancestors of the complainants were interested, and also with respect to like lands which the individual defendants had caused to be conveyed to the land company, that that company should convey to the complainants their proportionate interest in the land. It was held that there was a separable controversy between the complainant and the defendant company, which could be determined, as between them, without the intervention of the land company; and that the suit was, therefore, properly removable. In delivering the opinion of the court, Mr. Justice Harlan observes (pages 214, 216, 103 U. S., and page 518, 26 L. Ed.):

"We have endeavored to show that the land company was not an indispensable party to the controversy between the plaintiffs and the defendants, citizens of New York, Wisconsin, and Massachusetts. Whether those defendants and the land company were not proper parties to the suit, we do not now decide. \* \* \* A defendant may be a proper, but not an indispensable, party to the relief asked. In a variety of cases it is in the discretion of the plaintiff as to whom he will join as defendant. Consistently with the established rules of pleading, he may be governed often by considerations of mere convenience; and it may be that there was or is such a connection between the various transactions set out in the complaint as to make all of the defendants proper parties to the suit, and to every controversy embraced by it. \* \* \* We are of the opinion that, upon the filing of the petition and bond of the individual defendants in the separable controversy between them and the plaintiffs, the entire suit, although all of the defendants may have been proper parties thereto, was removed to the circuit court of the United States, and that the order remanding it to state court was erroneous."

In *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. 3, 27 L. Ed. 69, an accounting was sought by the complainant against the principal defendant, as between whom the federal court had undoubted juris-

diction. The other defendants, who had like citizenship with the complainant, were trustees of an estate in which the principal defendant was interested, and the bill asked for a decree against the defendant's trustees for the amount of the principal defendant's interest in the estate, in satisfaction, in whole or in part, of the part which might be adjudged against the principal defendant upon the accounting. The court held that, while the trustees were proper parties to the suit, they were neither indispensable nor necessary parties, and jurisdiction of the federal court was not devested by their joinder. We are referred to several cases in the supreme court which are supposed by counsel to hold a different doctrine, and to establish that the trustees here are indispensable parties to the suit. We think that the effect of these decisions has been misconceived. *Corbin v. Van Brunt*, 105 U. S. 576, 26 L. Ed. 1176; *Winchester v. Loud*, 108 U. S. 130, 2 Sup. Ct. 311, 27 L. Ed. 677; *Thayer v. Association*, 112 U. S. 717, 5 Sup. Ct. 355, 28 L. Ed. 864; *Crumph v. Thurber*, 115 U. S. 56, 5 Sup. Ct. 1154, 29 L. Ed. 328; *Insurance Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733, 29 L. Ed. 898; *Brooks v. Clark*, 119 U. S. 502, 7 Sup. Ct. 301, 30 L. Ed. 482; *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726, 36 L. Ed. 528; *Wilson v. Oswego Tp.*, 151 U. S. 56, 14 Sup. Ct. 259, 38 L. Ed. 70; *Merchants' Cotton-Press & Storage Co. v. North American Ins. Co.*, 151 U. S. 368, 14 Sup. Ct. 367, 38 L. Ed. 195. Whether one is an indispensable party, or a mere formal party, depends upon the case made; and a brief reference to the facts in each of these cases will, we think, establish that the decisions are in accord with the principle herein asserted.

In *Corbin v. Van Brunt* the action was in ejectment by citizens of the state of New York against a corporation of the same state, and individual defendants, residents of other states, to recover possession of certain premises in the state of New York. As shown by the court, there was no sort of separable controversy authorizing a removal of the cause.

In *Winchester v. Loud*, one of two grantors, both citizens of Michigan, filed his bill against three trustees, two of whom were citizens of Michigan, and one of whom was a citizen of Massachusetts, and against the other debtor, a citizen of Michigan, and the holder of the debt, a citizen of Massachusetts, asking for an accounting by the trustees with respect to property conveyed to them in trust to secure the debt, for a removal of two of the trustees, and, upon payment of the debt, for a conveyance of property conveyed in trust. It was held there was no separable controversy. The statement of the case is all-sufficient to show its irrelevancy to the case in hand.

In *Thayer v. Association* the parties in a trust deed given to secure a debt brought suit against the trustee and the claimant of the debt, alleging that the trustee was proceeding to sell the property conveyed in trust for nonpayment of the debt secured thereby; that the debt had in fact been paid, and sought a decree so adjudging, a release of the mortgaged property from the trustee, and that the sale be enjoined. The trustee was a citizen of the state of which

the complainants were citizens. It was held that the federal court had no jurisdiction, and that the trustee was an indispensable party to such a suit. The legal title of the trustee was sought to be extinguished, and that could not be done in a suit to which he was not a party.

In *Crump v. Thurber* the complainant brought suit against a corporation of the state of which he was a citizen, and against others, residents of other states, to declare certain stock of the corporation standing in the name of one of the defendants, and held by another of the defendants, to be owned by the complainants, and that the corporation defendant cancel upon its books the shares so standing in the name of the defendant, and issue to the complainant certificates for such shares. To such a suit the corporation was an indispensable party, and jurisdiction was rightly denied.

In *Insurance Co. v. Huntington* the complainant, a citizen of New York, brought in a state court of the state of Ohio a creditors' bill to obtain satisfaction of his judgment out of the incumbered real estate of the debtor by a sale and distribution of the proceeds among the lienholders. One of the lienholders, a citizen of the state of Pennsylvania, answered to the suit, claiming a first lien upon the incumbered property, and asking that the property be sold, and the proceeds first applied to the payment of its mortgage, and then sought to remove the case from the state court into the federal court on the ground of a separable controversy. The court held that there was no separable controversy; that the purpose of the suit was a decree subjecting the property to sale discharged of all incumbrances, and the distribution of the proceeds among the various lienholders according to priority of the various liens as they should be determined by the court; that there was but a single cause of action, to wit, an equitable execution of a judgment against the property; that the cause of action was indivisible, and that, while there might be separate defenses, these did not constitute separate controversies, within the meaning of the act; that the issue presented by the separate answers was merely an incident to this main contention. This case is without relevancy to the one before us.

In *Brooks v. Clark* there was a joint cause of action against two defendants, one of whom had community of citizenship with the plaintiff, and after judgment in the state court was let in to defend, and then sought to remove the cause to the federal court. There was no separable controversy, and neither defendant was a formal party.

In *Torrence v. Shedd* the complainant brought suit in partition against over 90 defendants, claiming title to an undivided one-third through conveyance by one Sorin, and seeking to have assigned to all the tenants in common their shares in severalty. Most of the defendants answered, denying the title of plaintiff, and asserting title in themselves. Afterwards Sorin was allowed to intervene and answer and to file a cross bill, asserting that the complainant's title was held in trust for the cross complainant; that the plaintiff had, in violation of his trust, refused to reconvey to Sorin, but had contracted to sell to one Brown. He sought a decree, and claimed an

equitable title in whatever of the land should be set off to the plaintiff. It was urged that this controversy between the complainant and Sorin presented a separable controversy, which could be wholly determined as between them, and that the case was, therefore, properly removable into the federal court. But it was held otherwise, Mr. Justice Gray, speaking for the court, declaring (page 532, 144 U. S., page 728, 12 Sup. Ct., and page 532, 36 L. Ed.):

"The object of the suit was not merely the establishment of the title of the plaintiff in an undivided share of the land, but it was the partition of the whole land, and the conversion of his undivided share into an entire estate in a proportional part, as well as the establishment of his title against all the defendants. The controversy between the plaintiff and Brown and Sorin related only to the title claimed by the plaintiff in an undivided share. Sorin's whole claim was of an equitable estate in whatever should be set off to the plaintiff, and the other defendants denied that either the plaintiff or Brown or Sorin had any title whatever. Neither of the three, therefore, could recover judgment setting off to him any share in the land without establishing a title, not only as between themselves, but also as against all the other defendants. The inevitable result is that the controversy of the plaintiff and Brown with Sorin was merely incidental to the main object of the suit, could not be determined as between them without the presence of the other defendants, and did not constitute such a separate controversy as would justify a removal into the circuit court of the United States."

This case certainly does not bear upon the one before us.

In *Wilson v. Oswego Township* a suit was brought by one claiming to be the owner of certain bonds which had been deposited with a bank to be held in trust for him, and to be delivered to him upon the completion by him of certain work. The complainant sought for the delivery of the bonds to him in pursuance of the trust deed. It was held that the bank, being bailee and trustee of the bonds, was an indispensable party, as, of course, it was.

In *Merchants' Cotton-Press & Storage Co. v. North American Ins. Co.* the case is thus stated in the report:

"A railroad company agreed with a cotton-compress company that the latter should receive and compress all the cotton which the railroad might have to transport in compressed condition, and that it should insure the same for the benefit of the railroad company, or of the owners of the cotton, for a certain compensation, which the railroad company agreed to pay weekly. It was further agreed that the compress company, on receiving the cotton, was to give receipts therefor, and that the railroad company, on receiving such a receipt, was to issue a bill of lading in exchange for it. Cotton of the value of \$700,000, thus deposited with the compress company for compress and transportation, was destroyed by fire. That company had taken out policies of insurance upon it, but to a less amount, in all of which the compress company was named as the assured, but in the body of each policy it was stated that it was issued for the benefit of the railroad company or of the owners. The various owners of the cotton further insured their respective interests in other insurance companies, called in the litigation the 'Marine Insurance Companies.' After the fire, the amounts of the several losses were paid to the assured by the several marine companies. In an action in the courts of Tennessee to settle the rights of the parties, the supreme court of that state held (*Lancaster Mills v. Merchants' Cotton-Press Co.*, 89 Tenn. 1, 14 S. W. 317; *Demming v. Merchants' Cotton & Storage Co.*, 90 Tenn. 306, 17 S. W. 89) that the companies so paying were entitled to be subrogated to the rights of the owners or consignees against the railroad company under its bill of lading, and that the railroad company was entitled to have the insurance which had been taken out by the compress company collected for its benefit. The railroad company not being party to those suits, the marine insurance

companies filed their bill in equity in a state court in Tennessee against the compress company, the several persons who had insured the destroyed cotton for it, and the railroad company, to reach and subject the fire insurance taken out by the compress company for the benefit of the railroad company, and for other relief set forth in the bill. The plaintiffs in the suit were a corporation under the laws of Pennsylvania, a corporation under the laws of New York, and a corporation under the laws of Rhode Island, on behalf of themselves and of all other companies standing in like position. On the other side were two corporations under the laws of Pennsylvania, two corporations under the laws of Great Britain, a corporation under the laws of New York, certain residents of Rhode Island, certain citizens of New York, certain citizens of Tennessee, two aliens, and forty-four insurance companies of West Virginia, Pennsylvania, New York, Illinois, Louisiana, Wisconsin, Alabama, Connecticut, Ohio, Texas, Indiana, and Great Britain. The defendants petitioned for the removal of the cause to the circuit court of the United States, on the ground that the controversy was wholly between citizens of different states, or between citizens of one or more of the several states and foreign citizens and subjects, and that the same could be fully determined as between them. The petition was denied, and the cause proceeded to judgment in the state court."

The opinion is exhaustive upon the facts declared, and satisfactorily establishes that both the railroad company and the compress company were indispensable parties to the suit, and that, therefore, the case was not removable. We have not been able to perceive that the ruling there in the slightest degree antagonizes the ground upon which the question here presented must be determined, but, as we think, inferentially affirms our position.

We have thus reviewed, possibly at unnecessary length, the cases in the supreme court having relation to the subject of removal of a separable controversy, and they confirm us in our opinion that in the case before us the only controversy is between the complainant and the individual defendants, and that, while it may have been proper enough to join the trustees as parties defendant, they were not indispensable or necessary parties to the bill, but merely formal parties, without whose presence the right as between the complainant and the individual defendants could be fully determined; and that the presence of the trustees as parties defendant cannot, because of the community of citizenship of one of them with the complainant, oust the federal court of jurisdiction. The refusal of the lower court to remand the cause was consequently correct.

This conclusion brings us to the questions presented upon the merits of the case. We are not advised by the records of the considerations which led the court below to dismiss the bill without prejudice to the right of the complainant to assert, in the foreclosure suit brought by one of the trustees to foreclose the trust deed, by answer or cross bill, the matters alleged in the present bill. It is manifest that neither party desired such disposition of the case, since both have appealed from the decree. Both parties had presented to the court, by pleadings and by proofs, their respective claims, and a full hearing was had. There would seem to be no good reason to remand the parties against the wishes of each to further litigation, or why the matter in dispute should not have here final determination upon the merits.

Two propositions are presented to our consideration by counsel for the Lake Street Elevated Railroad Company in support of the

contention that a decree should have been rendered in favor of the complainant below, which we will consider in their order. It is firstly contended that the \$725,000 of stock which Ziegler received from Underwood and Green, the contractors, pursuant to the underwriting agreement, and which had been issued by the company under the contract between them and the company for the construction of the railway, was so issued in violation of section 13, art. 11, of the constitution of the state of Illinois, repeated in chapter 114, § 21, par. 22, of the statutes of that state (3 Starr & C. Ann. St. 1896, p. 3236). This provision is as follows:

"No such corporation shall issue any stock or bonds, except for money, labor or property actually received and applied to the purposes for which such corporation was organized. All stock dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation, shall be void."

This clause of the constitution has received construction by the supreme court of the state in *Railroad Co. v. Thompson*, 103 Ill. 187. It was there held that the object of the provision "was to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad, or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market bonds or stocks that do not and are not intended to represent money or property of any kind, either in possession or in expectancy; the stock or bonds in such case being entirely fictitious. But it was not intended by that provision to interfere with the usual and customary methods of raising funds by railroad companies by the issue of their stock or bonds for the purpose of building their roads, or of accomplishing other legitimate corporate purposes." This construction was approved by the supreme court of the United States in *Railroad Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595, where a similar constitutional provision of the state of Arkansas was considered. There it was claimed that the bonds issued by the railway company were void because issued in contravention of the constitutional provision. The entire issue of bonds, amounting to \$2,600,000, and the entire issue of stock, amounting to \$1,300,000, were given in consideration of the conveyance to the company of the property of a predecessor company, bought by the trustees under a mortgage foreclosure. The value of the property conveyed did not exceed the par value of the stock so given, and the contention was that the \$2,600,000 of bonds were given without consideration received in money or property, and so within the prohibition of the constitution. This court overruled this contention, and held the bonds valid. Mr. Justice Harlan, speaking for the court (page 298, 120 U. S., page 487, 7 Sup. Ct., and page 600, 30 L. Ed.), says:

"The prohibition against the issuing of stock or bonds, except for money or property actually received or labor done, and against the fictitious increase of stock or indebtedness, was intended to protect stockholders against spoliation, and to guard the public against securities that were absolutely worthless. One of the mischiefs sought to be remedied is the flooding of the market with stock and bonds that do not represent anything whatever of substantial value. In reference to a provision in the constitution of Illinois adopted in 1870, containing a prohibition, as to railroad corporations, similar to that imposed by the Arkansas constitution upon all private corporations, the supreme court of the former state, in *Railroad Co. v. Thompson*, 103 Ill. 187, 201, said: 'The latter part of the clause of the constitution in question,

which declares that all stocks, dividends, and other fictitious increase of the capital stock or indebtedness of such corporation shall be void, we think clearly points out the chief object which the constitutional convention sought to accomplish in adopting it; and to this we must look, in a large degree, for a solution of the language which precedes it. The object was, doubtless, to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad, or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market bonds or stock that do not, and are not intended to, represent money or property of any kind, either in possession or expectancy, the stock or bonds in such case being entirely fictitious. \* \* \* Under this provision of the constitution, railroad companies have no right to lend, give away, or sell on credit their bonds or stock, nor have they right to dispose of either, except for a present consideration, and for a corporate purpose." "Recurring to the language employed in the Arkansas constitution, we are of opinion that it does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear, from the words used, that the framers of that instrument intended to restrict private corporations—at least, when acting with the approval of their stockholders—in the exchange of their stock or bonds for money, property, or labor upon such terms as they deem proper; provided, always, the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. We cannot suppose that the scheme whereby the appellant acquired the property, rights, and privileges in question for a given amount of its stock and bonds falls within the prohibition of the state constitution. The beneficial owners of such interests had the right to fix the terms upon which they would surrender those interests to the corporation of which they were to be the sole stockholders."

These cases speak authoritatively to us the construction to be given the constitutional provision under consideration and the principle upon which we are to determine whether the facts here involved place the issue of stock in question under the ban of the constitutional provision. The subscription by Miller antedated the contract between the company and Underwood and Green by some months. He was, without doubt, pecuniarily irresponsible. We are not informed of the object and purpose of his subscription, but the fact of his pecuniary irresponsibility does not, of itself, render void the stock issued thereon. It is a circumstance to be considered in connection with all the facts of the case to ascertain whether that stock was issued without consideration, and was fictitious. His subscription was approved, and the notes he was to give therefor were later on accepted by the board of directors upon the condition that the contractors would accept the notes as so much paid upon the contract for the construction of the road. We are not advised of the transaction as between the contractors and Miller, but presumably they received from him the stock, and the bill so treats the fact to be. The transaction was probably a device to carry into effect the prior subscription of Miller, and to transfer the stock to the contractors in part payment of their work on account. This conclusion is fortified by the fact that the original capital stock amounted to \$5,000,000, of which \$3,500,000 had been issued, and the balance was unissued, and represented by the Miller subscription; and that, to carry out the contract with Underwood and Green, the stockholders of the company voted to increase the capital stock to \$10,000,000, and, as

the contractors were to receive under their contract \$6,500,000 of stock, that amount was made up of the increase of stock and the amount subscribed by Miller. The pecuniary irresponsibility of Miller cannot, therefore, as we think, affect the question, since that stock was issued in consideration of the work performed by the contractors, and was applied as so much paid on the contract. The like result follows with respect to the stock issued to Underwood and Green. It was issued in payment of work done under contract, their subscription thereto in May, 1893, being merely formal, and to enable the issuing of stock to them for work done.

It is urged that the value of the road constructed did not exceed \$3,500,000, and that the contract was improvident, and is presumed to be fraudulent. We cannot concur in this contention. In the straitened condition of the company at the time of the contract the directors seemed to have done the best they could to procure the construction of the road upon as favorable terms as could be obtained. The contract appears to have been made in entire good faith upon their part. With \$3,500,000 of stock and \$812,000 of bonds outstanding, but one mile of the road had been constructed, and the company was without means to continue the enterprise. They bargained fairly with the contractors with respect to the price to be paid. That price cannot be measured by the face value of the bonds and stock to be received by the contractors. The stock was manifestly of but little, if any, value, and that purely speculative. The bonds were comparatively valueless until completion of the road, and, although disposed of by the contractors under the underwriting agreement at 90 cents on the dollar, had, after the completion of the road, a market value of but 52 cents on the dollar. If any one has lost by the transaction, it is not the complainant company, but those who, under the underwriting agreement, and for the purpose of carrying out a public enterprise, invested their money in these bonds at a price in excess of their real value. This is not, we think, a case of fictitious and speculative issue of stock without consideration, within the meaning of the constitutional provision, as construed in the cases quoted. It possibly may be better in the long run if the law should provide that all subscriptions of stock could be paid only in cash. This would doubtless prevent the floating of wild and chimerical schemes by which loss is entailed upon a community. But it must not be forgotten that men will not invest large capital in speculative and hazardous enterprises without being assured that, in case of success, they shall receive a profit corresponding relatively to the risk assumed. Whatever may be the correct solution of the problem, the law does not require payment of subscription of stock to be in cash. It may be paid for in work, labor, material, or service rendered. We sit to declare, not to make, the law, and are unable to condemn the transaction in question as within the ban of the constitutional provision.

But if this were otherwise, and the constitutional provision denounces this issue of stock, the act was ultra vires the corporation, and the stock was void, not merely voidable. *Bank v. Kennedy*, 167 U. S. 363, 17 Sup. Ct. 831, 42 L. Ed. 198. It had no validity in the



hands of a bona fide purchaser for value, without notice. The complainant has not suffered pecuniary injury by its issue, and cannot call upon Ziegler to account for what he received upon its sale, for that would be to affirm a void transaction; to both reprobate and approbate.

It is further urged by the Lake Street Elevated Railroad Company that, where default has occurred in the payment of a large bonded indebtedness, and an overwhelming majority of the bondholders desire to prevent foreclosure through some scheme of reorganization or by scaling the bonds, it is competent for a court of equity, to whom the minority bondholders have applied for relief, to ascertain the interest of such minority holders in the property and secure the same to them without foreclosure and sale. We need not, in the present case, assent to or dissent from the proposition in the general terms in which it is stated, for there are several sufficient reasons which render the suggestion immaterial to the case in hand. No bondholder has here applied to the court for affirmative relief. The action is by the debtor to declare certain bonds and stock to have been improperly acquired by one of its directors. Its bill suggests no such state of facts as are involved in the proposition, and seeks relief upon no such predicate. It doubtless is true that a court of equity, taking upon itself in foreclosure proceedings the administration of a public enterprise, will view favorably, and lend all proper aid to, a plan of reorganization which is fair and just. But no such case is presented by this bill. It was broadly suggested at the bar that upon the facts disclosed the time was ripe and the occasion fit for a court of equity to take a step in advance, and to declare that it could rightly determine the propriety of a scheme of reorganization, and compel recalcitrant bondholders to comply with it. This is certainly a startling proposition, suggesting a wide departure from precedent, and a great enlargement of equity power. If the case before us were one in which the proposition could be properly considered, it might be suggested that every one interested in an enterprise must determine for himself whether he will continue in it or abandon it; that a creditor must determine for himself whether he shall abate his claim or contend for the full amount. While a court of equity will not lend a helping hand to an importunate creditor to exact an inequitable demand, it may be suggested that here we are asked by the corporation debtor to compel a minority of the bondholders to scale their bonds, and to accept but 60 per cent. of the face value of the bonds upon the same security now held for their face; the additional guaranty proposed, if not ultra vires the proposed corporation guarantor, being, upon the facts disclosed, of doubtful value, if not wholly worthless. In addition to this, the stockholders of the Lake Street Elevated Railroad Company, who proposed this scheme, and in whose interest we are asked to enforce it, designed to make no sacrifice on their part in placing the company in a position to meet its obligation. If the scheme should be assented to, and should prove successful, the bondholders would abate at least 25 per cent. of their debt, which would inure to the benefit of the stockholders. In view of the further fact that, as it

is said, the assenting bonds are held or controlled by the directors of the company, we should hesitate to declare that the scheme so abounds with equity that a chancellor should delight to render it his aid and assistance if it were fit for him in any case to exercise the powers of a court of equity for the enforcement of a scheme of reorganization. This, however, is not such a scheme, but the mere proposal of a debtor to its creditors to compromise the debt.

Upon the whole, we are of the opinion that the complainant's case is without merit, and that its bill should have been dismissed upon the merits. The appeal of the Lake Street Elevated Railroad Company is denied. The appeal of the defendants to the bill is sustained. The decree is reversed, and the cause is remanded to the court below, with directions to enter a decree dismissing the bill for want of equity; the costs of both appeals to be taxed against the complainant below.

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#### KIMBALL v. CITY OF CEDAR RAPIDS et al.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. January 22, 1900.)

##### FEDERAL JURISDICTION—ACTION BY STOCKHOLDERS.

A suit by a stockholder in a waterworks company to restrain a city from putting in force and fixing water rates, on the ground that they are so low as to deprive the stock of any earning ability, thus depriving complainant of the equal protection of the law, in violation of Const. Amend. 14, being one in which complainant and the company are united in interest, though the latter is named as defendant, a federal court will not refuse to entertain jurisdiction, under equity rule 94, as being framed to invoke such jurisdiction, by using the name of the stockholder, where, if the suit was brought in the name of the corporation, jurisdiction would not exist, the case being one of federal cognizance irrespective of citizenship.

**In Equity.** Submitted on application for issuance of preliminary injunction.

Charles A. Clark & Son, for complainant.

John N. Hughes, Jamison & Smyth, Smith & Smith, and Rickel & Crocker, for defendants.

**SHIRAS**, District Judge. From the averments in the bill filed in this case it appears that the complainant is a stockholder in the Cedar Rapids Water Company, and in that capacity he seeks by this proceeding to restrain the city of Cedar Rapids and its officials from publishing and putting in force an ordinance adopted by the city council fixing the rates to be charged by the waterworks company for supplying water to the city and its inhabitants, it being averred that the rates and provisions of the ordinance adopted are such that it would prevent the earning of sufficient money by the company to enable it to pay a dividend to the stockholders after providing for the expenses and outlay incident to the management of the plant of the waterworks company and the interest upon the bonded debt of the company; and, furthermore, that the putting in force of the ordinance would be a violation of a contract now in force between the city and the waterworks company, regulating

the rates to be charged and the purposes for which water is to be furnished for city use. It is further expressly charged in the bill that the effect of the enforcement of the ordinance will be to deprive the stock in the waterworks company of any earning ability, and thus complainant will be deprived of his property without compensation, and therefore without due process of law, and thereby complainant will be deprived of the equal protection of the law in express violation of the fourteenth amendment to the constitution of the United States. It is further averred in the bill that complainant is a citizen of the state of Massachusetts; that the waterworks company and the city of Cedar Rapids are corporations created under the laws of the state of Iowa; that the individual defendants—being the mayor and other city officials—are all citizens of Iowa; and that complainant owns 255 shares of stock in the waterworks company, of the par value of \$11,250. The case is now before the court upon an application for a preliminary writ of injunction to restrain the publication and putting in force the proposed ordinance until the validity thereof is heard and determined. The defendants named in the bill are the city of Cedar Rapids, the mayor, aldermen, and recorder of the city, and the waterworks company. As the bill is framed for the purpose of invoking the protection of the provisions of the federal constitution, and as the matter involved exceeds \$2,000 in amount, the case is one which falls within the jurisdiction of this court, irrespective of the citizenship of the parties in interest; but it is strongly urged on behalf of the city and its officials that this court ought not to take jurisdiction of the bill as framed, because the proceedings are instituted by a stockholder of the waterworks company to protect rights properly belonging to the company in its corporate capacity; that it appears that the company has already brought an action in the district court of Iowa for Linn county to restrain the enforcement of the ordinance; and that complainant has not complied with the requirements of equity rule 94, and therefore the bill should be dismissed. The purposes for which this rule was promulgated by the supreme court are clearly set forth in *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, it being therein stated that the rule is aimed at two evils,—one being the effort to invoke federal jurisdiction wrongly by using the name of a stockholder in cases wherein, if the suit was brought in the name of the corporation, jurisdiction in the federal tribunal would not exist; and the other to prevent a minority of the stockholders from controlling and dictating the action of the corporation in matters properly within the control of the directors as the representative of the whole body of the stockholders. In the case now before the court, as already stated, it is one within federal cognizance, irrespective of the citizenship of the parties, and therefore the provisions of rule 94 cannot be invoked on the ground that the suit is in the name of a stockholder, in order to confer jurisdiction on this court, which would not exist if the suit had been brought by the waterworks company.

Is the suit open to the objection that a single stockholder is seeking to control the action of the corporation, and is thereby usurping

the power of control confided to the directors of the company? The object of the bill is not to compel or restrain action on part of the company, its directors or officers, but to prevent action on part of the city of Cedar Rapids which it is averred will wholly destroy the value of complainant's property, to wit, the shares of stock by him owned in the waterworks company. In *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, the supreme court recognized the right of individual stockholders in railway companies to bring bills in equity in the federal court to restrain the enforcement of the statute adopted by the legislature of the state of Nebraska regulating railway charges, on the ground that the rates prescribed were insufficient to secure just compensation; and it is difficult to see, under the doctrine of that case, why this court should refuse to entertain the bill filed herein. It is doubtless true, as is urged by the defendants, that the complainant and the water company are working in harmony to accomplish the same end, in that it appears that the company, as already stated, has instituted a suit in the district court of Linn county to the same effect as is sought by the bill in this court; but this fact will not justify the court in holding that this suit should be dismissed because thereby the single stockholder is seeking to control the corporate action of the waterworks company in a matter properly within the duties and powers of the board of directors. There is force in the contention of the defendants that the company, although named as a defendant in the bill, is in fact united in interest with complainant. In determining whether the actual controversy between the parties is one of which the court will assume jurisdiction the court may arrange the parties as plaintiffs or defendants, according to their actual interest in the subject-matter of the suit, having the right to disregard the position assigned them by the pleader. *Harter v. Kernochan*, 103 U. S. 562, 26 L. Ed. 411. Applying this principle to the present case, it appears that in fact the suit embraces a controversy upon one side of which the parties in interest are the complainant and the waterworks company, and on the other the city of Cedar Rapids and its officials; and, as the controversy is clearly one arising under the provisions of the federal constitution, according to the ruling of the supreme court in *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, no reason is perceived why the court should refuse to take jurisdiction over it. As the court takes jurisdiction on the ground that in truth the complainant and the waterworks company are united in interest in the case, the company should, by amendment to the bill, be made a co-complainant therein, and, that being done, the suit will present a controversy within the jurisdiction of the court.

Upon the argument several questions were discussed which do not properly arise upon this application for a preliminary injunction, and which cannot be intelligently presented or considered until the facts are brought before the court. For the present, and upon the showing made in the bill, it must be held that complainant is entitled to the preliminary injunction prayed for, and it is therefore ordered that upon filing with the clerk a bond in the sum of

\$5,000 conditioned to pay all costs and damages that may be awarded defendants by reason of the issuance of the injunction, with sureties to be approved by the clerk of this court or his deputy at Cedar Rapids, a writ of preliminary injunction under the seal of the court shall be issued as prayed for in the bill herein filed.

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**McILWAINE et al. v. ELLINGTON et al.**

(Circuit Court, W. D. North Carolina, Fourth Circuit. January 24, 1900.)

**CLERK OF COURT—FEES—PREPARING RECORD FOR APPEAL.**

The document required by Cir. Ct. App. Rule 14 (31 C. C. A. clv., 90 Fed. clv.), on appeal thereto, consisting of a true copy of the record in the trial court, bill of exceptions, assignments, and all proceedings in the cause, including the opinion of the court below, all under the hand and seal of the clerk, called by said rule, in case of writ of error, a "return" thereto, is a record, within Rev. St. § 828, allowing to the clerk for "making any record, certificate, return, or report, for each folio, 15 cents," preparation thereof is not a mere copying of a paper, fee for which is 10 cents per folio.

**In Equity.**

John W. Hinsdale, for complainants.

Robert Dick Douglas, for the clerk.

**SIMONTON**, Circuit Judge. This case comes up on a motion to retax a bill of costs in respect to the fee of S. L. Trogdon, Esq., clerk of this court. The decree of the circuit court having been filed, an appeal was allowed to the circuit court of appeals. Thereupon the clerk prepared the record for that court, and has charged for the same at the rate of 15 cents per folio. To this the appellant excepts, insisting that the charge should be 10 cents per folio, as for a copy of a paper. This record consists of a true copy of the record in the trial court, bill of exceptions, assignments of error, and all proceedings in the cause, including the opinion of the court below, all under the hand and seal of the clerk. Cir. Ct. App. Rule 14 (31 C. C. A. clv., 90 Fed. clv.). In this rule 14 all this is called a "return" to the writ of error. The same rule applies to appeals as to writs of error. The fee bill allows to the clerk (section 828, Rev. St. U. S.) "for entering any return, rule, order, continuance, judgment, decree or recognizance, or drawing any bond, or making any record, certificate, return or report, for each folio, 15 cents." This document required by rule 14 is a record. It becomes the record for the use of the appellate court. It is not simply a copy of the record in the court below. It embraces as well the bill of exceptions, the assignments of error, the opinion of the court, and all proceedings in the cause; and it is made up by the clerk on his own responsibility. If it be redundant, it will be cut down. If it be defective in its presentation of the case, it will be perfected on mandamus. Its preparation bears no resemblance to the copying of a paper. It requires experience, judgment, and care. It is also, as we have seen by rule 14, a return. It is a certified paper, and in

some sense a report of all that transpired below, for the information of the appellate court. For these reasons the item in the costs of the clerk is correct. He is entitled to 15 cents per folio. But one case can be found in which this point is adjudicated. *Cavender v. Cavender* (C. C.) 10 Fed. 828. This case allows for this service 10 cents per folio. It is with diffidence that a conclusion differing from that of the learned judge for the Eastern district of Missouri has been reached. He treats the record on appeal as a mere transcript,—“a copy of something ordered by the court in a case at law or in equity to be so forwarded.” Evidently it is something more than this. A copy of a paper can be prepared by any scrivener in the office. The preparation of the record for the use of the appellate court requires the exercise of experience, care, and skill on the part of the clerk or his responsible deputy. The exception to the taxation is overruled.

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**MCTIGHE v. KEYSTONE COAL CO., Limited, et al.**  
(Circuit Court of Appeals, Third Circuit. January 23, 1900.)

No. 20.

**1. MORTGAGE—CONSTRUCTION—FORECLOSURE—APPLICATION OF PROCEEDS.**

A mortgage to secure bonds and interest thereon discloses no intention that, in case of sale under general foreclosure proceedings, the interest shall be paid before the principal from the proceeds, there being no provision as to distribution thereof, though there is a provision that, in case of default in interest continuing for six months, the trustee may take possession of the property, and collect the rents and profits, and, after paying the expenses of managing it, apply the balance to payment of interest in the order in which the interest shall have become due, and turn the balance over to the mortgagor; and another provision that, in case of such a default in interest, the holders of a majority of the bonds can require the trustee to proceed to foreclose the mortgage by suing out a *scire facias*, and pursuing the same to judgment, with leave to take out execution for the amount of the interest, and, in case of any subsequent default, with leave to take out another execution for collection of the same.

**2. SAME—PRIORITY IN DISTRIBUTION.**

In case of sale of property by decree under general foreclosure proceedings for payment of the overdue debt evidenced by the bonds which the mortgage was given to secure, the interest is entitled to no priority in payment, in the absence of provision in the mortgage therefor, though the interest on the bonds held by certain persons had been paid up to the time of general default of interest, while that on the bonds of others had not been paid.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

D. T. Watson, for appellant.

C. C. Dickey and W. G. Guiler, for appellees.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from the decree of the United States for the Western district of Pennsylvania dismissing exceptions filed by James M. Bailey to the report of the master

appointed to distribute a fund realized from the foreclosure of a mortgage of coal situate in Pennsylvania and West Virginia, given by the Keystone Coal Company, Limited, a limited partnership association under the laws of Pennsylvania, to secure its certain coupon bonds aggregating \$275,000. The Keystone Coal Company, Limited, a joint-stock association, organized under the act of assembly of Pennsylvania approved June 2, 1874, and its several supplements, for the purpose of raising money wherewith to carry on its business of the mining, transportation, and sale of coal, sold and delivered 550 of its bonds, aggregating \$275,000, dated April 1, 1879, payable April 1, 1887, bearing 6 per cent. interest, and having semiannual interest coupons attached. To secure these bonds the coal company executed a mortgage of its coal property, situate in Washington county, Pa., and Brooke county, W. Va., to the Safe-Deposit Company of the City of Pittsburg, as trustee for the bondholders. By its bonds the coal company promised to pay the principal debt on April 1, 1887, and to pay the interest semiannually on April 1st and October 1st in each year, "upon presentation and surrender of the annexed coupons as they severally fall and become due"; and it stipulated that, in the event of default in payment of any interest coupon for six months, the principal and interest might be made due and payable immediately in the manner provided by the mortgage. The mortgage provided, in effect, in article 1, that, in case default be made in the payment of any semiannual installment of interest, and the same remain unpaid for six months, or in case default be made for six months in the payment of any taxes, assessments, or other governmental charges on said premises, the lien whereof might or could be held prior to the lien of this mortgage, and in case default be made in the payment of the principal of said bonds, when due, then, in any and every such case of default, it should be lawful for the trustee for the time being, personally or by his attorneys or agents, to enter the said premises, and "to have, hold, possess, and enjoy, operating the said coal underlying said described premises, and to mine, take, and carry away the same," and to collect and receive all rents, revenues, incomes, issues, and profits of the said association, and from all coal mined out of and from said premises, and, after deducting therefrom the expenses of entering and managing said property, to apply the balance thereof, first, to the payment of all overdue interest on the said bonds, with interest thereon, in the order in which said interest shall have become due; and, second, to the payment of interest accruing after such default and entry by the trustee, and during its possession, without preference between bondholders; and, if any surplus remains after these payments, the same to be paid to the treasurer of said association. Article 2 of the mortgage provides for the issuing of a scire facias upon default in the payment of any semiannual interest which shall remain unpaid for six months after the same shall become due and be demanded, upon written demand by the bondholders, and for the prosecution of the same to judgment, with leave to take out execution for the amount of said interest, and, in case of any subsequent default, with leave to take

out another execution for the collection of the same. The Keystone Coal Company, Limited, paid in full to all, except a few, of the bondholders, the semiannual interest coupons which matured in 1879, 1880, 1881, and on April 1, 1882. James M. Bailey is one of the bondholders who did not receive payment for his coupons maturing prior to the general default in October, 1882. The reason was that there was not enough money in the treasury of the company at the various interest periods to pay all coupons, and some coupon holders were paid in full in preference to the appellant and a few others. Of these unpaid coupons maturing prior to October, 1882, the appellant owns an aggregate of \$14,157. Some of these coupons were detached from their bonds, and were bought by the appellant from the original holders at various times, he paying full value therefor. The trustee under the mortgage never proceeded to foreclose the same. In 1897, McTighe, a citizen of New York, and a bondholder, filed his bill in the circuit court for the Western district of Pennsylvania, praying an account, a foreclosure of the mortgage, or sale, and a receiver. The court appointed the Safe-Deposit & Trust Company (the trustee named in the mortgage) receiver of the mortgaged property, and directed it to take possession thereof. By its final decree the court ordered the trust company, as receiver and trustee, under the terms of the mortgage, and also in pursuance of the order and decree of the court, to offer the mortgaged property at public sale, and sell the same. In its said decree the court made a finding of fact that only part of the interest coupons maturing prior to April 6, 1882, were paid by the mortgagor, some such remaining unpaid, and directed an account to be stated of the amount due on account of said bonds, and appointed W. R. Blair, Esq., master, to state such account, and to determine all disputes of the holders of the various bonds and coupons, and to determine the respective rights and priorities of each to share in the purchase money derived from the sale of the property and paid into the treasury of the court. \$29,750 was realized from the sale of the mortgaged property. The master found the facts as to the payment of interest coupons and the amount and classes of coupons owned by Bailey as above stated. Bailey claimed, under the terms of the bond and mortgage, to be allowed, out of the fund realized, payment in full for the unpaid interest coupons maturing prior to October 1, 1882, as above stated, prior to the allowance of any dividend on the principal of said bonds, and also prior to other coupons maturing subsequent to the said date of general default in the payment of interest coupons. The master disallowed this claim, and reported a schedule of distribution, allowing all bond and coupon holders to recover a proportionate part of said fund, based upon the aggregate amount of bonds and interest coupons owned by each, respectively, without any priority or preference in respect of coupons which matured and were unpaid prior to the general default in the payment of interest, and which were owned by Bailey and others, belonging to the various classes of which the holders of part had been paid in full by the company. Bailey filed exceptions to the master's re-



port, alleging that the master erred in not allowing his claim to a preference in distribution. After argument, the court, per Buffington, J., dismissed these exceptions, and confirmed the pro rata distribution, and entered a final decree to that effect. Thereupon Bailey appealed, assigning the dismissal of his exceptions claiming such preference as error.

The contentions of the appellant, as gathered from his exceptions filed and his argument before this court, are: First, that the terms of the mortgage disclose an intention that the interest first due shall be first paid, and that this intention so disclosed requires that the unpaid coupons held by appellant maturing prior to October, 1882, should be paid before subsequently maturing coupons, and before the principal of the bonds; and, second, that the holders of interest coupons belonging to a class of which part had been paid in full, and which matured prior to the date of general default, are entitled, on general equitable principles, to be paid in full before the principal of the bonds; and subsequently maturing coupons are entitled to share in the distribution of the funds in the hands of the trustee. As to the first contention, we are of opinion, after a careful examination of the terms of the mortgage, that the only case in which an intention is disclosed that the interest first due shall be first paid is in the event of the entry and possession by the trustee, under the power given in the mortgage, to operate the property, where there is default in the payment of interest as provided for in the first article of the agreement between the mortgagor and the trustee, as set forth in the mortgage. It is plain, from a careful reading of this article, that it was the intention of the parties to make special provision for the payment of overdue interest, in order that the mines might be carried on as a going concern, and to that end, after operating expenses, etc., were paid, that the interest due should be paid out of the profits as a prudent administrator of his own property would pay it, to prevent litigation and interference with the orderly conduct of business. The only other reference to the payment or collection of interest contained in the mortgage is in the second article of the agreement referred to. It is therein provided that, in case of default of an installment of interest, a majority in value of the holders of the bonds can require the trustee to proceed to a foreclosure of the mortgage by suing out a scire facias, and pursuing the same to judgment, with leave to take out execution for the amount of interest due, etc. This special provision for the collection of interest is confined and limited by its terms to the special conditions therein mentioned. There is nowhere else any language of the mortgage from which an inference can be drawn that the security of the same was intended to specially prefer the payment of overdue interest to the payment of the principal, to which it was appurtenant. No provision is made as to how the proceeds of a sale under general foreclosure proceedings shall be distributed. That matter is left to be determined upon the general principles governing the sale of property under foreclosure proceedings. Nor do we think that on "general principles of equity" the holders of coupons maturing prior to October, 1882, are entitled to be paid in full,

because certain similar coupons were paid before the general default. The sale of the property made by decree of the court under general foreclosure proceedings was for the purpose of paying the overdue debt evidenced by the bonds which the mortgage was given to secure. The principal and the accrued interest represented the debt evidenced by each bond and its coupons, but, in the absence of any stipulation in the mortgage contract to that effect, there is no priority or preference due to the interest or the coupons representing them. The fact that certain coupons of the same class as those represented in this suit had been paid by the company prior to the general default of interest can give no superior equity to these unpaid coupons. Those holding the paid coupons had a right to receive the money, and in doing so infringed upon no right of the holders of the unpaid coupons. There was that much less debt due, and, in the case of a going and solvent concern, that was beneficial, and not detrimental, to the other creditors. The principle is the same as would obtain in case payment had been made to others of a part of the principal of their bonds, or if they had collected a part by execution against property of the Keystone Coal Company not included in the mortgage. In the case supposed, as in the case at bar, the proceeds are to be applied to the debt remaining unpaid, with its accrued interest. In the language of *Ketchum v. Duncan*, 96 U. S. 659, 24 L. Ed. 868:

"The coupons are mere representatives of the claim for interest. The obligation of the debtor, evinced by them, cannot be higher, nor entitled to greater privileges, than it would be had the bonds in their body undertaken the payment of interest."

We think this case (96 U. S. 659, 24 L. Ed. 868) is decisive of the question in this appeal. As this was the opinion of the master appointed by the court below, and as the exception to his report in this respect was overruled by the said court, the decree of the court below in the premises is affirmed.

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#### STELK v. McNULTA.

(Circuit Court of Appeals, Seventh Circuit. January 18, 1900.)

No. 637.

**1. APPEAL—RECORD—STIPULATION OF FACTS MADE SUBSEQUENT TO DECREE.**

The duty of the circuit court of appeals on an appeal is confined to a review of the rulings and decree of the trial court, and a stipulation of facts made by the parties after the decree below is no part of the record which the court is required to consider.

**2. STREET RAILROADS—INJURY TO PERSON ON TRACK—CARE REQUIRED.**

The degree of care required from a motorman on an electric street car traversing the streets of a city to avoid injury to persons upon the track is different and greater than that required from the engineer of a railroad train running on the company's right of way, where any person upon the track is a trespasser, to whom the company owes no duty except not to injure him willfully or maliciously, but in either case the care to be exercised must be proportioned to the danger reasonably to be apprehended at the time and place.

## 2. SAME.

The motorman of an electric street car, at about 10 o'clock at night, when in the outskirts of Chicago, saw an object lying on the track about 65 feet ahead, which both he and a passenger standing beside him thought to be a dog. He at once applied the brakes and sounded the gong, and, on approaching a little nearer, reversed. On coming nearer still, the object was seen to be a man, and, there being a down grade, the car did not stop until it ran upon and killed him. The place was not a crossing, and the locality was sparsely settled, there being a few houses only on one side of the street, and on the other open prairie. The street was not lighted nor used for travel, there being a ditch on each side of the car track. The motorman saw the object as soon as it was possible to see it from his position, under the circumstances. *Held*, that he was not guilty of any negligence which rendered the company liable for the death.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

In a suit pending in the court below, the appellee, John McNulta, was appointed receiver of the Calumet Electric Street-Railway Company, in succession to John C. McKeon, who was operating the railway at the time of the occurrence which is the subject of contention here. The appellant, John Stelk, administrator of the estate of George Ware, deceased, filed his intervening petition in that cause, seeking to recover damages for the death of his intestate, caused, as alleged, by the negligence of the motorman in charge of the car which ran upon and killed him. Upon issue being formed, the matter was referred to a master, who reported the following facts with respect to the accident: On the 29th day of August, 1897, at 40 minutes past 9 o'clock p. m., George Ware was killed by car No. 233, south bound, on the Roby Division of the Calumet Electric Street Railway, a little southeast of Ninety-Third street. Ware was 39 years of age, and his business was that of a grain trimmer on boats, and he earned from \$35 to \$40 per week. The railway crossing Ninety-Third street runs in a northwesterly and southeasterly direction. In approaching the crossing at Ninety-Third street from the northwest, there is a slight rise in the roadbed of the railway, from a point 140 feet northwest from the south line of Ninety-Third street. The highest point of the incline is a little south of the south line of Ninety-Third street extended. From that point southeasterly the grade is downward for about 100 feet, the incline downward in that distance being 4 feet. About 40 feet north of the north line of Ninety-Third street there is a switch leading to a track turning thence east on Ninety-Third street. South of Ninety-Third street there is a ditch on each side of the car tracks. The car stopped a moment at the switch, and then proceeded up the incline. Upon crossing the south line of Ninety-Third street the motorman saw an object on the track between the rails at a point about 65 feet in front of the car. At this time the speed of the car was probably not less than six nor more than eight miles an hour. The night was quite dark, and there were no street lamps or other lights lighting the spot where the object lay, except such as was thrown upon it by the headlight of the car. When the motorman saw this object, a messenger boy was standing by his side. The motorman said to the boy that there was something on the track, and that it seemed to him it was a big black dog, to which the boy replied that he thought so too. Neither the motorman nor the messenger boy was able at that time and distance to determine what the object really was. As soon as the motorman saw the object, he rang the gong and applied the brakes. When the car had gone a little further, seeing that the object did not move, the motorman applied the reverse, but being on the down grade the reverse did not act. When the car had almost reached the object, the motorman saw it to be a human being lying partly across the space between the rails, but not across the rails, the head towards the southeast, the feet towards the northwest, and the body lying on the side, with the face southward, and clothed in dark garments. The car not having been brought to a stop when it came in contact with the body, the body was pushed before and under it for about 8 or 10 feet before the car came to a full stop. When his body was taken from under the car, Ware was dead or in a dying condition. From the place where the car stopped at the

switch the body could not be seen by the motorman in broad daylight, because of the convexity of the roadbed between these two points. When the car had passed 50 feet south of the switch, and was about 90 feet from the top of the incline, and about 155 feet from where the body lay, a straight line drawn from the eyes of the motorman, as upon the car, to the place where the body lay, would have just touched the highest point of the incline. Both the motorman and the messenger boy standing by his side testify that the motorman was looking ahead, and that the object on the track was not seen, and could not have been seen, by the motorman until he reached the top of the incline. Evidence was introduced on behalf of the intervening petitioner tending to show that the object might have been seen sooner, but considering all the evidence in the case, the master finds that the motorman, as was his duty, was looking forward upon the track, and that he did not see the obstruction until he reached the top of the incline.

The master found the following conclusions of law:

"(1) Under the evidence in this case, the motorman was not guilty of any negligence whatsoever in not having observed the obstruction upon the track until, as shown by the evidence here, he did so. Since the night was dark, and there were no lights to illumine the place where the object lay, the object could not be distinguished until the car arrived at the top of the incline, and the headlight threw its rays upon the object.

"(2) Under the evidence in this case, therefore, the liability of the defendant depends upon this question: What was the duty of the motorman when at the top of the incline, and about 65 feet from where Ware lay, he first saw something upon the track between the rails, and thought it to be a large black dog? The motorman owed a duty to his employer, a duty to the public, and a paramount duty to any person who, rightfully or wrongfully, carelessly or otherwise, was known to be upon the track. It is clear that, had the motorman been aware when he first saw the object that it was a human being, his obvious duty would have been to stop the car as quickly as possible, and it is equally clear that such would have been his duty if there was any reasonable cause for his believing it to be a human being."

"(5) While the question is by no means free from doubt, the master is of the opinion that, under the circumstances of this case, as soon as he saw the object on the track, the exact nature of which he could not determine, but which he thought was a big black dog, the motorman should have immediately put forth every effort to stop the car, and to ascertain what the object really was, and, having failed to do so, he was guilty of such negligence as renders the defendant liable for the death of George Ware."

Upon exceptions filed and upon hearing, the court below made the following decree, dated September 11, 1899: "This matter coming on to be heard by the court upon exceptions of the receiver to the master's findings of fact and conclusions of law, and the court, having heard the testimony and arguments of counsel, finds that the master's findings of facts are sustained by the evidence, and that the master's fifth conclusion of law, based on said findings, is erroneous. It is therefore ordered, adjudged, and decreed by the court that the exceptions of the receiver to the master's said findings of fact be, and the same are, overruled. It is further ordered, adjudged, and decreed by the court that the receiver's exception to the master's fifth conclusion of law be, and the same is hereby, sustained. The said intervening petition is therefore dismissed for want of equity."

Afterwards the parties entered into and filed the following stipulations of facts:

"It is further stipulated that the following are facts in this case, in addition to the facts as found by the master in chancery, to whom this cause was referred: That one Thomas Murray, at the time of the accident, was standing with one Martin on the east side of South Chicago avenue, and on the south side of Ninety-Third street, where they cross and make an acute angle, which is best described by saying it was at the southeast corner of the two streets. That he noticed a car coming southeast on South Chicago avenue, just as it had got over a switch that is there, a short distance north of Ninety-Third street. That he noticed a man about 150 feet southeast of the car, and he appeared as though he had been coming up out of a ditch or trench there. He

saw the man coming up out of the trench, and as he got to the top of it he stumbled across the tracks. At this time Murray was 25 or 30, or possibly 40, feet from the car at this corner, and the car was almost even with Murray, and it was light enough for Murray to see the car and the man. That at this time he heard a humming noise come from the car. That he saw the motorman when he first saw the car, just as the car passed over the switch. That when the man stumbled he fell between the two rails. That at the time the man fell the car was, in the judgment of Murray, 150 feet away from the man. That there is a city fire-engine house on this street 88½ feet south of the southeast corner of Ninety-Third street and South Chicago avenue. That Murray hallooed to the motorman to turn off his power. That the car dragged the man 8 feet. (2) That, when found dead under the car, the deceased had a five-cent piece in his hand, and he let go the five-cent piece, and it dropped to the ground. (3) That an electric car, equipped in practically the same way as the car in question, can be stopped on a clear, dry rail, when going 8 miles an hour on a level track, within a distance of 40 feet. (4) That witness William P. Martin, who was with witness Murray, heard Murray utter an exclamation, and saw him start to run. That he (Martin) did not see any object, but started to run right after Murray. That he (Martin) first saw the man when the car was about 25 or 30 feet from him. That the car ran over the man, and Martin helped pull him out. That this witness testified that on that night at that point he could see 200 feet."

"(1) That beginning at Ninety-Third street, and running southeast therefrom, the Calumet Electric Street Railway runs through a low prairie, and that the tracks of said railway are there laid on earth and cinders filled in across said prairie. (2) That, when the motorman and the passenger standing by his side first saw the dark-colored object on the track, neither the said motorman nor passenger was in doubt as to what the object really was; that the object, as it appeared to them, was a big black dog, which would be frightened from the track by the ringing of the gong. (3) That, when the motorman and the said passenger first saw the said object on the track, the said object, as it appeared to them, was something which would not be injured, and which would not endanger the car or passenger. (4) That from the time the said motorman and passenger first saw the object on the track, up to the time the said motorman discovered the object was a human being, the said object appeared to said motorman to be a big black dog. (5) That, at the spot where the object lay upon the track, the said motorman had no reason to expect to find a human being. (6) That, prior to the time the motorman discovered the real nature of the object, the said motorman had no idea that the object was other than a big black dog,—no thought that it was a human being. (7) That, at the spot where the object lay, there was no pathway or roadway across or along the car tracks, except the sidewalk running parallel with the tracks, and located east of the tracks, with a ditch between the sidewalk and the tracks; that the country west of the car tracks, and south of Ninety-Third street, is a low prairie, unoccupied by buildings of any kind."

Thereupon the appellant brings the cause here for review.

Alfred F. Gross, for appellant.

Kenesaw M. Landis, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

We might properly disregard the stipulations of the parties with respect to facts not found by the master or the court below, and made subsequent to the decree. We sit here to review the rulings of the court below, not to pass judgment upon stipulations of parties made subsequent to such rulings, and not properly preserved in a bill of exceptions or verified as part of the record by the certificate of the

judge. We deem it proper to make these observations upon the practice pursued, although we have concluded in this case to waive the irregularity, and to consider these stipulations.

The sole question here is whether, with respect to this accident, negligence can properly be imputed to the motorman in charge of the car. The principle of law which should control judgment of his conduct, under the facts disclosed, cannot be doubtful. In the case of *Railroad Co. v. Prewitt*, 59 Kan. 734, 54 Pac. 1067, to which we are referred, the driver of a locomotive in open daylight saw an object upon the railway track of the company, but supposed it to be a weed or piece of paper. Observing it carefully, so soon as he discovered the object to be a human being he did all in his power to stop his train, but without avail, and the child was killed. The court ruled that the duty of checking the speed of the train was not imposed upon the driver of a locomotive upon seeing an object upon the track which he reasonably believed to be inanimate, and not dangerous to the passage of the train, but that the duty arose immediately upon the discovery that the object was a human being, or an object endangering the passage of the train, and reversed the judgment of the court below, which had held the duty to be imposed upon the driver of a locomotive to check the speed of his train immediately upon discovering an object ahead, whatever that object might be. We cannot doubt the correctness of this decision of the supreme court of Kansas, when applied to the passage of trains upon the right of way of the company; for in such case the law is settled that the company owes no duty to trespassers upon its tracks except not to run them down willfully or maliciously. *Railway Co. v. Phillips' Adm'r*, 24 U. S. App. 489, 12 C. C. A. 618, 64 Fed. 823; *Sheehan v. Railway Co.*, 46 U. S. App. 498, 22 C. C. A. 121, 76 Fed. 201. The locomotive driver has the right to assume that the object, if animate, will leave the track upon hearing the coming train. It is quite a different matter, however, where railway trains, whether propelled by steam or electricity, pass along the crowded thoroughfares of a populous city. The care to be exercised is relative, and must be proportionate to the dangers reasonably to be apprehended. Here the locus in quo was in the outskirts of the city of Chicago, but was sparsely populated; there being, according to the facts found and stipulated, no houses on the westerly side of the railway, and along the easterly side there was a sidewalk of some sort and a few houses. It was an open prairie. The track of the railway may have been laid upon ground that was platted as a street, but there was no roadway for the passage of teams, and there was a ditch on either side of the railway. There were no street lights, as is usual in a city. The motorman, on reaching the crest of the incline, saw at a distance of 65 feet an object upon the track, which both he and the messenger boy standing with him upon the platform of the car took to be a dog. He immediately applied the brake, checking the speed of the car, and sounded the gong to arouse the supposed animal, and cause it to leave the track.

It is stipulated that the motorman had no reason to expect a human being to be upon the track at that place or at that time. The record does not explain the presence of the man, and we are unable to ascer-

tain with what purpose or for what object a human being should be in that situation. The stipulation of fact is certainly reasonable that the motorman had no reason to expect the presence of a human being upon the track. We do not think, therefore, that the duty was imposed upon him, upon perceiving an object, to bring his car to a stop to discover the nature of the object. He did no less than his duty required of him to check the speed of the car and sound his gong, and so soon as he perceived that the object did not respond to the signal he reversed to bring the car to a standstill. Upon a level, under such circumstances, the car could have been stopped within 40 feet, but, it being upon a downward grade, it could not be stopped within that distance. We cannot perceive that the motorman was lacking in any degree in the exercise of that prudence and care which, under the circumstances, the law imposed upon him. The decree will be affirmed.

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## MILLER v. PERRIS IRR. DIST. et al.

(Circuit Court, S. D. California. January 15, 1900.)

No. 752.

**1. MUNICIPAL BONDS—IRRIGATION DISTRICTS OF CALIFORNIA—ESTOPPEL BY RECITALS.**

A recital in negotiable bonds issued by the board of directors of an irrigation district in California under the power conferred by Act March 7, 1887, that such bonds were issued "by authority of, and pursuant to, and after a full compliance with, all the requirements of" said act, estops the district, as against bona fide purchasers of such bonds, from asserting that no estimate or determination of the amount of money necessary to be raised by issuing bonds was made by the board, as required by the act, or that the bonds were disposed of in a manner or for considerations other than those prescribed by the act.

**2. SAME—JUDGMENT OF CONFIRMATION—CONCLUSIVENESS.**

A judgment of confirmation in a special proceeding in the superior court by the directors of an irrigation district, brought, under the act supplemental to the Wright act (St. Cal. 1889, p. 212), for the confirmation of the organization of the district and the issue and sale of its bonds, is conclusive on the district as to all questions involved, which include the fact that the estimate required by law of the amount of money necessary to be raised by the issuing of bonds was duly made. Former opinion (85 Fed. 693) explained and reaffirmed.

**3. SAME—DE FACTO CORPORATION—EFFECT OF JUDGMENT OF OUSTER.**

Under the settled doctrine that a de facto corporation may legally do and perform every act and thing which it could do and perform were it a de jure corporation, and that its acts are valid as to all the world, except where challenged by the state in direct proceedings, a judgment in proceedings instituted by the state against an irrigation district in California declaring void the proceedings for the organization of the district does not affect the validity of bonds which the district had previously issued, after having obtained a judgment confirming its organization and the issuance and sale of such bonds as provided by statute.

Heard on pleas to the amended bill, and on demurrer to a supplemental bill.

Works & Lee, for complainant.  
C. C. Wright, for defendants.

WELLBORN, District Judge. Complainant, an owner of lands in the irrigation district mentioned, sues for the cancellation of bonds issued by said district, and to enjoin assessments against his lands for the payment of said bonds. The case has already been before me twice,—the first time on demurrer and plea to the original bill (Miller v. Irrigation Dist. [C. C.] 85 Fed. 693), and the second time on demurrer and exceptions to the amended bill (Id., 92 Fed. 263). At the latter hearing a formal ruling on the exceptions was inadvertently omitted, and an order allowing them will now be entered. The facts and statutory provisions pertinent to the present submission, except so far as they are herein stated, will be found in the two cases above cited.

After the demurrer to the amended bill was overruled, defendants pleaded thereto:

First. That they are innocent purchasers of the bonds held by them, and that said bonds contain a recital in the words and figures following to wit:

"This bond is one of a series of bonds, amounting in the aggregate to \$442,000, caused to be issued by the board of directors of said Perris irrigation district, and pursuant to a vote of the electors of said district at an election held for that purpose on the 1st day of November, 1890. The said series of which this bond is one is composed of 884 bonds, each of the denomination of \$500; and said bonds are issued by authority of, and pursuant to, and after a full compliance with all of the requirements of, the act of the legislature of the state of California entitled 'An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes,' approved March 7, 1887."

Second. That appropriate proceedings were had, and final decree entered therein by the superior court of San Diego county, confirming the organization of said district and issuance of said bonds.

After defendants had interposed these pleas, complainant, by leave of the court, filed a supplemental bill alleging, in substance, that the people of the state of California had brought an action in the nature of quo warranto in the superior court of Riverside county, and that said court in said action rendered a judgment that said irrigation district was and is wholly void, and that said district was unlawfully usurping the rights and powers of, and claiming to be, a lawfully organized district under the laws of this state. To this supplemental bill defendants have demurred on the ground that the matters therein pleaded do not entitle the complainant to equitable relief, and have also excepted to said bill for impertinence, and have also interposed a plea that an appeal has been taken from the decree of the superior court of Riverside county, and that said appeal is pending and undetermined. Said pleas to the amended bill, and demurrer and exceptions and plea to the supplemental bill, having been argued at the same time, are included in the pending submission, and will be considered in the order in which I have stated them:

1. The supreme court of the United States has declared, through a long and unbroken line of decisions, that where a municipality has power, under certain circumstances, to issue, and does issue, bonds which recite that all requirements of the law have been complied with,



and the officers issuing the bonds are charged with the duty of ascertaining and determining the facts authorizing their issuance, the municipality will not, as against bona fide holders, be heard to deny the facts so certified on the face of the bonds. *Mercer Co. v. Hackett*, 1 Wall. 83, 17 L. Ed. 548; *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110; *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. Ed. 816; *Warren Co. v. Marcy*, 97 U. S. 96, 24 L. Ed. 977; *Sherman Co. v. Simons*, 109 U. S. 735, 3 Sup. Ct. 502, 27 L. Ed. 1093; *City of Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760; *Commissioners v. Rollins*, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689; *Grattan Tp. v. Chilton (C. C. A.)* 97 Fed. 145.

The expression "want of power" has been usefully paraphrased as follows:

"Want of power arises from the following causes: (1) Because the bonds are issued without authority of any statute. (2) Because the statute under which the bonds are issued contravenes some provision of the state constitution. (3) Because the bonds are issued for some private, and not a public, purpose. (4) Because the power exercised is different from that delegated. (5) Because some of the conditions precedent to the issue of the paper (as, for instance, the signatures of a certain number of taxpayers, the presentation of a petition, or the consent of the electors) have not been obtained or performed, or no election has been held, although required, and only upon such compliance are the bonds to issue. (6) Because the total amount of paper issued exceeds the statutory or constitutional limit. In the first two cases the paper is void for want of power, and cannot be cured by any act of the municipal corporation. In the last four cases the paper, although issued without authority, may yet be held good in the hands of a bona fide holder, because of recitals contained in the paper, made by the officers of the corporation issuing it, which assure the purchaser that the paper is lawfully issued, provided there existed statutory authority for the issue of paper such as the paper in the hands of the bona fide holder purports to be; and, although the paper shows no recitals, the municipality may be estopped by its acts from repudiating it. The true meaning of the term 'want of power' is the total lack of authority in the corporation to act; and every act done by the municipal corporation without power is void, and cannot be made valid by any act of the corporation or its officers. Therefore the last four cases cannot logically be construed to arise from want of power, where the term is used in its true sense. They arise from irregularity or illegal use of the power, and for that reason are illegal." *Simonton, Mun. Bonds*, § 192.

In *Mercer Co. v. Hackett*, supra, the court says:

"Where county bonds on their face import a compliance with the law under which they were issued, the purchaser is not bound to look further. That evidence of fraud practiced by the railroad company to whom these bonds were delivered, and by whom they were paid to bona fide holders for value, or the fact that they were negotiated at less than their par value, cannot defeat a recovery on them by such holders. That on questions of mercantile or commercial law the federal courts do not feel bound to yield their judgment to state decisions."

In *San Antonio v. Mehaffy*, supra, the court says:

"The holder of commercial paper, in the absence of proof to the contrary, is presumed to have taken it underdue, for a valuable consideration, and without notice of any objection to which it was liable. If a municipality could under any circumstances issue negotiable securities, the bona fide holder of them has a right to presume that they were issued under the circumstances which give the authority. The municipality is estopped by the recital on the face of the securities to deny their verity as against a bona fide purchaser."

In the case last quoted from the bonds had the following recital:

"This debt is authorized by a vote of the electors of the city of San Antonio, taken in accordance with the provisions of an act to incorporate the San Antonio and Mexican Gulf Railroad Company, approved September 5, 1850. Entered and recorded in the office of the city treasurer, and is transferable on delivery.

"City Hall, City of San Antonio, March 1, 1852."

And the court declared the effect of the recital thus:

"This shuts the door, as a matter of law, to all inquiry touching the regularity of the proceedings of the officers charged with the duty of subscribing and making payment in the way specified. The rule in such cases is that, if the municipality could have had power under any circumstances to issue the securities, the bona fide holder has a right to presume that they were issued under the circumstances which gave the authority, and they are no more liable to be impeached in his hands for any infirmity than any other commercial paper. *Supervisors v. Schenck*, 5 Wall. 772, 18 L. Ed. 556; *City of San Antonio v. Lane*, 32 Tex. 405."

In *Warren Co. v. Marcy*, supra, the court says:

"If a municipal body has lawful power to issue bonds, dependent only upon the adoption of certain preliminary proceedings, the holder in good faith has a right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds themselves by the authority whose primary duty it is to ascertain it. Such bonds may be valid in the hands of a bona fide holder, notwithstanding the fact that the preliminary proceedings requisite to their issue may have been so defective as to sustain a direct proceeding against the officer to annul them or prevent their issue."

In *Grattan Tp. v. Chilton*, supra, the court says:

"If, under any circumstances, the board would have had authority to issue them, and the bonds would have been valid, innocent purchasers had the right to presume that those circumstances existed when they were issued, and the township was estopped to deny their existence after such purchasers had bought them in reliance upon the certificate that they were issued in compliance with the statute."

*Commissioners v. Rollins*, supra (the latest decision by the supreme court of the United States on this subject) contains the following summary of prior decisions:

"The adjudged cases, examined in the light of their special circumstances, show that the facts which a municipal corporation issuing bonds in aid of the construction of a railroad was not permitted, against a bona fide holder, to question, in face of a recital in the bonds of their existence, were those connected with or growing out of the discharge of the ordinary duties of such of its officers as were invested with authority to execute them, and which the statute conferring the power made it their duty to ascertain and determine before the bonds were issued, not merely for themselves, as the ground of their own action, but equally as authentic and final evidence of their existence, for the information and action of all others dealing with them in reference to it. \* \* \* The question of legislative authority to a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals, but, the power existing, the municipality may be estoppel by recitals to prove irregularities in the exercise of that power."

There are numerous other decisions by the supreme court of the United States bearing upon the question of estoppel,—some of them referred to in complainant's brief; but it is needless to review them here, since none, I believe, antagonize, while all are substantially agreed upon, the doctrine above enunciated. There is one case, however, cited in complainant's brief (*Scipio v. Wright*, 101 U. S. 665,

25 L. Ed. 1037), which invites particular notice, because it serves to define and illustrate the scope of the bond recitals in the case at bar. The last two paragraphs of the syllabus are as follows:

"(3) The fact that the bonds were not issued for borrowed money, but were exchanged for stock of the railroad company, is, according to the New York decisions, a defense for the town against a holder who, when he purchased, had notice of the manner of their issue, which decisions this court follows in this case. (4) A bona fide holder, who had no knowledge that the railroad company had received the bonds in payment for the stock taken for the town, would not be liable to such a defense."

In the opinion occurs this language:

"Some time after January 7, 1854,—when does not exactly appear,—Slocum Howland bought the seventeen bonds from the railroad company, with notice that money had not been borrowed upon them, but that they had been transferred by the town supervisor and railroad commissioners, or one or more of them, in the first instance, to the company, in exchange for its stock. What Howland paid for them—whether the company obtained their full par value—is not proved. Howland held the bonds until 1874, after they became due, when he sold them to the plaintiff, taking his note for the whole price; and that note remains unpaid. Neither Howland, therefore, nor Wright, the purchaser from him, stands in the position of a bona fide purchaser without notice of the exchange of the bonds for stock. Had either of them been such a purchaser, the plaintiff's right to recover could not be gainsaid. But the question now is whether the fact that the bonds were not issued for borrowed money, but were exchanged for stock of the railroad company, is a defense for the town against a holder who, when he purchased, had notice of the manner of their issue. Were the question an open one, it would seem that it ought not to be a defense."

The court then proceeds to review certain decisions of the supreme court of the state of New York holding the contrary, saying of them:

"These decisions have been constructions of the identical statute we have now under consideration, and by which the bonds now in suit are alleged to have been issued. The construction given by the state court must therefore be our guide. \* \* \* It thus appears to be the settled construction given by the courts of New York to the act under which the bonds now in suit were issued, and to other similar acts, that they do not authorize an exchange of bonds for shares of the capital stock of railroad companies, and that a purchaser who had notice at the time of his purchase that such a disposition of the bonds was made by the town officers or railroad commissioners cannot recover in a suit brought upon them."

It is to be observed, with reference to this last case, that the court, as already indicated, not only affirms the general doctrine enunciated in cases previously cited,—that, where negotiable bonds import compliance with the law under which they were issued, a bona fide purchaser is not bound to look further for evidence of compliance with the conditions annexed to the power to issue them,—but also treats the negotiation or disposition of the bonds by the municipality as part of their issuance, and not as a matter subsequent thereto. The supreme court of the United States has also repeatedly held that the power and duty of municipal officers issuing bonds to ascertain and determine the facts authorizing their issuance need not be expressly conferred and devolved, but may result from implication. *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Commissioners v. Bolles*, 94 U. S. 104, 24 L. Ed. 46; *Commissioners v. January*, 94 U. S. 202, 24 L. Ed. 110; *Bernards Tp. v. Morrison*, 133 U. S. 523, 10 Sup. Ct. 333, 33 L. Ed. 726.

**The court in *Bernards Tp. v. Morrison*, supra, says:**

"While it is true that the act does not, in terms, say that these commissioners are to decide that all preliminary conditions have been complied with, yet such express direction and authority is seldom found in acts providing for the issuance of bonds. It is enough that full control in the matter is given to the officers named. In the case of *Oregon v. Jennings*, 119 U. S. 74, 92, 7 Sup. Ct. 124, 30 L. Ed. 323, the rule is thus stated by Mr. Justice Blatchford: 'Within the numerous decisions by this court on the subject, the supervisors and the town clerk (they being named in the statute as the officers to sign the bonds, and the "corporate authorities" to act for the town in issuing them to the company) were the persons intrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If they have certified to that effect in the bonds, the town is estopped from asserting, as against a bona fide holder, that the conditions prescribed by the popular vote have not been complied with.' Whatever may be the hardships of this particular case, to sustain the defenses pressed would go far towards destroying the market value of municipal securities."

**In *Town of Coloma v. Eaves*, supra, the court says:**

"Where it may be gathered from the legislative enactment that the officers of the municipality were invested with the power to decide whether the condition precedent has been complied with, their recital that it has been complied with, made in the bonds issued by them, and held in the hands of a bona fide holder, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal."

**The court says in *Commissioners v. January*, supra:**

"This act, like the act of 1868, authorized the commissioners to issue the bonds when the requirements of the law had been complied with. They were thus constituted a tribunal for the adjustment of all questions touching the subject. They were clothed with the power and charged with the duty to decide them. No appeal or review was provided for. Their issuing the bonds was the reflex and embodiment of their judgment that it was proper. It implies a prior determination to that effect."

The powers and duties of the board of directors of an irrigation district in California, touching the issuance of bonds, are set forth mainly in sections 15 and 16 of the act of March 7, 1887; and from the former section I quote, as directly pertinent here, the following:

"For the purpose of constructing," etc., "the board of directors of any such district must \* \* \* estimate and determine the amount of money necessary to be raised, and shall immediately thereupon call a special election, at which shall be submitted \* \* \* the question whether or not the bonds of said district shall be issued. \* \* \* If a majority of the votes cast are 'Bonds—Yes,' the board of directors shall immediately cause bonds in said amount to be issued. Said bonds \* \* \* shall be negotiable in form, signed by the president and secretary, and the seal of the board of directors shall be affixed thereto. \* \* \* Said bonds shall express on their face that they were issued by authority of this act, stating its title and date of approval."

These provisions, and section 16, which relates to the sale of bonds, give to the board of directors full control over the issuance of bonds, and bring the case at bar fully within the rule above quoted from *Bernards Tp. v. Morrison*, where the court, after observing that legislative acts for the issuance of bonds rarely direct, in terms, the officers executing the bonds to pass upon preliminary conditions, comprehensively states the law thus: "It is enough that full control in the matter is given to the officers named." Furthermore, the power and duty of the board of directors of an irrigation district to ascertain and determine the facts authorizing the issuance of its bonds are neo-

essarily implied in the clause, "Said bonds shall express on their face that they were issued by authority of this act." Surely, the legislature did not intend that the board of directors should make a false recital, or certify to matters without inquiry as to their verity. The clause in question manifestly enjoins, if not in terms, by unavoidable inference, upon the board of directors to ascertain and determine that all preliminary conditions for issuance of bonds have been fulfilled, before they make the prescribed recital to that effect.

On this branch of the case my conclusion is that the recitals of the bonds, together with the allegation (which, for the purpose of the present hearing, must be accepted as true) that defendants are innocent purchasers, estop the district from asserting that no estimate or determination of the amount of money necessary to be raised by issuing bonds was made or had by said district, and also from asserting that the bonds were disposed of in manner or for considerations other than those prescribed by the statute.

2. The other plea of the defendants, which sets up certain proceedings and judgment of confirmation had in the superior court of San Diego county, does not go to the whole bill, but only to that part which alleges "that no estimate or determination was ever made or had by said pretended district before issuing bonds." Without undertaking now to define fully the scope of the proceedings and judgment of confirmation thus pleaded, it is sufficient to say that one of the matters potentially, if not actually, in issue in said proceeding was the fact that the estimate required by law of the amount of money necessary to be raised by the issuing of bonds was duly made, and that I still hold the views expressed by me in *Miller v. Irrigation Dist.* (C. C.) 85 Fed. 693, to the effect that a special proceeding by the directors of an irrigation district, brought under the act supplemental to the Wright act (St. Cal. 1889, p. 212), providing for special proceedings in the superior court for the confirmation of the organization of the district, and issue and sale of its bonds, is valid and binding as to all questions involved in such proceeding. After careful examination of the opinion last cited, I am unable to discern any inconsistency in its rulings, and now reaffirm them. Those relating to the organization of the district were substantially as follows: First, that, said district being a de facto corporation, its organization could not be collaterally attacked by an individual; second, that, if the first ruling was erroneous (that is to say, if an individual could attack the existence of a de facto corporation), still in the present case the decree of confirmation was conclusively against such attack; third, that, if the first and second rulings were erroneous (that is to say, if the existence of a de facto corporation was open to attack by an individual, and a decree confirming the organization of an irrigation district did not preclude such an attack), still the present suit, so far as it attacked the organization of the district, was barred by section 3 of the act of March 7, 1887, as amended by the act of March 20, 1891. It is true that in the third ruling concession of error in the first for the purposes of the third was not made in terms, but an ellipsis of that sort, the omitted words being obvious and readily supplied, is not uncommon, but of general use in judicial opinions, where the disposi-

tions of the matters at issue are rested upon two or more independent grounds, and untenableness of a prior ground is conceded for the purposes of subsequent grounds.

3. It has been held (and I am not advised of any decision to the contrary) that:

"A corporation *de facto* may legally do and perform every act and thing which the same entity could do and perform were it a *de jure* corporation. As to all the world, except the paramount authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid; and even as against the state, except in direct proceedings to arrest its usurpation of power, it is submitted, its acts are to be treated as efficacious." *People v. La Rue*, 67 Cal. 526, 84 Pac. 84.

To the same effect, see 8 Am. & Eng. Enc. Law (2d Ed.) 748; *Salt Co. v. Heidenheimer*, 80 Tex. 34, 5 S. W. 1038; and *Perun v. Cleveland*, 43 Ohio St. 481, 3 N. E. 357.

From the doctrine thus announced it follows, in my opinion, that the judgment set up in the supplemental bill, declaring void the proceedings for the organization of the Perris irrigation district, does not impair the validity of, nor afford any ground for equitable relief against, obligations incurred prior to said judgment. *Shapleigh v. City of San Angelo*, 167 U. S. 646, 17 Sup. Ct. 957, 42 L. Ed. 310; *Ashley v. Board*, 8 C. C. A. 455, 60 Fed. 55; *Havemeyer v. Iowa Co.*, 3 Wall. 294, 18 L. Ed. 38; 1 Dill. Mun. Corp. § 170. The pleas to the amended bill, and demurrer to the supplemental bill, will be allowed.

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#### MARYLAND STEEL CO. v. GETTYSBURG ELECTRIC RY. CO.

(Circuit Court, E. D. Pennsylvania. January 27, 1900.)

No. 13.

##### 1. STREET RAILROADS—FORECLOSURE OF MORTGAGE—PREFERENTIAL CLAIMS.

Debts created by an electric street-railroad company in rebuilding its power house, which had been destroyed by fire, do not constitute claims to which a court is authorized to give preference in payment from the proceeds of the property of the company when sold under mortgage foreclosure to the displacement of the lien of a prior mortgage covering all the property.

##### 2. SAME—ESTOPPEL.

The fact that the bondholders delayed the commencement of foreclosure proceedings for a year after the burning of the power house, and after default in the payment of interest on their bonds, during which time the company rebuilt such house, did not create an estoppel against them in favor of those furnishing labor or material for the structure which entitles the latter to prior payment therefor from the proceeds of the property.

This was a suit in equity for the foreclosure of a mortgage on the property of defendant street-railroad company, in which the property had been sold. Heard on petitions of intervening creditors for preferential payment from the proceeds.

Rudolph M. Schick, for claimants.  
John Hampton Barnes, opposed.

DALLAS, Circuit Judge. When a court whose judgments are authoritative declares and applies a principle which had not before been generally recognized, the announcement of that principle is likely to be followed by attempts to extend its operation beyond the bounds of its true limits. This tendency has been so strenuously manifested with respect to the doctrine of *Fosdick v. Schall*, 99 U. S. 235, 25 L. Ed. 339, that the supreme court has found it necessary to repeatedly say that the discretion to displace vested contract liens is one which should be exercised with very great care, and that the appointment of a receiver vests in the court no general authority to do so. See *Miltenberger v. Railroad Co.*, 106 U. S. 311, 1 Sup. Ct. 140, 27 L. Ed. 117, *Kneeland v. Trust Co.*, 136 U. S. 97, 10 Sup. Ct. 950, 34 L. Ed. 379, and the other cases hereafter cited. Yet, I am now asked to adjudge that the lien created by a duly-recorded mortgage shall be subordinated to the claims of certain creditors of the mortgagor, who have no lien at all, and to award them preferential payment from a fund which has been produced by a sale of the mortgaged property, under an order of this court, in a proceeding to foreclose that mortgage. Bearing in mind that "it is the exception, and not the rule, that such priority of liens can be displaced," and that it may not be done in any case unless there be "special circumstances" to warrant it, the circumstances of this case should be carefully noted. *Kneeland v. Trust Co.*, *supra*; *Miltenberger v. Railroad Co.*, *supra*; *Thomas v. Car Co.*, 149 U. S. 110, 13 Sup. Ct. 824, 37 L. Ed. 663. The Gettysburg Electric Railway Company, the mortgagor defendant, being the owner of a railway operated by electricity, made and delivered the mortgage which has been referred to in May, 1893. Thereafter, in September, 1894, its power house (covered by the mortgage) was destroyed by fire. Soon after the fire, some machinery was erected under temporary shelter, and, in April, 1895, the company commenced the construction of a new power house, which was fully completed about August 30, 1895. Several of the claims now under consideration are for materials furnished for this erection. Are they entitled to be preferred to the bonds secured by the mortgage?

In *Railroad Co. v. Hamilton*, 134 U. S. 299, 10 Sup. Ct. 546, 33 L. Ed. 905, it was held that:

"A recorded mortgage, given by a railroad company on its roadbed and other property, creates a lien whose priority cannot be displaced thereafter directly by a mortgage given by the company, nor indirectly by a contract between the company and a third party for the erection of buildings or other works of original construction."

It has been ingeniously argued that this proposition is inapplicable here, because, as contended, the re-erection of an essential part of a railway plant, which had been accidentally destroyed, cannot be regarded as an original construction, but must be looked upon as being merely the restoration or replacement of such a construction. The fallacy of this contention lies, I think, in its erroneous assumption respecting the sense in which the term "original construction" was used by the court in *Railroad Co. v. Hamilton*. It was not there intended to set in opposition a construction made for the first time, and one which was made to supply the place of a previously existing one;

but to contrast the "erection of buildings" and other like works with works of operation, or of maintenance or repair. Further on it was said:

"The work which Hamilton did was in original construction, and not in keeping up, as a going concern, a railroad already built. The amount due him was no part of the current expenses of operating the road. There was, as to him, no diversion of current earnings to the payment of current expenses." And again: "The equitable principles upon which the decisions rest, applying to the payment, out of the proceeds of the sale of railroad property, of such debts for operating expenses and necessary repairs, are not applicable to claims such as the present, accrued for the original construction of a railroad while there was a subsisting mortgage upon it. These five appellees gave credit to the company for their work. It was construction work, and none of it was for operating expenses or repairs, and none of it went towards keeping a completed road in operation, either in the way of labor or material."

In *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663, a claim for car rent which had accrued prior to the receivership was disallowed, and the following statement in the opinion of the court in *Miltenberger v. Railroad Co.*, *supra*, was quoted with approval:

"It is easy to see that the payment of unpaid debts for operating expenses, accrued within ninety days, due by a railroad company suddenly deprived of the control of its property, due to operatives in its employ, whose cessation from work simultaneously is to be deprecated, in the interests both of the property and of the public, and the payment of limited amounts due to other and connecting lines of road for materials and repairs, and for unpaid ticket and freight balances, the outcome of indispensable business relations, when a stoppage of the continuance of such business relations would be a probable result, in case of nonpayment, the general consequence involving largely, also, the interests and accommodation of travel and traffic, may well place such payments in the category of payments to preserve the mortgaged property in a large sense by maintaining the good will and integrity of the enterprise, and entitle them to be made a first lien."

From the opinion in *Kneeland v. Trust Co.*, *supra*, there was extracted the following:

"When a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. \* \* \* It is the exception, and not the rule, that such priority of liens can be displaced."

Having thus referred to these cases, the court, in *Thomas v. Car Co.*, then observed:

"The case of a corporation for the manufacture and sale of cars dealing with a railroad company whose road is subject to a mortgage securing outstanding bonds is very different from that of workmen and employes, or of those who furnish, from day to day, supplies necessary for the maintenance of the railroad."

It is not necessary to extend this examination of the decisions of the supreme court, for they have been fully and very satisfactorily considered by the court of appeals for the Fifth circuit in the case of *Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co.*, 24 C. O. A. 487, 79 Fed. 202, where it was held that the purchase by a railroad company of about 20,000 tons of steel rails, to replace the old and deteriorated rails with which its tracks were laid, did not create a debt entitled to preference as against bonds secured by mortgage. That court said:



"It is difficult to see how the purchase of 20,000 tons of rails, made under the circumstances stated in the intervenor's own pleadings, can be a current debt for operating expenses, made in the ordinary course of continuing business. If the road was in the condition of dilapidation which is inferable from the intervenor's averments, it might be sufficient to say, in denying the demand, that the rails were supplied, not as a matter arising in the ordinary course of the railroad's operations, but for the virtual reconstruction of the road. No authorities need be cited to establish the proposition that works of reconstruction are not entitled to preferential payment."

This proposition, and the preceding remark, that there does not appear to have been any case in which such a claim has been, on final adjudication, allowed a preference, I unhesitatingly adopt, and do not perceive that in principle the "virtual reconstruction of the road" of an electric railway company differs from the actual reconstruction of its power house.

In the able and very thorough brief which has been submitted by the learned counsel for the claimants, "the particular equities of this case which are relied on as the basis of the exercise of the extraordinary power in this case" are stated to be:

"That the road was utterly disabled, by the destruction of the power house, from earning money with which to pay interest on its bonds. The bondholders delayed a year before taking possession of the road, and during that time permitted the company to rebuild the power house, and incur the obligations to these claimants. That these claimants were thereby induced to put their labor and materials into the improvement of what was, in effect, the bondholders' property. That the value of that property is enhanced thereby; and that it is inequitable that they should afterwards step in, take possession of the improved property, and refuse to pay for the improvements."

The position here assumed seems to be that, by reason of the "special circumstances" alleged, the mortgage bondholders are estopped in equity from asserting their right to the fund in question, without satisfying the particular obligations referred to. But this position is not tenable. It does not appear that the action of these claimants was in the slightest degree induced by the bondholders, or that any delay of the latter in enforcing their rights in any manner influenced or affected the conduct of the former. Whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens through the interposition of a court of equity; and "the necessity for the supplies does not entitle to preferential payment, unless the supplies are for current expenses in the ordinary course of operation." *Kneeland v. Trust Co.*, 136 U. S. 97, 10 Sup. Ct. 950, 34 L. Ed. 379; *Thomas v. Car Co.*, 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663; *Railroad Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. Ed. 905; *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625; *Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co.*, 24 C. C. A. 487, 79 Fed. 210. For the reasons which have been indicated, I am of opinion that the claims thus far considered are not entitled to the priority which is asked for them.

The claim of Adam Ertter, amounting to \$192, for bricks furnished in the re-erection of the power house, about 10 months before the receivership, must, upon the ground already discussed, be disallowed.

He has, however, also made claim for salary from February 20, 1894, to September 21, 1895, at \$500 per annum, amounting in the aggregate to \$762. The master allowed this claim, but only for four months next preceding the receivership; and he cannot be said to have erred in this, for the time limit which he applied had been prescribed by an order of this court. I think, however, that this limitation is not now binding upon the court itself, and that, under all the circumstances, the discretion vested in it will be properly exercised by extending the period of allowance to six months, and this will accordingly be done. The further claim of Mr. Ertter,—\$60 for rental of room in a building owned by him and used by the company for office purposes,—though rejected by the master, mainly upon the ground that it had not properly come before him, should, I think, be allowed. The business of the company was transacted in this office for about five months before the receiver was appointed, and he continued to use it for some time thereafter. There is no evidence of bad faith in the matter, and, while such an office may not have been absolutely necessary, it was certainly at least a not unreasonable provision for the conduct of its affairs.

The master also held that the claim presented by Craig, Finley & Co., for printing tickets, amounting to \$270, could not be allowed by him, because it had not been properly filed with the trustee. This circumstance, however, does not preclude the court from considering the claim on its merits, and I do not think that the tickets in question were so manifestly superfluous and inappropriate to the business of the railway company as to justify the disallowance of the debt incurred in having them printed. I regard them as having been day by day supplies. The claim will be allowed.

Let a decree in accordance with this opinion be prepared.

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### COMMERCIAL BANK OF AUGUSTA v. SANDFORD et al.

(Circuit Court, D. South Carolina. January 12, 1900.)

#### 1. TAXATION—SALE UNDER TAX WARRANT—VALIDITY.

Under the statute of South Carolina (Acts 1887; 19 St. at Large, p. 884), providing that a sheriff having a tax warrant for collection shall seize and sell so much of the property of the delinquent taxpayer as may be necessary to raise the sum of money therein named, and charges thereon, the limitation is mandatory, and a sale of a tract of land worth \$2,500, and readily capable of division, to satisfy a tax warrant calling for only about \$30, is unauthorized, and voidable by the landowner.

#### 2. EQUITY PLEADING—MULTIFARIOUSNESS—BILL FOR FORECLOSURE OF MORTGAGE.

A bill to foreclose a mortgage on real estate is not multifarious because it joins as defendants parties claiming title to the land under a sale upon a tax warrant against the mortgagor, which sale was made after the execution of the mortgage, and, if valid, would defeat the lien thereof, and seeks to have such sale set aside as illegal.

#### 3. PARTIES—SUIT TO SET ASIDE TAX SALE.

In a suit against the purchasers of land at a tax sale, to set aside such sale on the ground that the action of the sheriff who made it was illegal, such sheriff is a proper party defendant.

**In Equity.**

Jos. R. Lamar, for complainant.

D. S. Henderson and Wm. H. Townsend, for defendants.

**SIMONTON, Circuit Judge.** This bill is filed for the foreclosure of a mortgage executed on May 7, 1896, by Mary E. Sandford, a citizen and resident of the state of Tennessee, to the Commercial Bank of Augusta. The principal of the bond secured by the mortgage is \$2,500. The land embraced in the mortgage is situate in Barnwell county, in the state of South Carolina, containing 202 acres. The mortgage was duly recorded. The defendants in the cause are the said Mary E. Sandford, the mortgagor, H. S. Mellichamp, Mrs. E. R. Easterling, and Mrs. Julia B. Easterling, who hold and claim possession of this land under a tax title executed to them on August 6, 1898, by Frank H. Creech, sheriff of Barnwell county; and this sheriff is also made a defendant. Mrs. Sandford filed her answer, admitting the execution of the bond and mortgage, the amount claimed to be due and unpaid thereon, and the right of complainant to foreclose. H. S. Mellichamp and the Mesdames Easterling join in demurrer to the bill. This demurrer is for these causes: (1) That the complainant hath not, in and by said bill, made or stated such a cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for from or against these defendants; (2) that it appears from said bill that the same is exhibited against these defendants and several other persons therein named as defendants thereto for distinct matters and causes, in several whereof, as appears by said bill, these defendants are in no wise interested or concerned, and that the bill is altogether multifarious.

The defendant Creech files his demurrer, the first and third grounds whereof are the same as those in the demurrer of the other defendants; and the second ground that it does not appear from the bill of complaint that this defendant has any interest in the subject-matter of this suit. These grounds will be considered in their order.

As the demurrers admit all the facts stated in the bill, these will be set out. The bill alleges that the defendants Mellichamp and the Mesdames Easterling are in possession of the tract of land, claiming under a tax title executed to them by their co-defendant F. H. Creech, sheriff of Barnwell county, on August 6, 1898; that said tax title is null and void, having been given and obtained without warrant of law and under circumstances not sustained by law; that the warrant on which the tax title is based was issued by the treasurer of the county for \$22.65, with \$8.45 costs, the warrant containing in part taxes issued for the school district within which this tract lay, which school taxes were improperly and illegally levied, there being no petition of freeholders therefor, as the law requires; that the statute in such case made and provided requires the sheriff, under the warrant, to seize and take possession of so much of the defaulting taxpayer's estate, real or personal, or both, as may be necessary to raise the sum of money therein named, and charges thereon, and, after due advertisement, to sell the same; that under said war-

rant so illegally issued the said sheriff did not seize and take exclusive possession of so much of defaulting taxpayer's estate, nor did he personally take possession, or personally sell the same, but, on the contrary, an illegally appointed deputy went on the land, and took possession of all of it, and not of so much as was necessary to pay the tax, which could easily have been done, and the entire tract was sold by the illegally appointed deputy, not by the sheriff, and was purchased by said defendants for \$85; that the levy so made was excessive, the said tract being easily divisible into two parts, which could have been easily sold so as to bring the amount of the tax and charges, the whole land being worth at least \$2,500; that although the tract of land levied upon was easily divisible into two parts, which could have been easily sold to bring the amount of taxes and charges thereon, the whole tract was sold and purchased by the defendants for the sum of \$85, its actual value being \$2,500; that the levy and sale were made not by the sheriff, but by an illegally appointed deputy.

If these facts be true,—and for the occasion the demurrer admits them,—the levy and sale were illegal, and the defendants took nothing. In the case of *Wilson v. Cantrell*, 40 S. C. 114, 18 S. E. 517, the sheriff, acting under the same statute as the sheriff in this case acted (Acts 1887; 19 St. at Large, p. 884), levied upon and sold the entire tract. This was sustained. It did not appear that the tract was divisible so as to be sold in parcels, and the conclusive fact was found by the circuit judge and the master that the levy was not excessive. In the case at bar it is stated in the bill and admitted by demurrer that the land could easily have been divided, and the parts easily sold to pay this tax; and, as to the excess of the levy, there can be no doubt when a tract of the value of \$2,500 is sold for a tax of \$22.65.

The rule is stated by Mr. Justice Field in *French v. Edwards*, 13 Wall. 511, 20 L. Ed. 703, as follows:

"There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such, generally, are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be, and generally would be, injuriously affected, they are not directory, but mandatory. They must be followed, or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

Cooley, Tax'n, p. 496, states this rule. He adds:

"And such a provision [that only so much of the land must be sold as would pay the tax] must be strictly obeyed. A sale of the whole, when less would pay the tax, would be such a fraud on the law as to render the sale voidable, at the option of the landowner, and the deed would be void on its face, if it showed the fact of such excessive sale."

But the question remains, can this be considered in this suit? or, in other words, is this bill multifarious? It is difficult, if not im-

possible, to define "multifariousness." There is not any positive, inflexible rule as to what, in the sense of a court of equity, constitutes "multifariousness," which is fatal to a suit on demurrer. *Shields v. Thomas*, 18 How. 253, 15 L. Ed. 368, approved in *Harrison v. Perea*, 168 U. S. 319, 18 Sup. Ct. 129, 42 L. Ed. 478. Story defines this term, "The improperly joining in one bill distinct and independent matters, and thereby confounding them." Story, Eq. Pl. § 271.

In *Salvidge v. Hyde*, 5 Madd. 146, we find this:

"If the object of the suit be single, but it happens that different persons have separate interests in distinct questions which arise out of that single object, it necessarily follows that such different persons must be brought before the court, in order that the suit may conclude the whole object."

See, also, *Brown v. Deposit Co.*, 128 U. S. 403, 9 Sup. Ct. 127, 32 L. Ed. 468; *Barcus v. Gates*, 32 C. O. A. 337, 89 Fed. 791.

The complainant, and Mr. Mellichamp, with the two Mesdames Easterling, claim through and rely upon the title of Mrs. Sandford. The complainant sets up a mortgage lien; these defendants set up a sale under the prior tax lien. The question is as between these alleged liens. If the sale under the tax lien is good, the complainant's lien is defeated. It is not defeated if the sale be illegal. The complaint sets up no title; only a lien. The defendants claim under a prior lien, and must connect themselves with it in order to defeat the mortgage lien.

A suit to foreclose the mortgage, leaving this matter of sale under the tax lien open, would be futile, and lead to further litigation. Indeed, as it appears, but for this claim there need be no suit. These defendants do not claim adversely to Mrs. Sandford. They claim under her. They derive their title from her. If she never had any title, they have none. They get their title under a lien on her land. If she had parted with her title before the execution of this mortgage, either by her own voluntary act or by operation of an execution or a tax sale, then possibly they would not be proper or necessary parties to this suit. But, if she had made a conveyance or assignment after the date of the mortgage, the purchaser would have been a necessary party to the foreclosure of the mortgage. Story, Eq. Pl. §§ 193, 199, 201; *Terrell v. Allison*, 21 Wall. 289, 22 L. Ed. 634. In *Stevenson v. Railway Co.*, 105 U. S. 703, 26 L. Ed. 1215, a bill in equity to foreclose a mortgage was sustained which tried the validity of a sale on execution against the mortgagor upon judgments recovered after the mortgage was made. These authorities are quoted in *Hefner v. Insurance Co.*, 123 U. S. 755, 8 Sup. Ct. 337, 31 L. Ed. 309, as sustaining this doctrine. On principle, it was within the jurisdiction and authority of the court, upon a bill in equity for the foreclosure of the plaintiff's mortgage, to determine the validity or invalidity of a tax title, and the purchaser and holder of the tax title acquired after the date of the mortgage was a proper, if not a necessary, party to the bill.

The bill is not multifarious as to these three defendants. Can the demurrer of the sheriff be sustained? The sheriff may not be a necessary party, but he certainly is a proper party. The other defendants claim through his action, and complainant alleges that it was illegal.

Indeed, he is responsible for the irregularity and invalidity of the sale. The bill discloses no collusion, fraud, or improper conduct on the part of the other defendants. As their rights depend on the validity of the sheriff's discharge of his duty, they are entitled to his assistance in the defense of his action. In the note on "Parties" to *Mitf. Eq. Pl.* (6th Am. Ed., from 5th Lond. Ed.) p. 398, the rule is stated: "There is, however, another rule, that, when a defendant is interested in having another made a party defendant, the plaintiff is obliged to make him a party, so that the principal defendant may have his assistance in the defense." There is another consideration. If this sale be set aside, the defendants, who purchased and paid their money, they being without fault, are entitled to the return of what they paid. This must be made by the sheriff, who received it. That gives him an interest in the subject-matter of this suit. So he comes within the general rule, stated by the same authority, "that all interested in the subject-matter of a suit in equity, whether directly and immediately, or incidentally and remotely, are to be made parties, so that complete justice may be done between all parties interested in one suit"; quoting *Crease v. Babcock*, 10 Metc. (Mass.) 531. As was said by Lord Chancellor Talbot, and repeated by Chief Justice Marshall, "the court of equity in all cases delights to do complete justice, and not by halves." *Hefner v. Insurance Co.*, *supra*. Let an order be taken overruling the demurrers, and giving leave to defendants, if they be so advised, to plead or answer under equity rule No. 34.

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WYCKOFF, SEAMANS & BENEDICT v. WAGNER TYPEWRITER CO.

(Circuit Court, S. D. New York. December 16, 1890.)

1. WITNESSES—PERSONAL PRIVILEGE—EXPOSURE TO PROSECUTION OR PENAL LIABILITY.

Whether the answer to a question asked a witness may reasonably have a tendency to criminate him, so as to justify his refusal to answer, under Rev. St. § 860, is to be determined by the court, in view of the pleadings and the other testimony in the case.

2. SAME.

Where it is charged in the pleadings that a corporation, which is a party, is a constituent part of a combination or trust formed in violation of the federal and state statutes, a witness who is a stockholder in such corporation is justified in refusing to answer a question directed to obtaining information as to the transfer by the witness of his own stock, and touching his individual transactions in the formation of the alleged trust, on the ground that the answer might tend to criminate him, and subject him to the penalties and forfeitures provided by such statutes.

In Equity.

This is an equity action brought by the complainant against the defendant to restrain the infringement of certain letters patent for improvements in typewriting machines, and for an accounting. Among other defenses, the defendant alleged in its answer that the complainant corporation turned over its profits to an illegal combination of typewriter manufacturers, in restraint of trade, and for the purpose of enhancing prices thereof, of which illegal combination complainant was a part and parcel, and that by reason thereof complainant had violated the antitrust statutes of the United States in such cases made and provided, and was not entitled to any relief in the court of equity,

and had no right to bring this action. The defendant sought to prove these allegations in its answer by H. H. Benedict, the president of the complainant company. During the examination of Benedict before the examiner, the questions hereinafter quoted in the opinion of the court were propounded to the witness. The witness declined to answer, and demurred to the questions, on the ground that his answer thereto might subject him to the pains and penalties contained in the federal antitrust act and statutes of the state of New York to prevent combinations and monopolies. Thereupon, at the request of defendant's counsel, the examiner certified the record to the court for its decision as to whether or not the witness should be required to answer the questions.

H. D. Donnelly and J. W. Suggett, for complainant.

A. v. Briesen and Charles Strauss, for defendant.

LACOMBE, Circuit Judge. The first question upon which a ruling is asked reads as follows:

"Q. 9. When did you last have in your possession or under your control any of the papers mentioned in this subpoena?"

The papers mentioned in the subpoena were agreements or correspondence relating to the sale or exchange of the witness Benedict's individual stock in the corporation of Wyckoff, Seamans & Benedict.

The second question reads as follows:

"Q. 10. Will you state whether or not, in an agreement made between yourself and Mr. Charles N. Fowler, in the fall of 1892, it was not provided, among other things, as follows: 'The vendors, each for himself, contract, covenant, and agree that they, and each of them, will, upon the consummation of this contract in due form, assign and transfer any and all patents owned by them, and any and all interests which they may have in any patents, covering, appertaining, or relating to typewriting machines'?"

It is quite apparent that the purpose of these questions, which are directed to obtaining information as to the witness' own transfer of his own shares of stock, and touching his individual transactions in the formation of the Union Typewriter Company, which it is charged is an illegal trust, is to establish the proposition that the witness has himself violated the provisions of the antitrust act. That being so, his declination to answer the questions on the specific ground that his answer might have a tendency to incriminate himself is well taken.

#### On Motion to Settle Order.

The discussion had upon the settlement of the order in this case has practically amounted to a reargument, which, however, has left the opinion of the court unchanged. This is not a case arising under the peculiar language of the interstate commerce act, which was discussed in *Commission v. Brimson*, 154 U. S. 448, 14 Sup. Ct. 1125, 38 L. Ed. 1047, and in *Brown v. Walker*, 161 U. S. 591, 16 Sup. Ct. 644, 40 L. Ed. 819, in which latter case, by a bare majority, the court held that the witness was compellable to answer. We are dealing here only with the provisions of section 860 of the United States Revised Statutes, and the case of *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, is controlling. Of course, the witness is not the tribunal ultimately to decide whether the question will or will not tend to incriminate him. It is for the

judge before whom the question arises to decide whether an answer to the question put may reasonably have a tendency to criminate the witness, or to furnish proof of a link in the chain of evidence necessary to convict him of a crime. *Ex parte Irvine* (C. C.) 74 Fed. 954.

The two questions are as follows:

"Q. 9. When did you last have in your possession or under your control any of the papers mentioned in this subpoena?"

"Q. 10. Will you state whether or not, in an agreement made between yourself and Mr. Charles N. Fowler in the fall of 1892, it was not provided, among other things, as follows: 'The vendors, each for himself, contract, covenant, and agree that they, and each of them, will, upon the consummation of this contract in due form, assign and transfer any and all patents owned by them, and any and all interests which they may have in any patents, covering, appertaining, or relating to typewriting machines?'"

An examination of the subpoena indicates that the papers mentioned in question 9 are of the character more specifically recited in question 10. Considered by themselves, the questions are not obnoxious to the objection, but they must be read in the light of the pleadings and of the other testimony in the case. When such examination is had, it becomes apparent that it is contended that some combination of the character denounced by federal and state statute, as being in restraint of trade, or promotive of a monopoly, has been formed, and that this very witness was an active party in such formation. Under these circumstances, the court can very well see how, if an answer were enforced to these questions, it might disclose some fact which would form a link in the chain of testimony, in the event of prosecution for the commission of the offense prohibited by the statute. The motion to require the witness to answer is therefore denied.

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#### A. B. FARQUHAR CO., Limited, v. NATIONAL HARROW CO.

(Circuit Court, D. New Jersey. January 19, 1900.)

#### INJUNCTION—GROUNDS—THREATENING SUITS FOR INFRINGEMENT OF PATENT.

A court of equity will not enjoin the owner of a patent from sending circulars to customers and agents of the complainant, charging that an article manufactured and sold by complainant infringes such patent, that complainant is not financially responsible, and that the recipients will be subjected to damages and costs if they continue to handle or sell such article, in advance of an adjudication, in a suit brought to determine the question, that the article does not infringe. Such question cannot be adjudicated in the suit for injunction, and until so adjudicated the defendant is within its rights in giving notice of its claims, and its intention to bring suit for their enforcement; and for any false charges contained in the circulars the complainant has a remedy at law, by an action for libel.

This was a suit in equity for an injunction. On demurrer to bill. Wm. C. Strawbridge and John G. Johnson, for complainant. Mr. Risley, for defendant.

KIRKPATRICK, District Judge. The complainant herein is a corporation organized under the laws of the state of Pennsylvania, en-



gaged in the manufacture and sale of spring-tooth harrows. The defendant is a corporation organized under the laws of the state of New Jersey, holding by assignment certain patents for improvements in spring-tooth harrows, and granting licenses to various persons to manufacture its patented devices. The complainant does not hold such license, but the product of its factory comes in competition with the goods put upon the market by the defendant's licensees. The bill of complaint alleges that for the purpose of suppressing this competition, and with intent to break up and destroy complainant's harrow business, the defendant is circulating among complainant's customers and agents letters by which they are falsely and maliciously informed that the defendant's patents have been sustained by the courts, that the complainant's harrows are infringements thereon, and that, unless they desist from handling and selling the same, suits will be brought by defendant against them, and they subjected to large costs, which they will be obliged to pay, because of complainant's want of financial responsibility. The bill avers that the patents of defendant have narrow claims, and that complainant's harrows do not infringe thereon; that complainant's business is being ruined and destroyed by defendant's action; and that unless it is restrained the injury will be irreparable. The prayer of the bill is that the defendant be enjoined from writing and publishing, distributing, or circulating any letter or circulars containing intimidating threats of suit against complainant or its customers, or against persons selling or using complainant's harrows under the letters patent alleged to be owned by defendant. Before such an order issues, there must be a judicial ascertainment whether the complainant's harrows are or are not infringements upon any of the patents of which it is said the defendant is the owner. The allegations of invalidity and noninfringement made in the bill are not admitted by the pleadings, nor can those questions be determined in this suit. The falsity of defendant's representations in respect to its patents and complainant's infringement of them will not be presumed. If the defendant has a patent which the complainant or its customers infringe, it is immaterial that it is a corporation composed of several leading manufacturers, termed in the bill a "trust," or that it is charged with attempting to control the price of harrows or suppress competition. The grant of the patent, which carries with it the sole right to manufacture, use, and sell the patented device, of itself stifles competition in that particular line, and creates a monopoly. The patent owner is justified in using all lawful means to protect his monopoly. He may give notice of his rights as he understands them, and of his intention to ask the courts to enforce them in suit to be brought for the purpose. If the defendant's assertions respecting the validity of its patents and the charge of infringement by complainant be true, and not false, it will be well within its rights in giving the notices complained of; and whether they be true or false cannot be made an issue in this suit. As to defendant's alleged false assertions respecting the financial responsibility of complainant, if complainant has been damaged thereby he has his remedy at law. The case is analo-

gous to that of *Francis v. Flinn*, 118 U. S. 385, 6 Sup. Ct. 1148, 30 L. Ed. 165, which charged the defendants with conspiring to destroy a business by publications in newspapers and other and divers means, and asked injunctive relief. Mr. Justice Field said, "If the publications are false and injurious, he can prosecute publishers for libel;" adding, "If a court of equity could interfere and use its remedy of injunction in such cases, it would draw to itself a greater part of the litigation properly belonging to courts of law." Judgment should be for the defendant, and decree entered dismissing the bill of complaint.

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SOUTHERN RY. CO. v. NORTH CAROLINA CORP. COMMISSION et al.  
 SEABOARD & R. RY. CO. v. SAME. ROANOKE & T. R. CO. v. SAME.  
 RALEIGH & G. RY. CO. v. SAME. RALEIGH & A. AIR-LINE RY. CO.  
 v. SAME. CAROLINA CENT. RY. CO. v. SAME. ATLANTIC COAST-  
 LINE RY. CO. OF VIRGINIA v. SAME. WILMINGTON & W. RY. CO.  
 v. SAME. NORFOLK & C. RY. CO. v. SAME.

(Circuit Court, E. D. North Carolina. January 12, 1900.)

**FEDERAL COURTS—FOLLOWING STATE DECISIONS—CONSTRUCTION OF STATE STATUTES.**

The decision of the highest court of a state, construing a state statute, or determining whether or not a statute has been repealed by a subsequent act, will be recognized as authoritative by a federal court, subject to certain exceptions, as where prior acquired rights are affected; and, where such court has independently rendered a contrary decision, it will be recalled, if still within the court's control, in deference to a later decision of the state court.<sup>1</sup>

**In Equity. On rehearing.**

For former opinion, see 97 Fed. 513.

**SIMONTON**, Circuit Judge. These cases having been heard together, an opinion was filed directing that injunctions issue as prayed for in the several bills. 97 Fed. 513. Before the expiration of the term within which the opinion was filed, and therefore while the cases were within the control of this court, a petition for rehearing was filed by the defendants. After due notice to all parties, this petition was heard, and full argument had thereon. The petition seeks to reopen the cases, because, as is alleged, the supreme court of North Carolina has rendered a decree construing the acts of the legislature of North Carolina, and reaching a different conclusion from that of this court.

The legislature of North Carolina, in 1891, passed an act to provide for the general supervision of railroads, steamboat or canal companies, express and telegraph companies, doing business in the state of North Carolina, being chapter 320 of that year, and popularly known as the "Railroad Commission Act." This act constituted a railroad commission, consisting of three members, elected

<sup>1</sup> As to state laws as rules of decision in federal courts, see note to *Wilson v. Perrin*, 11 C. C. A. 71, and, supplementary thereto, note to *Hill v. Hite*, 29 C. C. A. 553.

by the general assembly, holding their offices for a term of years, removable, under certain circumstances, by the governor, who in such case could fill the vacancy so created, and enjoying a salary of \$——. The act, in minute detail, specifies the duties of this board. This act went into effect on 1st April, 1891. It was amended once by name by chapter 206, Acts 1897. The original act and its amendment give the railroad commission full power of supervision over the management of railroads. Neither of them make any reference whatever to the assessment and taxation of railroad property. At the session of 1891 (9th March), the legislature passed what is known as the "Machinery Act." This is an act providing the ways and means of meeting the expenses of the state government in the assessment of property and the collection of taxes, and seems to be passed for an occasion, and so to be temporary in its character. Each year the legislature passes a machinery act having almost identical provisions. This would be wholly unnecessary if the act were permanent in its character. In this machinery act of 1891 is section 44, as follows:

"The commissioners elected from time to time under the authority of an act to provide for the general supervision of railroads, steamboat or canal companies, express and telegraph companies, doing business in the state of North Carolina, shall constitute a board of appraisers and assessors, for railroad, telegraph, canal and steamboat companies."

This same provision is repeated year by year in the machinery act of each year, from 1891 to 1899, inclusive. At the session of 1899, two acts were ratified on 6th March, 1899. The one of these declared "that chapter 320, Public Laws of 1891, and all acts amendatory thereof and supplementary thereto, be and the same are hereby repealed." The other of these was an act to establish the North Carolina corporation commission. This act provided for the election, by the general assembly passing it, of three commissioners, who shall have general supervision of railroads, steamboat, navigation, and canal companies, express, telegraph, and telephone companies, building and loan associations, banks, and sleeping-car companies. Those then elected held for a term ending January 1, 1901. Thenceforward the commissioners were to be elected by the people at the general election, the first election to be in 1900, one of them for a term of two years, another for a term of four years, and another for a term of six years. At all subsequent elections the term of the person elected shall be six years. The duties of this board are minutely specified,—very similar to those of the railroad commissioners with respect to the railroad, steamboat, or canal companies and express and telegraph companies,—and adds to these supervision over telephone companies, building and loan associations, sleeping-car companies, and banks. A separate, distinct provision in the act is "to perform all the duties and exercise all the powers imposed or conferred by chapter 320, Public Laws of 1891, and the acts amendatory thereto." Neither this act,—which, by the way, was made of force the day after the repeal of the railroad commission act,—nor, as has been seen, this last-named act itself, say anything whatever about the assessment and taxation of railroad property. The cor-

poration commission proceeded to assess for taxation the property of the complaining railroad companies, and the question was made as to the right of the commission so to do.

Unaided by any decision on this point of the court of last resort in North Carolina, the conclusion was reached that it had no such power. This power of assessment was intrusted to the commissioners elected under chapter 320, Laws 189f, and for this purpose they were constituted a board of appraisers. The machinery act of each succeeding year had done this, including that of the year 1899. The legislature of 1899 repealed that act in toto, so far as language and intent could do so. The conclusion then seemed inevitable that the act was in fact repealed. Besides this, one day after that act was said to be repealed the legislature put in force the corporation commission act, by which they declared their purpose to establish the North Carolina corporation commission, by electing then and there three commissioners, to whom was given a different term from that of the railroad commissioners, whose successors would hold for a term differing wholly from the railroad commissioners, who, after one election by the legislature, would thereafter be elected by the people, whose vacancies were filled, not by the governor, but by the board of internal improvements, and who received a different salary, and took a different oath of office. With this light, the conclusion was reached that the act providing for railroad commissioners was repealed; that other officers had been elected, differing in tenure and in other important respects from them; and that, as was stated at bar, two of the former railroad commissioners, having accepted election under the new act, and having taken the oath of office thereunder, necessarily vacated their former office, and there remained but one person who could claim to be a railroad commissioner. So, as he could not act as a board himself, and in fact did not act with any one, and as the corporation commission was not empowered to make the assessment, the conclusion was reached that the supposed assessment was void, and action under it was enjoined.

But, while the case was before this court, there was pending in the courts of North Carolina an action of the state *ex relatione* Abbott, the railroad commissioner who was not elected on the corporation commission, against Beddingfield, who, never having been a railroad commissioner, was elected on the corporation commission. Abbott claimed that he had property in his office, of which he could not be deprived, except by the abolition of the office, and that, so long as the duties of the office were continued, a mere change of the name of the office did not abolish it or extinguish his right to it; that the corporation commission was but the railroad commission under another name; and that its passage in no way affected his right to his office, and that Beddingfield was an intruder therein. The cause was heard in the court of last resort in North Carolina. That court awarded the office to Abbott, and excluded Beddingfield. Construing the acts quoted above, the court held that the railroad commission act was not repealed in fact; that the corporation commission was the same commission, to all intents and purposes, except the name; that, when the legislature passed it, they defeated

their declared purpose, because, under the law of North Carolina, established by a current of decisions from *Hoke v. Henderson*, 15 N. C. 1, a public office is property, of which the incumbent cannot be deprived so long as the duties of the office, under whatever name or title, must be performed; that, construing these two acts in *pari materia*, the corporation commission act was an amendment to the railroad commission act, and that the two commissions were one and the same. They seated Abbott on the corporation commission, and held that he was a component part thereof, by virtue of his office as railroad commissioner. This decision as to the action of the legislature, and the construction put upon the repealing act of 1899 and the corporation commission act, differ *toto cœlo* from the conclusion reached by this court on the case presented by these bills in equity.

The question now is, what effect should the judgment of the supreme court of North Carolina have upon the action of this court? Ought it to lead to a reconsideration of its opinion, and the recall of its action thereon?

We are bound to presume that, when a question arose in the state court, it was thoroughly considered by that tribunal, and that the decision rendered embodied its deliberate judgment. *Cross v. Allen*, 141 U. S. 539, 12 Sup. Ct. 67, 35 L. Ed. 843. It is the practice of the supreme court of the United States, whose practice controls all federal courts, to adopt the interpretation given by the highest tribunals of the several states to their respective acts of legislation, where such interpretation does not conflict with the paramount authority of the constitution of the United States, binding on their own courts, or with the fundamental principles of justice and common right. *Murray v. Gibson*, 15 How. 421, 14 L. Ed. 755. There are exceptions to this rule: When the meaning of a state statute has not become established (*Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359; *Carroll Co. v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, 28 L. Ed. 517); when the decision is in conflict with previous decisions of this court; and when the rights which it affects here were acquired before the decision of the state court was made (*Carroll Co. v. Smith*, *supra*). In these cases the federal courts exercise their independent judgment. Subject, however, to these exceptions, by comity or by the suggestion of public policy, federal courts adopt the decision of state courts as to the construction and validity of their local laws. In these cases the supreme court will change its decision when the highest tribunal of a state has given a different interpretation. In *Morley v. Railway Co.*, 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925, these propositions were affirmed. The rule of construction adopted by the highest court of the state, in construing its own constitution and one of its own statutes, in a case not involving any question re-examinable in this court, under section 25 of the judiciary act, must be regarded as conclusive in this court. *Provident Inst. v. Massachusetts*, 6 Wall. 611, 18 L. Ed. 907. "The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text." *Leffingwell v. Warren*, 2 Black,

599, 17 L. Ed. 261. The meaning of a state statute declared by the highest court of a state is conclusive on this court. *Randall v. Brigham*, 7 Wall. 523, 19 L. Ed. 285. In *Kibbe v. Ditto*, 93 U. S. 674, 23 L. Ed. 1005, the decision of the highest court of a state, as to whether a statute has repealed the provisions of a former act, was held conclusive on the supreme court. So, also, the decision of the highest court of a state that an act of such state has not been repealed, was followed by the supreme court. *Peik v. Railway Co.*, 94 U. S. 164, 24 L. Ed. 97. Even if there be a diversion of opinion between the members of the state supreme court, such diversion, although a close one, does not prevent the opinion of the majority from becoming the decision of the court, and as such conclusive on the supreme court of the United States. *Williams v. Eggleston*, 170 U. S., at page 311, 18 Sup. Ct., at page 617, 42 L. Ed., at page 1047. This general current of decisions is approved in the latest case upon the subject. *Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.* (Nov., 1899) 20 Sup. Ct., at page 33, Adv. S. U. S. 33, 44 L. Ed. —. The case of *State ex rel. Abbott v. Beddingfield* (N. C.) 34 S. E. 412, involved the construction of the acts of the legislature of 1899, repealing the railroad commission act, and establishing the corporation commission. The language of the court is distinct, and its purpose is clear. It says this: "It is established to be the law of this state by *Wood v. Bellamy*, 120 N. C. 221, 27 S. E. 113, *Day v. State Prison*, 124 N. C. 362, 32 S. E. 748, and *State v. Jordan*, 124 N. C. 683, 33 S. E. 139, that an act is not repealed by the legislature's saying it is repealed, when the same act or contemporaneous acts show that it is not repealed. And it is established to be the law of this state by *State v. Jordan*, supra, and the authorities there cited, and by *Arendell v. Worth* (at this term) 34 S. E. 232, that contemporaneous legislation about the same subject-matter is in *pari materia*, and may be read and construed together. It is established law in this state by *Hoke v. Henderson*, 15 N. C. 1 (which has been approved in as many as 40 cases decided by this court, as shown in the concurring opinion of Justice Douglas in *State v. Jordan*), by *Wood v. Bellamy*, and by *Day v. State Prison*, supra, that a public office, to which there is attached a salary, is a vested interest,—a property in the holder,—and, as such property holder, he is protected by the law and constitution of this state and the laws and constitution of the United States. It is the settled law of this state (*Wood v. Bellamy*, *Day v. State Prison*, and *State v. Jordan*, supra) that the change of the name from 'railroad commission' to that of 'corporation commission' does not deprive the relator of his office,—his legal and constitutional rights to hold said office. If we consider the two acts of 1899 in *pari materia*, and read them together, as we are bound to do, unless we disregard all the former decisions of this court, we find that the two acts of 1899 did not repeal the act of 1891 or the act of 1897, but are amendatory thereof; that the re-enactment of the act of 1891 and the act of 1897, amendatory thereof, in the same legislation that it is contended by defendant repealed them, had the effect to continue in force the acts of 1891 and 1897. *State v. Williams*, 23 S. E. 250." The same court, at the

same term, reiterated its conclusion in *Abbott's Case* in *State v. Owen*, 34 S. E. 424; *State v. Griffin*, Id. 429; *State v. Webb*, Id. 430; *State v. Hill*, Id. 432. *State ex rel. Abbott v. Beddingfield* is distinctly recognized in *State v. Southern Ry. Co.* (Sept. term, 1899; supreme court of North Carolina) 34 S. E. 527. There can be no doubt as to the conclusion of the supreme court of North Carolina. That court holds that the legislature, however distinctly it may declare its intention to repeal an act, cannot repeal it so as to deprive an incumbent of his office, if by another act it attempts to clothe other persons with his duties; that, therefore, the attempt to repeal chapter 320, Acts 1891, and its amendatory acts, is a nullity; that the new act establishing the corporation commission is but an amendment of the railroad commission act, operative in every respect but the change of officials; and that the persons theretofore elected as railroad commissioners retain all the powers and duties theretofore devolving upon them, undergoing only a change of name to that of corporation commissioners. Under the cases cited above from the supreme court of the United States, it would appear that this course of decisions of the court of last resort of North Carolina, as to the force and effect of their own statutes, on a matter of local law, is obligatory on this court. It must recede from its former ruling, made contemporaneously with these decisions of the North Carolina supreme court, but not brought to its attention. It is so ordered.

In the argument of the case in this court, four grounds were taken against the constitutionality of the action of the corporation commission: (1) It was denied that it had any power to levy the assessment complained of. (2) It was alleged that the method adopted for assessing the value of railroad property differs so materially from that provided for assessing other property in the state of North Carolina as to deny the complainants the equal protection of the law. (3) That there has been in the state of North Carolina a systematic and intentional undervaluation of real and personal property, other than railroad property, with the design to discriminate against railroads, and to cast upon them an undue share of the burdens of taxation, for the purpose of relieving other property of its just proportion of state taxation. (4) That, there being this systematic and intentional undervaluation of real and personal property other than railroad property, the property of complainants has been valued higher than that of individuals.

The first ground has been passed upon, and, in deference to the decisions of the supreme court of North Carolina, is not sustained.

The three other grounds present federal questions, dependent upon issues both of fact and of law. An examination of the affidavits filed leads to no satisfactory conclusion or to an inclination of opinion. They will be referred.

It was stated at the hearing that appeals in three of the cases have been taken to the circuit court of appeals, and have been perfected. These are therefore out of the reach of this court. *Ensminger v. Powers*, 108 U. S. 302, 303, 2 Sup. Ct. 643, 27 L. Ed. 732.

It is ordered, adjudged, and decreed that each of the cases in the margin, except the three in which appeals have been taken and

perfected, be referred to the Honorable J. E. Sheppard, standing master; that he take all testimony as to the matters of fact therein presented; and that he report the same to this court, and at the same time, merely, however, to aid the court, that he submit his conclusions thereon. It is further ordered that, for the purpose of taking this testimony, he be at liberty to hold references in any part of the state of North Carolina which may suit the convenience of counsel as well as the witnesses; the counsel in the case to submit, for the further order of this court, an order directing when the references shall begin, the time the complainants may need to put in their testimony, the time which the defendants may need to put in their testimony, and the time required for the testimony in reply. The restraining order heretofore made to continue in force, subject to the further order of this court.

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**ELDRED et al. v. AMERICAN PALACE-CAR CO. OF NEW JERSEY et al.**

(Circuit Court, D. New Jersey. January 13, 1900.)

**1. PARTIES—SUIT TO RECOVER ASSETS OF CORPORATION.**

In a suit in equity by stockholders of a corporation to compel restitution to such corporation of assets alleged to have been fraudulently transferred, and to be in the possession of defendants, the persons by or through whom the transfer was made are not necessary parties, nor is one who holds certain of such assets as depositary merely, subject to the orders of defendants.

**2. CORPORATIONS—SUIT BY STOCKHOLDERS—NECESSITY OF DEMAND ON DIRECTORS.**

The purpose of equity rule 94 is to prevent collusion, and to make the question of jurisdiction a preliminary one; and where it appears, from all the averments of a bill by stockholders, that there is no collusion, and that a demand on the directors of the corporation to bring the suit would have been useless, and a mere matter of form, it is not required to sustain the jurisdiction of the court.

In Equity. On demurrer to bill.

E. Q. Keasbey, for complainants.

Robert H. McCarter, for defendants.

**KIRKPATRICK**, District Judge. The complainants in this case are stockholders in the American Palace-Car Company, a corporation organized under the laws of the state of Maine, and the defendants are the American Palace-Car Company, a corporation organized under the laws of the state of New Jersey, Lawrence S. Mott, Haywood A. Harvey, and Hobart Tuttle. The bill of complaint sets out the means by which it is alleged the defendants obtained possession of certain property, patent rights, etc., the assets of the American Palace-Car Company of Maine, and charges the same to have been without consideration, fraudulent, and illegal. The bill also charges that it is the intention of the defendants, who have the possession and control of the property so acquired, to dispose of the same, and divert the proceeds, so as to deprive the real owner, the American Palace-Car Company of Maine, of any benefit resulting



therefrom. Various methods are suggested in the bill by which the defendants seek to accomplish this purpose. The prayer of the bill is that the said assets so transferred to the defendants may be set aside, and the same restored to the American Palace-Car Company of Maine, in which, as has been said, complainants are stockholders. The bill also asks for a preliminary injunction forbidding the defendants to make disposition of said assets until the determination of the questions involved in the suit. The defendants demur to the bill, and thereby, for the purposes of this motion, admit the facts as stated in the bill, but insist that the bill should be dismissed (1) because the averments of the bill as amended are not in compliance with equity rule 94; (2) because Denham, Scott, Lord, and the State Trust Company, whose names are mentioned in the bill, are not made parties defendant.

It clearly appears from the bill that the transfer of the assets of the Maine company was made by Denham in pursuance of a resolution adopted by the board of directors of the company, that Scott Lord was the intermediary through whom the title passed to the New Jersey company, and that the State Trust Company of New York never held the assets, except for a specific purpose, and holds them now subject to the order of Mott & Harvey, two of the defendants. No relief is sought against Denham, Lord, or the State Trust Company. Denham and Lord have parted with their possession of the disputed assets, and the State Trust Company holds them subject to the order of Mott & Harvey. If it be adjudged that the complainants are entitled to the relief they seek, and that the defendants are wrongfully in the possession of the assets of the Maine company, it is, for the purpose of obtaining restitution, immaterial who operated the machinery by which the transfer was effected, or who acted as intermediaries to accomplish the result. It is not necessary, on the facts stated in the bill, that to give the relief sought there should be any decree against Denham, Lord, or the State Trust Company. They are not, therefore, necessary parties.

As has been said, the transfer of the assets by Denham was made by him acting under the orders of the board of directors of the Maine company, under advice of counsel. The charge is that, in giving such order, the board of directors acted ultra vires. Surely, it would be a mere matter of form, subserving no good purpose, to call upon the board of directors of the Maine company to institute proceedings for the purpose of declaring its own acts illegal. The purpose and effect of the ninety-fourth rule is clearly set out by Judge Grosscup in *Young v. Mining Co.* (C. C.) 71 Fed. 810. The purpose was to prevent collusion, and make the question of jurisdiction a preliminary one. But, as is well said, "when the bill, in all its averments, shows that the controversy is substantially between citizens of different states, and that there is no collusion, all of the ends of the rule are met. To require more would be to exalt the means above the end." I am of the opinion that the demurrer should be overruled, and the defendants required to answer.

## SOUTHERN RY. CO. v. CITY OF MEMPHIS.

(Circuit Court of Appeals, Sixth Circuit. November 13, 1899.)

No. 708.

On Petition for Rehearing. Modified.

For former opinion, see 97 Fed. 819.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge. Attention has been called by a petition to rehear, filed by the Southern Railway Company, to the fact that the resolution of the city council of Memphis required the railroad company to remove the whole of its Washington street track, including that west of Main street as well as that lying east of said street, and that a decree affirming that of the circuit court without modification would deny relief against the threatened action of the city in respect of the track on Washington street west of Main street. The opinion of the court treated the issue presented by the parties as involving only that part of the track east of Main street, for to that alone was applicable the provision that it should be operated only by horse or other animal power. West of Main street the track might, by express provision of the grant, be operated by steam power. It is clear that the grant has not terminated west of Main street for the reasons which apply to the track east of Main, and that, if the city has a right to remove the track west of Main on Washington, it must be so for reasons not covered by the opinion filed. It is suggested by counsel for the appellee that, if the track east of Main cannot be operated and the franchise has terminated as a consequence of the conditions imposed by the grant, the track west of Main must likewise fail for want of any physical connection with the principal tracks of the company owning it. The facts show, however, that the Memphis & Charleston Railroad Company had a track over Broadway, which connected with a track of the Illinois Central Railroad on the river front, and that the west end of this Washington street track also connects on the river front with this Illinois Central track. It also appears that by paying transfer charges the Memphis & Charleston Railroad Company and its successor, the Southern Railway Company, may and does use this connection, and thus utilizes its own track on the river front west of Washington, and may in the same way use its track on Washington between Front and Main. There is shown, therefore, no such impossibility of use or long-continued disuse of the track west of Main as to justify a decree based on either abandonment or inherent limitation by impossibility of future use. The decree of the court below will therefore be so modified as to continue the injunction granted so far as to restrain any removal of the track west of Main street, but in other respects the decree will be affirmed. In view of this modification of our former decree, the costs of appeal must be divided, the appellee paying one-third and appellant the remainder.

## CONTINENTAL TRUST CO. OF NEW YORK et al. v. TOLEDO, ST. L. &amp; K. C. R. CO. et al.

(Circuit Court, N. D. Ohio, W. D. January 19, 1900.)

## 1. EQUITY—VALIDITY OF DECREE—WHO MAY ATTACK.

General creditors of a railroad company, who appear before a master to prove their claims in a creditors' suit, but who do not file intervening petitions or otherwise become parties to the record, have no standing to file a petition attacking the validity of the decree entered in the suit, unless by leave of court.

## 2. SAME—FEDERAL COURTS—CONSENT HEARING OUTSIDE OF DISTRICT.

By consent of the parties a cause in equity may be finally heard and decided by a circuit judge of the United States within his circuit, but outside of the district in which the cause is pending; and a recital in the decree directed to be entered on such hearing, in accordance with the usual practice, that the cause was heard in open court in the district, is conclusive on all the parties who participate in the hearing.

## 3. SAME—FAILURE TO JOIN IN APPEAL—ESTOPPEL.

Parties to a suit in equity who are brought into appellate proceedings by citation, and given an opportunity to appeal, of which they do not avail themselves, cannot thereafter attack the validity of the decree by a petition filed in the lower court.

## 4. APPEAL—AFFIRMANCE OF DECREE—EFFECT OF MANDATE.

After the circuit court of appeals has affirmed a decree of the circuit court on appeal, and has issued its mandate, the circuit court cannot entertain a petition to modify or expunge such decree.

## Petition to Expunge Decrees of George N. Thornton and Franklin J. Sawyer.

This is a petition, filed by George N. Thornton and Franklin J. Sawyer, to expunge from the record of this court decrees for sale entered in the above-entitled cause on April 1, 1898, the modification of that decree entered May 16, 1898, another decree of sale on the creditors' bill of Stout & Purdy, entered May 16, 1898, and two decrees of November 13, 1899, in execution of the mandate of the circuit court of appeals affirming the three first-mentioned decrees, on the ground that William H. Taft, circuit judge, whom the record shows to have been present at Toledo when said decrees were entered, was not present and did not hold court as therein recited, but was in Cincinnati, and directed the decrees to be entered by letter written from Cincinnati to the clerk at Toledo. The above-entitled litigation has been pending in the circuit court of this district and in the court of appeals of this circuit for, now, seven years. A full account of the litigation may be had by reference to the opinions of this court, to be found under the above title, in 82 Fed. 642, and 86 Fed. 929, and to the opinion of Judge Lurton, speaking for the court of appeals, reported under the title of Toledo, St. L. & K. C. R. Co. v. Continental Trust Co., 38 C. C. A. 155, 95 Fed. 497.

Shortly stated, the litigation was begun by a general creditors' bill of Stout & Purdy, judgment creditors of the Toledo, St. Louis & Kansas City Railroad Company, against the railroad company. Under this bill a receiver was appointed, and thereafter a dependent bill was filed by the Continental Trust Company, in this court, to foreclose a first mortgage upon the defendant company's property, securing \$9,000,000 of its bonds. The cause was delayed because of the controversy raised by preferred stockholders claiming the right to appear by answer and by cross bill in their own interest, as distinguished from that of the common stockholders, who controlled the defendant company and its answer. The controversy was taken to the court of appeals, and there decided under the name of Hamlin v. Trust Co., 47 U. S. App. 422, 24 C. C. A. 271, 78 Fed. 664, 36 L. R. A. 826. When the mandate in the Hamlin Case came down, the district judge for this district was absent from the district on account of his health. Therefore all the then parties to the record applied to Judge Taft to hear the cause, and to pass upon certain preliminary motions

necessary to shape the cause for hearing. Notice was duly given to all parties of a hearing at Cincinnati before Judge Taft. All the parties to the record appeared either in person or by counsel, and the hearing was had in Cincinnati. The case was fully argued in behalf of every interest, and thereafter the court filed an opinion in which the orders to be made were fully indicated. This is the opinion reported in (C. C.) 82 Fed. 642. Upon due notice to all parties, a further hearing was had at Cincinnati as to the form of the orders to be made, and a motion to modify the orders was made by those asserting the invalidity of the mortgage and the bonds issued thereunder. The orders were accordingly modified, and, upon being signed, were sent from Cincinnati to Toledo. One of these orders directed the master theretofore appointed to advertise for claims of creditors under the prayer of the general creditors' bill, and the master was directed to report the claims made, and it was permitted that each creditor be allowed to object to the claims of other creditors in accordance with the practice in equity. Another order allowed judgment creditors, as parties to the creditors' bill, to file intervening petitions against the trustee under the mortgage, attacking the validity of the bonds secured thereby. Issues were made on these intervening petitions by answers and replications, and an immense mass of testimony was taken on them. When all the proof had been taken, upon due notice to every party to the record, a final hearing was had at Cincinnati; and every party to the record was present in person or by counsel at the hearing, and full argument was made on behalf of every interest, and briefs were subsequently submitted. An elaborate opinion, reported in 86 Fed. 929 (C. C.), was mailed from Cincinnati to Toledo by Judge Taft, and it was filed there. After the opinion had been on file for some weeks, notice was duly served by counsel for the complainant trust company upon all the parties to the record, both in the foreclosure suit and in the creditors' bill, that a motion would be made before Judge Taft at Cincinnati for a settlement and entry of the decree. All the parties appeared, either in person or by counsel, and the decree was settled at Cincinnati, and was sent from there by the judge to Toledo to be entered; and it was entered, as all the parties understood it would be, as if the hearing had been had at Toledo, and the judge had been present there. Subsequently a modification of the decree was made, affecting only the issue between the common stockholders and the preferred stockholders; and the modification was made after due notice to Kneeland, who had filed an answer and cross bill on behalf of the common stockholders. Upon the same day a decree was entered upon the creditors' bill ordering the sale under the foreclosure to stand as the sale under the creditors' bill, and remitting the question of priority as between the claims filed under the creditors' bill until after the sale of the property. This was entered after due notice to all the parties of record in the creditors' bill. Thereafter, on May 3, 1898, as appears by the records of this court, a petition for the allowance of an appeal was filed by the Building & Contracting Company of Kentucky and the Rhode Island Locomotive Works, by Potter & Emery, William B. Sanders, and J. D. Springer, their solicitors; the Rhode Island National Bank and the Signal Oil Works, Limited, by William B. Sanders and J. D. Springer, their solicitors; Ferdinand E. Canda, by Smith & Baker, William B. Sanders, and J. D. Springer, his solicitors. Accompanying this petition was filed an assignment of errors, 71 in number. Subsequent to this, the decree, as already stated, was modified on May 16, 1898, and the decree of the creditors' bill was entered. Thereafter the petition for the allowance of the appeal came on to be heard, and it was found by the court that all the parties to the record had been notified of the application for the appeal, and that notice of the application had also been served on all the persons who had filed their claims before the master as creditors under the creditors' bill, among whom were George N. Thornton and Franklin J. Sawyer, the petitioners at the bar. At the hearing of this petition 17 additional assignments of error were filed, and others of the parties to the record, together with one creditor who had filed his claim under the creditors' bill, became parties to the appeal. The appeal was allowed, and special orders made for the citation of the parties. Thereafter all the parties to the record were served with citation, as well as all the persons filing their claims before the master. Among the persons thus cited upon appeal, who had filed their claims before the master, were George N.

Thornton and Franklin J. Sawyer, the petitioners here. Thornton and Sawyer had filed objections to the claims of the trust company before the master. No objection was made, of record or orally, or in any way at any time, to the settling and entry of the decrees at Cincinnati before Judge Taft, in his chambers at that place; and the decrees signed by him were therefore entered at Toledo, as if he were present at that place. Thereafter the 88 assignments of error were filed on appeal, and no mention was made in any way of this alleged irregularity as an objection to the validity of the decrees. The appeal was taken, and 4,000 printed pages of the record were transcribed and carried into the court of appeals, and there printed. The cause was heard at length in the court of appeals. No objection of the kind here made was made, orally or of record, in that court, to the decrees, and judgment was rendered in the court of appeals affirming in every material respect, except a provision as to the preferred stockholders, the decrees entered in the court below; and the mandate of the circuit court of appeals was sent down, directing the execution of the decrees in accordance with its opinion, and the modification of it indicated therein. After the mandate reached the circuit court, counsel for the complainant trust company issued a notice to all the parties of record in the circuit court of their intention to apply to Judge Taft, at Cincinnati, for a settlement and entry of the decree and order upon the mandate of the circuit court of appeals. All of the parties appeared, or were represented by counsel, and the decree was there settled. Among the counsel present was Mr. J. D. Springer, who appears of record in the case as counsel and solicitor for Franklin J. Sawyer, one of the petitioners, and a claimant and objector before the master, though he does not sign this petition. Mr. Springer does, however, make an affidavit, which is filed in support of the petition, in which he says that before the appeal in the cause was taken he was in Toledo, and examined the decrees, and found that the record recited the fact of Judge Taft's presence in Toledo, when he knew that he was in Cincinnati, and that he learned that this was the customary mode of entering decrees in such cases. Mr. Springer was leading counsel for many creditors, and most active in opposition to the foreclosure of the mortgage and collection of the bonds. The last decree was entered November 13, 1899, and on the 18th day of December these petitions are filed; and proof is offered to sustain the averments of them by the affidavits of S. H. Kneeland, J. D. Springer, John Ford, counsel for Kneeland, and the clerk of the court. Each of the petitions avers "that your petitioner was not notified of, and in no wise participated in, any of the said acts or proceedings before the said the Honorable William H. Taft aforesaid, and in no wise consented to any action being taken therein by the said the Honorable William H. Taft, and has never in any wise consented to the determination of his rights by or before the said the Honorable William H. Taft, nor has he in any wise waived or relinquished his right to the determination of his rights in the premises by this court."

Cary & Whitridge, for Continental Trust Co.

Pliny B. Smith, for Geo. M. Thornton and F. J. Sawyer.

J. D. Springer, for Toledo, St. L. & K. C. R. Co. and others.

RICKS, District Judge (after stating the facts as above). These petitions will be stricken from the files for the reason that they were filed without leave of court, and by persons who are not parties to the cause in this court. The consolidated case was made up of two causes,—one a foreclosure suit, and the other a creditors' bill. The petitioners were not parties to the foreclosure suit. They were not made parties by the bill of complaint, and they did not attempt to, and were not allowed to, intervene by petition. They were mere general creditors, who had no right to be heard on the issue of foreclosure between the trustee of the mortgage and the defendant railroad company. They had attained no lien on the property, by judgment or otherwise, and were not entitled to resist the prayer of foreclosure. So much for the foreclosure decree. As

to the decree on the creditors' bill, they were not parties to the record. They filed no intervening petition, and all they did was to appear before the master, and file their claims and make objection to other claims. They were but quasi parties, and have no right to be heard in this cause, except after leave obtained of the court.

This would dispose of the petitions, but we prefer also to consider them on their merits. It is unnecessary for us to consider the question whether it is within the power of a circuit judge to direct the entry of a decree of sale in one district of his circuit, when he is sitting in another, without the consent or acquiescence of the parties. It is clear that, by consent of the parties, a cause in equity may be finally heard and decided by a circuit judge within his circuit, but outside of the district in which the cause is pending. In *Doggett v. Emerson*, 1 Woodb. & M. 1, 7 Fed. Cas. 819, Mr. Justice Woodbury had occasion to consider the validity of a final hearing by Mr. Justice Story of a suit in equity pending in the district of Maine, which was heard, by agreement of parties, before the circuit judge, in vacation, at Boston; and it was said in that case that no one of the parties consenting to such hearing could impeach the validity of the hearing and decree on account of the time or the place at which the hearing was had, and the decree directed to be made. Speaking of the opinion rendered upon such a hearing, the court said:

"It shows what is the decree of the court, as much as an opinion, read by one of the judges in the court room, containing the views of the court, shows the opinion of the court. If both are completed and announced to the parties at the time and place agreed by them, they are finished, except the mere entry of them on the docket and record. The subsequent steps are rather steps to enforce or carry them into effect, than parts of the decree and opinion themselves."

No such authority was necessary, however, in courts of the United States, to sustain the view that, where parties consent to the final hearing of the cause before a circuit judge whose jurisdiction is throughout the entire circuit, such consent authorizes the entry of the decree in the court where the cause is pending, and upon its records, as if the cause had been heard in open court at that place. No other construction can be put upon the consent of the parties to have the final hearing at some other place than that fixed by law. It has been the uniform practice in this circuit in equity causes for parties to consent to the final hearing of them outside of the district in which they are pending, at some convenient point in the circuit, before the circuit judge, and after consideration, and upon decision, to enter the decree, by direction of the judge, at the place of holding court in the district, as if the judge had been present at the time of hearing the cause and entering the decree. Such practice has been of the greatest convenience to parties and to the judge. It has facilitated the business of the circuit, and made it possible for the circuit judges, whose time has been chiefly taken in appellate work, to assist their brethren, the district judges, in their work in the various districts, in the disposition of causes which in

their nature might be as easily heard at one point as another in the circuit. Patent suits in equity, and suits for the foreclosure of railroads, usually involve the attendance of counsel, most of whom do not reside at the place of holding court; and it is as convenient for such counsel, after the record is made up, to attend the judge at one point in the circuit as at another, and not to wait until such time as he may be able to be present in the district where the cause is pending. If it were to be held that decrees entered in accordance with such practice were null and void, and might be impeached by affidavits or other evidence tending to show that the judge whose presence was recited in the record was in some other part of the circuit upon the day on which the decree in the cause was entered, it is not too much to say that there are many decrees, upon which vast interests are dependent for title and security, and of many years' standing, which will still be subject to impeachment as void. The proof upon this motion shows conclusively, and it is within the personal knowledge of one member of this court, who entered the decrees, that every party to the record was represented at the many hearings which were held, both interlocutory and final, and at the settlement of the several decrees which were made, and that it was clearly understood by all the parties that the final decree was to be entered at Toledo, exactly as if the presiding judge had been present in person at that place. It follows, therefore, that all the parties to the record are bound by the recital of the record, and are estopped to deny it.

But how is the case of the petitioners? They assert that they were parties to the record, and received no notice of the hearings or of the settlement of the decrees at Cincinnati. In the first place, Sawyer, one of the petitioners, has, as his counsel and solicitor, Mr. J. D. Springer, who was present in the court room and in the judge's chambers at Cincinnati on every occasion when any hearing was had, when any order was made, when any decree was settled. In the second place, both Sawyer and Thornton were, out of abundant caution, brought in by citation to the appellate proceedings, and were given an opportunity to join in the appeal. They were thus advised of the decrees which had been entered, and had full opportunity to appeal therefrom, and to be heard upon such appeal; and one person, similarly situated with them, Charles Miller, who was only a general creditor, having filed his claim before the master, was allowed to appeal from the decrees theretofore entered. Notwithstanding this, the petitioners made no objection in the court of appeals that the decrees entered had not been regularly entered according to law. As these petitioners were given an opportunity to join in that appeal, and declined to do so, the order and mandate of the appellate court is as binding upon them as it is upon any of the persons who were regularly parties to the record. Moreover, this court has no power to modify or supersede, in the slightest degree, the decrees which bear the imprimatur of the court of appeals. In *re Potts*, 166 U. S. 263, 17 Sup. Ct. 520, 41 L. Ed. 994; In *re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414. It is the duty of this court simply to execute the mandate of that

court. It cannot annul its decree after the expiration of the term at which it was entered. *Sibbald v. U. S.*, 12 Pet. 488, 9 L. Ed. 1167.

The supreme court of the United States has said that:

"On a mandate from this court affirming a decree, the circuit court can only record our order, and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what we have established. \* \* \* After the appeal had been taken, the power of the court below under its own decree was gone. All it could do after that was to obey our mandate when it was sent down. We affirmed its decree and ordered its execution."

In accordance with that duty the decree of November 13, 1899, was entered. It was settled at Cincinnati after due notice to all the parties to the record, and without objection by any of them, in accordance with the course which had been taken with respect to every hearing in the case after the cause had first been submitted to Judge Taft. So far as the foreclosure decree is concerned, the petitioners are not parties to it in any way, and they have no standing to impeach it for any reason. So far as the creditors' bill is concerned, and the decree of the court executing the mandate of the court of appeals upon that, their position is no better. They were not parties to the record, and, so far as the regularity of the decree is concerned, they are bound by the consent of the complainant in the creditors' bill, and the other parties thereto, who for such purpose are representative of the whole class of creditors. It would be the grossest injustice to the parties to this cause, in whose favor those decrees have been pronounced, and who have, in the well-founded belief induced thereto by the consent and conduct of their real opponents, that hearings had and decrees settled at Cincinnati were to be recorded at Toledo as if held or passed at the latter place, expended much time, money, and labor to bring this protracted and burdensome litigation to an end, now to hold that the decrees are as waste paper. For the reasons given, the petitions are held to have no merit in them, and, having been filed without leave, they are stricken from the files.

This action of the court meets the present emergency, and we should be content to leave the matter as it is, were it not that these petitions, considered in the light of all the circumstances, justify the suspicion that some of the defeated litigants in this cause are willing to evade the estoppel against obstructive proceedings which considerations of propriety and good faith to their adversaries and the court would necessarily create, by the instigation of others, with comparatively little interest in the litigation, to a course of obstruction in which it is hoped they may not be met by the estoppel, and which, if successful, will inure to the benefit of all the defeated litigants. Counsel may be easily changed, and new counsel employed, who can deny any consent to proceedings of the court which were induced by the consent and acquiescence of the retiring counsel. We propose, therefore, to remove every shadow of a ground, however slight and unfounded, which the desperation of defeated litigants may seize upon, or the astuteness of compliant counsel may suggest, for future attack upon the regularity of these decrees. Therefore, out of abundant caution, we shall re-enter and confirm



the decrees of November 13, 1899, as of this day. Under that decree the advertisement for the sale has begun, and the date fixed as of the 14th day of February next. Some expense has been incurred thereby. Nevertheless an order will be entered directing the masters to cease the advertisement begun. The decree of November 13, 1899, will be modified so as to extend the time within which the sale may take place to the 2d of April next, and the special masters are authorized and directed to fix a day for the sale, within the time limited, so that due advertisement under the decree may be had before the sale, and to begin a new advertisement accordingly. Proper entries have been prepared by the court, and will be entered by the clerk forthwith.

The full brief of counsel for the petitioners, and all the evidence offered in support of their motions, have been submitted to Judge TAFT, and he joins me in this opinion, and fully concurs therein, and also with the orders and decrees this day entered.

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CONTINENTAL TRUST CO. OF NEW YORK et al. v. TOLEDO, ST. L. & K. C. R. CO. et al.

(Circuit Court, N. D. Ohio, W. D. January 29, 1900.)

No. 1,205.

**EQUITY PRACTICE—CERTIFYING BILL OF EXCEPTIONS.**

A judge of a federal court is not required to certify to a bill of exceptions in an equity cause.

**On Application for Allowance of a Bill of Exceptions.**

Oary & Whitridge, for Continental Trust Co.

Pliny B. Smith, for Geo. M. Thornton and F. J. Sawyer.

J. D. Springer, for Toledo, St. L. & K. C. R. Co. and others.

**RICKS**, District Judge. Since the 19th inst., when the last proceedings in this case took place at Toledo, in pursuance of special notice of counsel, I have taken pains to examine the authorities as to the duty of the trial judge in the circuit court of the United States to sign a bill of exceptions in an equity cause. I find the authorities are overwhelming in favor of the proposition that no such thing as a bill of exceptions is known in the equity practice in the federal courts. The earliest and the leading case which passes upon this question is the case of *Ex parte Story*, reported in 12 Pet. 339, 9 L. Ed. 1108. That was a case where, on a mandate from the supreme court of the United States, the trial judge in the circuit court refused to sign a bill of exceptions presenting the fact as to the death of Edward Livingston, one of the parties to the suit, which fact became a material point in the case. As stated in the report of the case, upon the presentation of the bill of exceptions, the judge remarked:

"That he would sign no bill of exceptions unless he was convinced that he was bound to sign one. Upon being subsequently importuned upon the subject, he stated, if he signed a bill of exceptions, he must give the reasons at length for his opinion. He has been again and again importuned, and unsuc-

cessfully, upon the subject. That on this day your petitioner's counsel presented to the court the annexed answer, etc., and desired that it might be placed upon the files in the cause, but the court refused permission to file the same. Thereupon the annexed bill of exceptions was tendered to the judge, which bill truly stated the facts, but the judge refused to sign the same or make it a part of the record. The court was then moved to direct the clerk of the court to state the facts upon the order book, but the court refused to suffer any notice to be taken of this matter, as a part of the proceedings in the court; stating at the same time that he considered a mandamus to be the true remedy, and alleging no other reason for not signing the bill of exceptions, or suffering notice to be taken of the presentation of the answer on the record."

On a motion for a mandamus the supreme court said:

"We think there is no sufficient ground for this application. A bill of exceptions is altogether unknown in chancery practice, nor is a court of chancery bound to inscribe in an order book, upon the application of one of the parties, an order which it may pass in a case before it; and the facts which the defendant stated in the supplemental answer and plea which he offered furnished no ground of defense in the circuit court, when acting under the mandate of this court, and carrying its directions into execution. In the case of Skillern's Ex'rs v. May's Ex'rs, 6 Cranch, 267, 3 L. Ed. 220, this court said that as it appeared that the merits of the case had been finally decided in this court, and that its mandate required only the execution of its decree, the circuit court was bound to carry that decree into execution, although the jurisdiction of the court was not alleged in the pleadings. In the case now before the court the merits of the controversy were finally decided by this court, and its mandate to the district court required only the execution of its decree. The case therefore comes within the principle of Skillern's Ex'rs v. May's Ex'rs, and the facts stated by the defendant cannot, in this stage of the proceedings, form any defense against the execution of the mandate; and consequently he was not deprived of any legal or equitable ground of defense by the refusal of the court to suffer him to file the supplemental answer and plea which he offered. The motion for the rule to show cause is therefore refused."

In the case of *Johnson v. Harmon*, 94 U. S. 371, 24 L. Ed. 271, the supreme court, on application for a bill of exceptions, say:

"A bill of exceptions cannot be taken on the trial of a feigned issue directed by a court of equity, or, if taken, can only be used on a motion for a new trial made to said court. 2 Daniells, Ch. Prac. (3d Am. Ed.) 1106; *Armstrong v. Armstrong*, 3 Mylne & K. 52; *Ex parte Story*, 12 Pet. 343, 9 L. Ed. 1108. See the cases on new trials on feigned issues collected in 3 Grah. & W. New Trials, 1553, etc. The issue is directed to be tried for the purpose of informing the conscience of the chancellor, and aiding him to come to a proper conclusion. If he thinks the trial has not been a fair one, or for any other reason desires a new trial, it is in his discretion to order it. But he may proceed with the cause, though dissatisfied with the verdict, and make a decree contrary thereto, if, in his judgment, the law and the evidence so require. A decree in equity, therefore, when appealed from, does not stand or fall according to the legality or illegality of the proceedings on the trial of a feigned issue in the cause, for the verdict may or may not have been the ground of the decree. It is the duty of the court of first instance to decide (as was done here) upon the whole case, pleadings, evidence, and verdict, giving to the latter so much effect as it is worth. An appeal from the decree must be decided in the same way, namely, upon the whole case, and cannot be made to turn on the correctness or incorrectness of the judge's rulings at the trial of the feigned issue."

In the case of *Watt v. Starke*, 101 U. S. 248, 25 L. Ed. 826, it was said by the supreme court that the verdict upon an issue which a court of chancery directs to be tried at law is merely advisory. A motion for new trial can be made only to that court, and the party submitting it must procure, for the use of the chancellor, notes of

the proceedings at the trial, and the evidence there given. The evidence and proceedings become, then, part of the record, and are subject to review by the appellate court, should an appeal from the decree be taken. This is from the opinion of Mr. Justice Bradley, who had examined very exhaustively all the cases reported in which the question of the right of the appellant to have the bill of exceptions signed by the trial judge is involved. In all these cases, it will be observed, the supreme court bases its action upon the theory that in an equity case all of the proceedings, pleadings, and evidence are in writing, and therefore make up a complete record of all the proceedings in the case. The court therefore has no need of a bill of exceptions, or any other form of certificate, in deciding the case. In an action at law the record is made up in a different way. In such a case the pleadings, of course, are a matter of record. The verdict of the jury, and the motion to set aside the verdict and for a new trial, are also a part of the record; but, there being no rule or practice requiring the evidence to be reduced to writing, the appellate court, in a law case, has nothing to show what was the testimony in the case. This is supplied by a bill of exceptions, which, when properly prepared, shows all the proceedings in the court, except the pleadings and the steps heretofore stated. The courts therefore unanimously hold that a bill of exceptions has no place in the record in an equity case. If there is any oral testimony offered on the trial of an equity case, and, owing to special conditions and circumstances, the chancellor should allow such oral evidence, it would be supplied by some sort of a certificate or bill of exceptions; but this can only be done, as I have already stated, in a special case, where the chancellor, in the discretion vested in him, makes a special order concerning the mode of presenting to the court of review the oral testimony so taken. That this is the ruling of the courts of the United States is beyond all question; but, if we turn to the third volume of the *Encyclopædia of Pleading and Practice* (page 381), we find that the practice is almost as uniform in the state courts, in refusing a bill of exceptions in such a case as this, as I have already shown it to be in the federal courts. Under the subject of "Bills of Exceptions," a very elaborate review is made of all the authorities, in both the federal and state courts, in the *Encyclopædia*, above referred to. The proposition stated is as follows:

"In equity, as the evidence and all objections thereto, and all the orders and decrees of the court, are in writing, under the technical chancery practice, and are parts of the record proper, a bill of exceptions is improper, and, where taken, will be disregarded on appeal."

I do not know what counsel for the petitioners Sawyer and Thornton undertake to incorporate in their bill of exceptions. I do not know what there is, outside of the record already made, that will enable them to present any more clearly to the reviewing court the irregularities and errors complained of. Everything that has been offered in evidence at the various hearings which we have attended under the several notices of counsel is already a matter of record in this case, and all that is needed is that such record should be

fully and properly presented to such court of review. What has taken place at either of these hearings by way of colloquy in open court is not a matter of record, and the court ought not to certify to the correctness of such proceedings. Such proceedings are not required by statute or practice, and the court, when called upon, should refuse to certify the same, on the ground that they are not a part of the record, and therefore need not be certified. The refusal of the court to allow the written applications for an appeal to the supreme court from the order striking the petition of Sawyer from the files is a matter of record, and therefore need not be specially certified. No question of jurisdiction is involved in their cases, and the refusal to certify cannot be error. The refusal to allow the written prayer for an appeal, on the motion to dismiss the bill of foreclosure for want of jurisdiction, to the supreme court of the United States, is a part of the record of the case, and therefore the holding of the court is not error. The parties lost their right to appeal to the supreme court on the question of jurisdiction by their appeal to the circuit court of appeals.

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**HOOVEN, OWENS & RENTSCHLER CO. v. FEATHERSTONE et al**

(Circuit Court, W. D. Missouri, W. D. January 8, 1900.)

**1. ACTION—LEGAL OR EQUITABLE—SUIT TO ENFORCE MECHANIC'S LIEN.**

A suit to enforce a mechanic's lien is essentially one in equity, and, on its removal to a federal court, is properly triable as such, although it was instituted as an action at law, as permitted by the state practice.

**2. MECHANIC'S LIEN—WAIVER—RESERVATION OF TITLE.**

A reservation, by one furnishing an engine to be placed in a building, of title to the engine until payment is made, does not amount to a waiver of the right to a mechanic's lien therefor given by statute.

**3. SAME—EXTENT OF LIEN—SUFFICIENCY OF DESCRIPTION.**

A subcontractor who furnished an engine which was placed in one of a number of separate buildings previously built, and constituting a packing plant, and which was used only in the manufacture of ice in such building, is not entitled, under the mechanic's lien statute of Missouri, to a lien upon the other buildings of the plant; and where his notice of lien claims a lien upon all, and does not contain a sufficient description to identify the building in which the engine was placed and used, the lien cannot be enforced, even as against such building.

**4. SAME—NOTICE—INCLUDING MATERIALS FURNISHED UNDER SEPARATE CONTRACTS.**

A notice of lien filed under the mechanic's lien law of Missouri by a subcontractor, for materials furnished and placed in a building, which specifically states that all the materials mentioned in the account were furnished under one entire contract, will not sustain a lien, where the evidence shows that such materials were furnished under two separate and distinct contracts, made at different times.

This was an action for the enforcement of a mechanic's lien, removed by defendants from a state court.

Meservey, Pierce & German, for plaintiff.

Lathrop, Morrow, Fox & Moore, for defendant Jacob Dold Packing Co.

PHILIPS, District Judge. Both parties have treated this case as an action at law for the enforcement of a mechanic's lien, which is permissible under the state statute. On its removal into this jurisdiction the action would nevertheless be treated according to the system of jurisprudence and rules of practice which obtain in the federal courts. In this court the action to enforce a mechanic's lien is "essentially a suit in equity, requiring specific directions for the sale of property, such as are usually given upon the foreclosure of mortgages and the sale of mortgaged premises." Davis v. Alvord, 94 U. S. 546, 24 L. Ed. 283; Improvement Co. v. Bradbury, 132 U. S. 509, 10 Sup. Ct. 177, 33 L. Ed. 433; Furnace Co. v. Witherow, 149 U. S. 578, 579, 13 Sup. Ct. 936, 37 L. Ed. 853; De La Vergne Refrigerator Mach. Co. v. Montgomery Brewing Co. (C. C.) 46 Fed. 829. Yet, as the case was tried to the court, and the court has found the facts, neither party asking to have the pleadings reformed, and the conclusion of the court not being different, whether it be regarded as an action at law or a suit in equity, no error, perhaps, is predicable by either party of the course of procedure pursued.

The first insistence of the defendant Jacob Dold Packing Company is that the plaintiff waived its right to enforce a mechanic's lien herein by reason of the following provision in its contract with John Featherstone's Sons for furnishing the engine as subcontractor, to wit:

"It is agreed that the engine," etc., "above specified, shall remain our property, as security for the deferred payments, until fully paid for in cash. There are no understandings or agreements outside of this written contract."

It is true, as said by Judge Scott in Gorman v. Sagner, 22 Mo. 139, that:

"Although there may be some distinction between an equitable lien and one expressly given by law, yet there is nothing in the cases hostile to the idea that the lien conferred by the statute may be extinguished by implication arising from the conduct of the parties."

Without indulging in any discursive discussion as to what state of facts might amount to such waiver, as applied to a mechanic's lien, the court is of opinion that such reservation of title in the manufacturer or vendor does not amount to a waiver of the right to file and enforce a mechanic's lien for material thus furnished. Manufacturing Co. v. Smith (C. C.) 40 Fed. 339, 5 L. R. A. 231; Chicago & A. R. Co. v. Union Rolling-Mill Co., 109 U. S. 719, 3 Sup. Ct. 594, 27 L. Ed. 1081.

The second objection made to the lien is more serious. It is predicated of the insufficiency and uncertainty of the description of the property given in the lien, and its extension to other buildings and ground than that on which the improvement was made. The description of the property given in the lien is as follows:

"The four (4) story and basement brick, stone, and frame packing-house building, with composition roof, and all other buildings and improvements connected therewith, or adjacent or adjoining, and used and operated by Jacob Dold Packing Company as a packing-house plant, and situated on the following described premises, to wit: On blocks numbered eighteen (18) and twenty-three (23), West Kansas addition No. one (1) to the city of Kansas (now Kansas City), Jackson county, state of Missouri."

One unfamiliar with the real character and description of the property, known as the "Jacob Dold Packing Company," from the foregoing description would very naturally conclude that it consisted principally of one four-story and basement brick, stone, and frame building, under one roof, situated on two parcels of ground, blocks 18 and 23, in Kansas City, whereas, as the plat in evidence and the facts found show, said blocks 18 and 23 embrace an area of six acres of ground, or more, on which are about 12 buildings, of different stories, no one of which is covered by the description of a "four-story and basement brick, stone, and frame." The machinery in question was furnished for and placed in the building designated as "C" on the plat, which is 177 feet long, 61 feet wide on the west side, and 50 feet wide on the east side, and is a four-story brick, without basement, and without stone in its composition. This building was separated from the adjoining buildings on the south by a fireproof wall, and, as proof of its separation from the building south of it, when it was consumed by fire the partition fireproof wall remained intact, and this building C alone was destroyed. These buildings, many years prior to the erection of this machinery in building C, had been completed and used in connection with the packing business of the defendant. The easterly part of the building south of it, designated as "B" on the plat, was first built, the first two stories of which were of stone, on top of which were two stories of brick; and the west room of this building B was five stories high, built entirely of brick, and not on the same elevation with building C. On the south of this building was originally laid off, on the plat of the city, Eighth street, a part of which is now covered by building B, and a part of which has a covered passageway between building B and the buildings F and A, south thereof, on block 23. On the west side of buildings C and B is another covered passageway, which separates buildings C and B from buildings D and E. Building D is a one-story brick, without basement, used as a boiler house. Building E, south of D, is a four-story brick, with basement, used as a smoke house. And still west of these buildings, on block 18, are smaller houses, some of them entirely detached. Two of them are one-story frame, and one of them a three-story stone, used as a boiler room and pump house, and carpenter shop and tin shop. On block 23, south of the platform line, is a cold-storage warehouse, a four-story brick, and a house of one-story brick, used as a market, and a one-story frame stable; and then still further west are cattle pens, and still further south are hog pens; and in the southeast corner of the lots is a three-story brick building, used as an office. Some of these buildings are entirely separated from others, with vacant spaces between them, with intervening platforms and passageways. As applied to the defendant's property, there was no reason why this lien could not have been limited to building C, in which the machinery furnished by plaintiff was placed and operated, and the land on which it stood. The machinery furnished by the plaintiff was simply an engine for manufacturing ice and cooling the air in part of the buildings. This ice was manufactured alone in building C. The air compressor furnished by John Featherstone's Sons

rested on the platform outside of the building, and was not even inclosed on its sides, and connected by pipes with the engine, not adhering to the building. The engineer (Ryan) in charge of this machinery testified that the work done by the refrigerating machinery and the engine was making ice, and nothing else, and that the ice manufactured was sold in the city trade, some little of it being used in the plant and for icing cars (that is, cars in which the fresh meats were shipped from the packing house); that there were four ice machines and power engines in this building to refrigerate the building, and a couple of dynamos. While the engine was designed to operate the compressor for cooling the air, this was solely as to the buildings where such cooling was needed. The description (that is, the specific description) given in this lien does not describe the building in which the plant's machinery was placed and used. There was neither stone nor frame work in it, nor a basement beneath it. It is perfectly obvious from the description given in the lien, as also from the contention of plaintiff's counsel at the hearing, that he sought to apply to this case the provisions of section 6729 of the Missouri statutes, respecting mechanics' liens, which is as follows:

"When the improvement consists of two or more buildings united together and situated on the same lot, or contiguous lots, or upon separate buildings upon contiguous lots and erected under one general contract, it shall not be necessary to file a separate lien upon each building for work done or materials furnished in the erection of such improvements."

It is well understood by well-advised lawyers of this state that this addendum to the mechanic's lien law, made in 1879, was enacted to avoid, under certain conditions, the rulings of the state supreme court in cases like that of *Fitzgerald v. Thomas*, 61 Mo. 499, and *Fitzpatrick v. Same*, Id. 512, and *Lemley v. Steel Co.*, 65 Mo. 545, in which it was, in effect, held that where material was furnished for the erection or improvement of a number of buildings erected on separate lots, although the lots were contiguous, a separate lien must be filed on the buildings on each lot, for the reason that:

"The lien given by the statute against such building or improvement, and the lot on which it is situated, is for the work and labor done on, and the materials furnished for, that particular building or improvement, and not for work done and materials furnished for the building or improvement upon any other lot; and only that building and lot are to be charged for the lien for which such materials were furnished, and on which such labor has been performed."

Hence section 6729 was enacted, by the very terms of which it is limited to the improvement of two or more buildings united, standing upon the same lot or contiguous lots, and erected under one general contract; that is to say, when the contractor, under a general contract with the owner of the property, furnishes materials for the improvement and erection of a number of buildings, either united or disconnected, standing upon different lots, he may file one lien for the material upon such lots and buildings, without more. But in respect of materials furnished for, or machinery placed in, a particular building or buildings, the law stands just as it did prior to the enactment of this statute, unless it is made to appear that such improvement or machinery enters into, and becomes a

component part of, "a solid block of buildings, consisting of distinct, but connected houses, and covering several lots." This was the case presented in *Progress Press-Brick & Machine Co. v. Gratiot Brick & Quarry R. Co.*, 52 S. W. 401, recently decided by the supreme court of this state, so much relied upon by plaintiff's counsel. This was a decision of the majority of one division of the supreme court of this state. It is to be conceded that the court departed measurably from the postulate laid down in *Graves v. Pierce*, 53 Mo. 423, and *Richardson v. Koch*, 81 Mo. 264, reaffirmed in *Machine Co. v. Cole*, 130 Mo. 8, 31 S. W. 924, which held:

"That the machinery for which a lien may be created must be furnished for a building or improvement made upon the land. That this clearly indicates that the machinery must be such as is used in the erection of a building, which will, when placed in the building, erection, or improvement on the land, become a fixture, and become a part of the realty, or at least such as is necessary in the erection of the improvement to be made," etc.

This later *Progress Press-Brick & Machine Co. Case*, *supra*, holds that the lien may extend to the building in which the machinery may subsequently be placed, although it was a completed structure before the machinery was erected, and although the building may not have been originally designed for the use to which the machinery is to be applied. But that case does not disturb the rule established in *Fitzgerald v. Thomas*, *Fitzpatrick v. Same*, and *Lemley v. Steel Co.*, *supra*, except where the case is brought within the remedial provision of section 6729 of the Revised Statutes. The facts in the *Progress Press-Brick & Machine Co. Case* are wholly different from these at bar. The plant was for the manufacture of pressed brick, and the buildings erected therefor were incomplete, and wholly unadapted to the purpose of their erection, without an engine and a kiln. In order to the completion of the structure, and its adaptation to the use of its construction, the contractor furnished 202,000 hard-pressed bricks for the kiln, and a pressed-brick machine, weighing over 52,000 pounds, permanently attached to the freehold. "The whole plant was used as one plant, and the several parts were necessary to make up the whole plant, which would not be a complete plant with any of the parts omitted." The machinery for conveying the material to this kiln ran and operated throughout the whole structure. The harvested clay was brought from the clay sheds to the hopper, and carried into the machines by lifters; and all the parts "were connected so that the manufacture of the bricks could be carried on in one building, so as not to expose the clay to the elements while in course of manufacture." The whole plant was inclosed on all sides, and throughout the opinion stress is laid upon the fact that the whole collection of buildings was covered by one roof. Without the bricks which went into the construction of the kiln, "the business of making dry pressed brick could not be carried on until the whole plant was completed." As such, the machinery and the brickkiln became constituent parts of the united plant. And therefore the court held that the fact that the buildings extended over several lots did not disentitle the material man to file his lien on the whole plant and the lots on which it rested. In the



case at bar the packing-house plant and buildings had existed and been operated for many years prior to the acquisition of this machinery, and had been operated as a plant after the building in which the machinery was placed and the machinery were consumed by fire. The buildings were not covered by one roof, and in some of the buildings the machinery furnished by the plaintiff performed no function, and sustained no physical relation thereto. The machinery here was not, like that placed in a saw or grist mill or a factory, essential to or as a means for the operation of the plant, and therefore an integral part of the structure. It was principally for the manufacture of an additional supply of ice for use outside of defendant's packing-house business, and for the transportation of fresh meats in cars. And the compressor, as a method for cooling the air in certain rooms, was nothing more than the office performed on a smaller scale by electric fans placed in houses. The defendant's packing establishment was and is divided by Liberty street, principally used for railroad tracks, running north and south. If the entire plant on the west side of this street is subject to this lien, why not that on the east side of the street? The plaintiff insists that it is not to be restrained to the specific description given in the lien filed, to wit, "the four story and basement brick, stone, and frame packing-house plant, with composition roof," because it contains the further statement, "and all other buildings and improvements connected therewith, or adjacent or adjoining, and used and operated by Jacob Dold Packing Company as a packing-house plant." This would be well enough if the lien were filed in the instance contemplated by section 6729 of the Revised Statutes, which, as already shown, cannot apply to this case. This latter description would apply as well to that portion of the plant east of Liberty street. If it be said that the description limited it to the west side of the street, by designating blocks 18 and 23, yet if it was entitled to a lien on this division because it was an integral part of the packing-house plant, regardless of the building in which the machinery was placed or used, there is no escape from the conclusion that the lien could as well have been filed on all the buildings and lands of the defendant used in the packing-house establishment. If this be law, the decisions of the supreme court in 61 Mo. and 65 Mo., *supra*, were all wrong, which the learned judge in the Progress Press-Brick & Machine Co. Case did not pretend to overrule, or even criticise. And, if this be law, the legislature did a work of supererogation in enacting said section 6729. The express permission given in that section, authorizing one lien to be filed on different lots and different buildings, where the improvement consists in an erection under one general contract, is, by necessary implication, a denial of such a single lien filed under any other circumstances or conditions.

The plaintiff has not asked to have its lien as to the building in which the machinery was located, or any particular buildings, or on any piece of ground, limited thereto. But at the hearing its counsel distinctly stated that he claims to have it enforced against all the buildings and all the grounds covering blocks 18 and 23. No officer, with an execution in his hands containing the description

given in this mechanic's lien, could execute it upon any one building containing such description; and in order to make a sale he would have to sell one building five stories high, and others four stories high, and some three stories, and some one story, constructed of different materials, not covered by one roof, and wholly disconnected, on separate blocks, and to which the things accomplished by the machinery did not extend. To sustain such a lien would, in my judgment, change the statute, and overturn a line of decisions of the supreme court of the state of long standing. The authorities cited by plaintiff's counsel from other states, based upon the phraseology of their statutes, are not applicable.

And what is certainly fatal to this lien is the attempt to put in one lien items of account furnished under two separate contracts. The facts found in this case show two distinct contracts respecting the items of the account for which the lien was filed. After the plaintiff, in fulfillment of its contract, had furnished the machinery complete, and after it had been in use for a considerable time by the defendant, the rocker plates connected with the engine, for which an additional charge of \$74.35 is made, of date July 13, 1898, in the account filed with the lien, broke in the use and operation of the machinery by the defendant, for which the plaintiff was not responsible on the ground of having furnished an improper equipment. Thereupon the defendant applied to Featherstone's Sons for new rocker plates, whereat Featherstone's Sons wired the plaintiff to make and furnish the needed parts to the defendant, which was accordingly done; and the plaintiff charged the amount thereof as an additional charge to Featherstone's Sons. This was clearly a separate and distinct contract. *Central Trust Co. of New York v. Chicago, K. & T. Ry. Co.* (C. C.) 54 Fed. 600. The lien by the plaintiff states specifically that all the materials mentioned in the account were furnished "under one entire contract," and the petition alleges that all the materials were furnished under "one entire, joint contract." This, it seems to the court, is fatal to the lien. In *O'Connor v. Railroad Co.*, 111 Mo. 194, 20 S. W. 18, the court said:

"That plaintiff has so joined in one account and one notice, and one count in his petition, the work done under both of its contracts, is apparent upon the face of the petition. What is the effect of such a commingling? It destroys his lien, because he has mingled in one account the labor performed under two distinct contracts. The statute has been uniformly construed to discountenance such a practice."

In view of the conclusion reached on the foregoing propositions of fact and law, it is not deemed essential to discuss other questions raised by the defendant. It results that the plaintiff cannot recover.

## HUDSON RIVER PULP &amp; PAPER CO. v. H. H. WARNER &amp; CO., Limited.

(Circuit Court of Appeals, Second Circuit. January 5, 1900.)

No. 71.

## 1. APPEAL—REVIEW—CAUSE TRIED BEFORE REFEREE.

Where the trial of an action at law is had before a referee, with instructions to report the testimony, with findings of fact, to the court, and the court subsequently makes the findings of fact its own, and renders judgment thereon, the only question which can be reviewed on a writ of error is whether the facts found sustain the judgment.

## 2. SAME—FINDINGS OF FACT—FOREIGN LAWS.

The law of a foreign country being required to be proved as a fact in the courts of this country, a finding by a referee as to such law is a finding of fact, not subject to review as a question of law.

## 3. FOREIGN CORPORATIONS—RIGHTS OF AMERICAN STOCKHOLDERS—LAWS GOVERNING.

A citizen of the United States who becomes a stockholder in a foreign corporation holds his stock subject to the laws and policy of the country of the corporation's domicile, and where, by an amendment of its by-laws, the corporation acquires a lien which, under the laws of the country, is paramount to the lien of a previous pledgee, the priority of such lien must be recognized by the courts of the United States.

## In Error to the Circuit Court of the United States for the Southern District of New York.

This is a writ of error to the circuit court, Southern district of New York, to review a judgment entered upon the confirmation of report of a referee dismissing the complaint. The plaintiff in error was plaintiff below. The cause being at issue on the law side of the court, a stipulation was entered into waiving the intervention of a jury, and consenting that judgment might be entered upon the report of the referee with the same force and effect as upon a hearing and decision of the court, requiring the referee to make special findings of law and fact, and to return all the evidence introduced before him, which evidence should thereby become part of the report, and providing that said report should be subject to like exceptions as other reports of referees, and should, when adopted by the court, have the same force and effect, and should be deemed findings of the court. The order of reference conformed to the stipulation. The referee, having heard the cause, duly filed a report containing certain findings of fact, and a conclusion of law therefrom that defendant was entitled to judgment dismissing the complaint on the merits. Thereafter defendant applied to the circuit court for judgment upon said report. The court ordered that "the findings of fact of the referee be, and the same are hereby, adopted as and for the findings of this court"; and further found, as a conclusion of the law, that defendant was entitled to judgment, and adjudged that defendant have judgment dismissing the judgment. This judgment recited the procedure in the cause already set forth, concluding with the statement, "this action and the issues therein having been tried by the court without the intervention of a jury." This is a manifest error, the cause was not tried by the court, and it must be presumed that the statement was not eliminated by the judge from the decree he signed, solely because his attention was not called to it.

Louis Marshall, for plaintiff in error.

David Willcox, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). This action was brought to recover damages alleged to have been sustained by the plaintiff by reason of the refusal of defendant, an

English corporation, to transfer to the name of the plaintiff upon its books 500 shares of stock. This stock had been issued to Hulbert H. Warner, in whose name it stood on the books of the company, and who held certificate therefor. He became indebted to plaintiff in 1891, and assigned this stock as collateral, and subsequently, being unable to pay his debt, made his conveyance absolute. At the time Warner pledged his stock, and for two years thereafter, the articles of association of the defendant provided, in the case of shares not fully paid up, that the directors might refuse to register a transfer by a member against whom the company had an unsatisfied claim, and that the company should have a first and paramount lien upon such shares, registered in the name of any member for any debt due by him to the company. The instrument of transfer executed by Warner, and the certificate representing said shares, were not presented to defendant by plaintiff, nor was a transfer of said shares demanded until subsequent to June 1, 1893, nor did defendant receive until subsequent to that date any notice that plaintiff had or claimed to have any interest in said shares. Meanwhile, and on May 15, 1893, defendant amended its articles of association so as to give it a paramount lien against a stockholder's shares for any indebtedness from him to the company, whether the shares were or were not fully paid up. During all the times mentioned in the complaint Warner was indebted to defendant in the sum of over \$200,000, which is greatly in excess of the value of the 500 shares.

The writ of error presents little for the consideration of this court, since the trial was had before a referee. The supreme court in *Shipman v. Mining Co.*, 158 U. S. 361, 15 Sup. Ct. 887, 39 L. Ed. 1016, which sanctions the practice of sending a cause to a referee, with instructions to report the testimony, with the findings of fact and of law, to the court, indicates the functions of the reviewing court in these words:

"As the court in its judgment ordered his findings to stand as the findings of the court, the only questions before this court are whether the facts found by the referee sustain the judgment. As the case was not tried by the circuit court upon a waiver in writing of a trial by jury, this court cannot review exceptions to the admission or exclusion of evidence, or to findings of fact by the referee, or to his refusal to find facts as requested."

See, also, two recent decisions of this court. *Railroad Co. v. Clark*, 35 C. C. A. 120, 92 Fed. 971, 983, and *Steel v. Lord*, 35 C. C. A. 555, 93 Fed. 728.

The first 29 assignments of error present exceptions to the admission of evidence, which cannot be reviewed here. The referee was called upon to find, and did find, what provisions of English statutes were in force, and what was the law of England, at the several dates with which the case is concerned, touching the power of corporations created under English statutes to amend their articles of association, and to refuse to register transfers of stock, and what liens were or were not created under English law by transactions such as took place in this case, and what were the relative priorities of such liens under the same law. It is elementary law

that our courts do not take notice of foreign law, unless it be proved as a fact in the case. *Talbot v. Seeman*, 1 Cranch, 38, 52 L. Ed. 15; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 446, 9 Sup. Ct. 469, 32 L. Ed. 788. The findings of the referee, therefore, as to English law, statute or common, are findings of fact not reviewable here. This disposes of the 30th, 32d, 33d, 36th, and 37th assignments of error. The 31st assignment covers an exception to a finding of the referee that upon May 15, 1893, the defendant amended its articles of association in certain specified particulars. This was either purely a question of fact, or if it were a mixed question, depending in part upon a determination as to what procedure would, under English law, affect an amendment, the finding was nevertheless a finding of fact. Findings by the referee as to the state of the account between Warner and defendant on certain specified days, and as to what agreement was entered into between them on or about November 20, 1890, are made the subject of the 34th and 35th assignments of error. They are manifestly findings of fact.

The remaining assignments of error present, in varying forms of words, an exception to the conclusion of law which the referee and the court drew from the facts found. These assignments fully present the question whether the findings warrant the conclusion, but that question is no longer an open one in this court. It being established that under the law of England, upon the facts set forth above, the defendant, by its amendment of May 15, 1893, would secure a lien upon the shares paramount to the one which plaintiff had obtained two years before, we are constrained, by the decision of the supreme court in *Railway Co. v. Gebhard*, 109 U. S. 527, 3 Sup. Ct. 363, 27 L. Ed. 1020, to hold that the plaintiff here was not entitled to recover. The judgment is affirmed.

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JENNINGS v. SMITH.

(Circuit Court, N. D. Illinois, N. D. February 5, 1900.)

No. 24,544.

**CARRIERS—CONTRACT LIMITING LIABILITY.**

Notwithstanding Rev. St. Ill. 1859, c. 114, § 82, declaring it unlawful for a carrier, on receiving property for transportation, to limit its common-law liability for safe delivery by any stipulation of limitation in its receipt for the property, a contract signed by the shipper, providing that, in consideration of the lower rate of freight, his recovery, in case of damage, shall be limited to \$100 for each horse shipped, is binding on him, he knowing of the provision, though the railroad clerk told him the clause "did not amount to anything," and was "only a matter of form," such statement not being within the line of the servant's duties, and the contract informing the shipper of the two rates, that the lower was in consideration of the limited liability, that the shipper could be bound only by written contract, and that a special contract could only be made by a general officer.

James C. McShane, for plaintiff.  
Robert Dunlop, for defendant.

**KOHLSAAT**, District Judge. On the trial of this cause plaintiff sought to recover the value of four horses destroyed in an accident while in transit from Chicago to San Diego, Cal., over defendant's line of road. The evidence fairly establishes defendant's negligence. The action is brought upon the common-law liability of defendant as a public carrier. Defendant caused to be placed in evidence a certain contract of shipment from Chicago to Albuquerque, N. M., signed by plaintiff, and another contract from Albuquerque to destination, over defendant's line, signed by plaintiff's agent in charge of the horses. The contract signed by plaintiff, and also the one signed by plaintiff's agent, provided that, in consideration of the lower rate of freight given, plaintiff's recovery, in case of damage, should be limited to the stipulated sum of \$100 for each horse. The court held at the trial, and so instructed the jury, that plaintiff was bound by the terms of the contracts, and could not recover in excess of the stipulated value of the horses, and a verdict was rendered accordingly. Plaintiff now moves for a new trial upon the ground that the court erred in so instructing the jury.

There is an apparent conflict between the rule followed by the courts of Illinois and that laid down by the United States supreme court, though a close examination greatly modifies the apparent variance. The statutes of Illinois declare that:

"Whenever any property is received by a common carrier, to be transported from one place to another, within or without this state, it shall not be lawful for such carrier to limit his common-law liability safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property." Rev. St. 1889, c. 114, § 82.

The leading Illinois cases are *Railway Co. v. Chapman*, 133 Ill. 96, 24 N. E. 417, and *Same v. Simon*, 160 Ill. 648, 43 N. E. 596. Neither of these cases present the exact question at issue herein, and therefore it cannot be held to have been decided by them. The *Chapman Case*, in its facts, was quite similar to the case at bar, but it appears from the opinion in that case that at the time of shipment no notice was given of two classifications,—one limiting the amount of recovery for the horse to \$100 in case of loss, and the other having no limitation as to value, but a higher rate being charged. The opinion goes on to state that a contract would be illegal which attempted to limit the common carrier's liability in the case of gross negligence or willful misfeasance. In the *Simon Case* there was a simple freight receipt, and not a signed contract, at issue. The statute only refers to a receipt, and from its terms does not contemplate a contract fairly entered into between the shipper and the railroad company, and signed by the shipper, wherein the shipper, in consideration of a reduction in the freight rate, agrees that the liability of the carrier in case of loss shall be limited to a stipulated value mentioned in the contract. The distinction between negligence and gross negligence is receiving less recognition than formerly by the courts, and in the federal courts the distinction is practically abrogated. The exact question presented herein does not appear to have been squarely presented to the Illinois supreme

court; but, in any event, as the question is one of general commercial law, any rule laid down in the premises by the federal supreme court would be binding on this court, even in the face of a contrary decision by the state court. *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 443, 9 Sup. Ct. 469, 32 L. Ed. 788, and cases cited. In the case of *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, the United States supreme court held in unmistakable language that where a contract of shipment, signed by the shipper, is fairly made, wherein the valuation in case of loss is mutually agreed on in consideration of a lower rate of freight, the contract will be upheld. If the facts of the case at bar bring it within the rule laid down in the Hart Case, manifestly the former ruling of this court must obtain. There then remains only to determine whether the contract between the parties hereto was fairly entered into; and this question, on the condition of the evidence in this case, is clearly a question of law for the court. From plaintiff's testimony it appears that he had the previous year shipped over the same route a car containing horses, and had paid as the through rate the sum of \$225. At the time of the first shipment he was called upon to sign a contract similar to the one at issue herein, and signed it, although, as he says, he "made a fuss about it." Prior to the time of the shipment in suit, plaintiff called upon the general freight agent at Chicago, and made arrangements with him for the transportation of a car to contain, among other things, the horses in question, from Chicago to San Diego, at the through rate of \$220. Subsequently plaintiff had the car placed upon the tracks of the initial road, the Santa Fé, at its Chicago station, and commenced the loading thereof. He then went across the street, to the freight office, for the purpose of signing the contract of shipment. He testifies that he knew that he had to go to the station to sign a contract of shipment. When the contract was presented to him, he "kicked about signing it," because, as he stated, "his horses were worth more than \$100." Thereupon the clerk of the company who had prepared the contract said to him that the limitation clause "did not cut any figure, and it was merely a matter of form." Plaintiff then signed the contract. At the top of this contract, in heavy type, were the following words: "Notice. This railway has two rates on live stock." Following which notice was the following paragraph:

"The rate given under this contract is lower than the rate made by the railroad company for the transportation of stock at the carrier's risk, and without limitation of liability, and is based upon the conditions and agreements found in this contract, and upon the valuation therein fixed. The shipper, by signing this contract, is deemed to accept the lower rate upon the terms and conditions specified as a part of this contract."

Then follows the statement that no station agent or station master has power to bind the company in regard to the shipment of live stock except by written contract, and that no one but a general officer of the company, and he only in writing, has power to make contracts with relation to certain methods of shipment. The third paragraph of the contract reads:

"Blooded animals, or those deemed especially valuable, will not be received for shipment and carried except on a special contract, which must be made between the owner or consignor and the general freight agent or general livestock agent of the company. Station agents will not be allowed to receive and ship such animals until such contract has been made."

Then follows the description of this particular shipment, and the clause limiting the valuation to \$100 per horse. Section 7 of the contract signed at Albuquerque by plaintiff's agent in charge of the horses, with the defendant, reads as follows:

"It is understood and agreed that the stock shipped under this contract is transported at the above rates, upon the representation of the second party [plaintiff] that its value does not exceed \$100 for each horse," etc.

Plaintiff actually read at least a portion of the contract, for he objected to the clause limiting the amount of recovery to \$100 for each horse. As a matter of law, he is presumed to have read it all. Can it be said that the contract was not fairly entered into because of the statement of the railroad clerk that the limitation clause "did not amount to anything," and was "only a matter of form"? Plaintiff was advised by the contract that no agent could modify it. The most casual inspection would, and under the circumstances must, have informed plaintiff that the company had two rates on live stock, and that the low rate given was in consideration of the limited liability as to valuation. Certainly, unless plaintiff was fraudulently misled as to the contents of the instrument, or fraudulently procured to sign the same, the contract is binding upon him. As to the statement of the clerk, at best it can only be said that plaintiff took bad advice as to the legal effect of the contract. It would be unconscionable if great railroad systems should be bound by every expression of opinion of its servants as to the legal effect of a written instrument, unless such statement were shown to be clearly within the line of the servant's duties. There can be no such claim in this case. In the eye of the law this contract was fairly made, and is binding upon plaintiff in this case. The motion for a new trial is denied.

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#### METROPOLITAN ST. RY. CO. v. GUMBY.

(Circuit Court of Appeals, Second Circuit. January 5, 1900.)

No. 38

#### TESTIMONY OF DECEASED WITNESS IN ANOTHER ACTION.

Testimony in an action by an infant claiming damages for his pain and suffering from an injury is not admissible (the witness having died in the meantime) in a subsequent action against the same defendant by the infant's mother, claiming damages for loss of his services; there being no privity between the plaintiffs.

In Error to the Circuit Court of the United States for the Southern District of New York.

This is a writ of error to review a judgment of the circuit court, Southern district of New York, in favor of Anne Gumby, defendant in error, who was plaintiff below. The judgment was based upon a



verdict against defendant below awarding damages for loss of services of plaintiff's son, George Gumby, a child 5 years of age at the time of the accident, who was injured by one of defendant's cars May 22, 1897. The facts sufficiently appear in the opinion.

Charles P. Brown, for plaintiff in error.

M. P. O'Connor, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. All assignments of error, save one, were abandoned by plaintiff in error upon the argument, and that one only need be discussed. One of the eyewitnesses of the accident was Macon Lyons. He was dead at the time of the trial of the cause at bar, but had testified with great fullness to what he saw of the accident, upon the trial of an action brought by Elizabeth Clayton, grandmother of George Gumby, as guardian ad litem, against the same defendant, to recover for pain and suffering, and for any permanent loss of ability to work, caused by the accident. After introducing some testimony which is not especially persuasive, plaintiff's counsel offered to read the testimony of Lyons taken in the son's action. It would appear from the record that the attendance of the trial judge was not at the time called to the circumstance that the guardian ad litem who prosecuted the former action was not the infant's mother (the present plaintiff), but his grandmother. Defendant objected that he knew of no rule of law that made it competent testimony. The objection was overruled, and the testimony read, defendant reserving an exception. The objection is not formulated in specific terms, to the effect that what was offered was hearsay, and not within any of the exceptions which are recognized to the rule that hearsay is incompetent. Nevertheless, since the objection urged here is of such sort that nothing could have been done by the party offering the evidence to overcome such objection, we may with entire propriety dispose of the question raised here.

The statutes of New York (section 830, Code Civ. Proc.) provide that:

"Where a party or a witness has died or become insane since the trial of an action \* \* \* the testimony of the deceased or insane person \* \* \* taken or read in evidence at the former trial \* \* \* may be given or read in evidence at a new trial \* \* \* subject to any other legal objections to the competency of the witness, or to any legal objection to testimony or any question put to him."

It is manifest that this does not touch the point at issue. It provides only for new trials of the same action in which the deceased witness testified. We find no other section of the Code authorizing the admission of such testimony, and the question raised here will have to be disposed of under the principles of the common law.

The entire reliance of the plaintiff seems to be upon a paragraph in the sixteenth edition of Greenleaf on Evidence, enlarged and annotated by Prof. Wigmore, published in 1899. The paragraph (which is the annotator's) is section 163a, and reads as follows:

"As to the parties, all that is essential is that the present opponent should have had a fair opportunity of cross-examination. Consequently a change of parties which does not effect such a loss does not prevent the use of the testimony,—as, for example, a change by which one of the opponents is omitted, or by which a merely nominal party is added. And the principle also admits the testimony where the parties, though not the same, are so privy in interest—as where one was an executor, or perhaps a grantor—that the same motive and need for cross-examination existed."

A very large number of cases are cited by the annotator, all of which have been examined by the court. If the propositions above quoted are read with the qualifications which are indicated by the illustrative examples given in the paragraph, they are sound, and abundantly supported by authority. If they are to be read, however, as plaintiff reads them, namely, as asserting that evidence of a deceased witness may be read in any subsequent suit when it appears that the same issue is involved, that the witness testified under the sanction of an oath, that he was confronted with the person against whom the testimony is offered, and that the latter had the opportunity of cross-examination, then it is not supported by the authorities to which our attention has been called, or which we have been able to discover. Stated thus baldly, the proposition imports that when, for example, the derailment of a train because of a misplaced switch has caused injury to a score of passengers, and a witness has testified to the circumstances of the accident in an action brought by A. to recover for his injuries, and has since died, the evidence of such witness may be read by any other injured passenger upon the subsequent trial of his action for damages. No case has been found which lends the slightest support to any such proposition. In all of them it is postulated that the parties must be substantially the same, or, if they are not, that the newcomer must be a privy with the former party in blood, in estate, or in law. There seems to have been some relaxation of the rule in criminal causes. Thus, in *Charlesworth v. Tinker*, 18 Wis. 633, the deceased witness had testified on a prosecution of defendant for assault, and the testimony was read upon the trial of a civil action against the same defendant for the same assault. The court places its decision on the ground that under the statutes of Wisconsin the complainant in a criminal prosecution for an assault and battery has control of the prosecution, and may examine all witnesses sworn at the trial. In *Reg. v. Beeston*, 29 Eng. Law & Eq. 529, the deposition of a wounded person, taken before the magistrate in presence of the prisoner (charged with assault with intent, etc.), and where the prisoner has the opportunity of cross-examination, was held admissible on the trial of an indictment for murder, the assaulted person having died. Here the real question is as to identity of the issue. The parties were the same,—the queen and the prisoner. See, also, *Summons v. State*, 5 Ohio St. 343. A case which seems to lend some support to plaintiff's contention is *Kreuger v. Sylvester*, 100 Iowa, 647, 69 N. W. 1059, where, upon the trial of a civil action for assault, the evidence of a deceased witness given on the trial of an indictment for the assault was held admissible. The opinion is very brief. There

is no discussion of the subject, and the only citations given are Greenl. Ev. § 164, which sustains no such proposition, and Charlesworth v. Tinker, *supra*. The decision is so opposed to the almost universal body of authority as to be entirely unpersuasive. A few citations from reported opinions in civil causes will indicate the firmness with which the rule is adhered to that the parties must be substantially the same, or privies, in blood, in law, or in estate. The testimony is either held to be competent because such privity is found to exist, or is held incompetent because no privity is established.

In *McDonald v. Cutter* (Cal.) 52 Pac. 120, Melone brought an action against Meyers to foreclose a lien on certain bonds. McDonald, who had bought the bonds at a sale by Meyer's assignee in insolvency, was substituted as defendant. Robinson, to whom Meyers had transferred the bonds before petition in insolvency was filed, and who claimed to own them, paid plaintiff's claim, and secured a dismissal of that action. Held, that Robinson was not subrogated to plaintiff's (Melone's) rights, so as to render a deposition of deceased witness taken in Melone's suit admissible in a subsequent action between McDonald and Robinson's executor.

In *Railroad Co. v. Atkins*, 2 Lea, 248, it is held that judgment in favor of defendant in a suit brought by husband and wife is ordinarily no bar to a suit brought by the husband alone, nor are depositions taken in the first suit admissible as evidence in the other. Wharton, in his work on Evidence (section 177), states the rule thus:

"Whenever a judgment in one cause would be evidence in the other cause, there evidence of the deceased witness may be reproduced, the witness having been open to cross-examination."

Several authorities support his proposition that the test to be applied is the same as that used when a prior adjudication is offered as evidence.

In *Goodlett v. Kelly*, 74 Ala. 220, the court, admitting the testimony, says:

"The subject of the controversy in the two suits is the same, involving the title to the same tract of realty; and the parties are the same, excepting only one, who claims title through privity with the plaintiffs in the former suit."

To the same effect is *Wells v. Mortgage Co.*, 109 Ala. 430, 20 South. 136.

In *Smith v. Keyser*, 115 Ala. 455, 22 South. 149, the first suit was an action of ejectment brought by plaintiff in her individual capacity against a tenant in possession. The second suit was an action in ejectment brought by the same plaintiff, as executrix, against the same defendant and his landlord, for recovery of the same lands. Held competent:

"The matters in issue and the parties are essentially the same in both actions,—'parties,' as thus used, comprehending privies in blood, in law, or in estate."

*Hulin v. Powell*, 3 Car. & K. 323, was an action of ejectment against Powell. Vaughan Williams, J., says:

"I understand the facts to be that, a former ejectment having been commenced against Mr. Richards, he agreed with Mr. Powell to defend for Powell, the latter allowing him his expenses, so that Powell was substantially defendant in that action. The admissibility of depositions in cases of this kind does not depend upon technical grounds, and one question is, had the lessor of the plaintiff an opportunity of cross-examining the witness? He certainly had, and I see no fair reason for supposing that the cross-examination would have been to a different effect, whether the lessor of the plaintiff knew or did not know that Mr. Powell was the real defendant. The lessor of the plaintiff had to succeed by the goodness of his own title, and who was the defendant would be of little importance. \* \* \* The matter may not be free from some doubt, but on the whole I am of opinion that the evidence is receivable."

In *Llanover v. Homfray*, 19 Ch. Div. 229, the former suit was a bill of peace brought in 1815 by some of the tenants in behalf of themselves and all others against the lord of the manor. Testimony was taken therein *de bene esse*, defendant joining. Jessel, M. R.:

"The question has been raised whether this testimony is admissible in the present suit. I must say I have no doubt whatever that it is. The suit of *Moggridge v. Hall* [13 Ch. Div. 380] was a suit by persons who were privies in estate with the present tenants. They were not, indeed, owners of the same estate, but, as the suit was on behalf of all the tenants, it included the then owners of the estate now belonging to the Messrs. Phillips; and on the other side there was a lord of the manor, who is now represented by the present lord of the manor. Therefore it was a suit between persons privy in estate to the parties in the present action. The issue in that suit was the same as that in the present action, and the evidence in one is therefore admissible in the other."

In *Wright v. Cumpsty*, 41 Pa. St. 102, the questions raised were the same as in a former suit, viz. whether or not a partnership existed between plaintiff and defendant, and to what extent, and whether the purchase of a steamboat was in the purchaser's own right or in trust. The court says:

"We think the identity of the subject-matter in dispute was the same in both actions, and so were the parties, excepting that, owing to the nature of the action (being *replevin*), a stranger to the contract which was involved in that controversy was included; but the parties here were parties plaintiff and defendant there, and we think the identity is sufficient, and brings the admission of the evidence within the ruling in *Insurance Co. v. Johnson*, 23 Pa. St. 72, and in *Haupt v. Henninger*, 37 Pa. St. 138."

In *Orr v. Hadley*, 36 N. H. 575, the court says:

"As a general rule, the parties must be the same, and the point in issue must be the same. It is not required, however, that the parties to the second suit should be literally the same as in the first; for if the trial is between those who represent the parties to the first by privity in law, in blood, or in estate, the evidence is admissible. In *Wilbur v. Selden*, 6 Cow. 162, the parties in the former suit were Wilbur & Doremas against Selden, Richards & Ogden; in the second they were Wilbur, survivor of Doremas, against Selden, impleaded with Richards, survivor of Ogden; and it was held that the parties were substantially the same. \* \* \* But the testimony offered in this case was not admissible, according to any of the authorities which we have examined. The parties in the present suit are not the same as in the former, nor are they in privity with them, so as to be bound by what was said and done in that action. Peter E. Hadley, one of the present defendants, was plaintiff in that suit; but the other defendant, so far as the case shows, had no connection with that proceeding, either as party or privy. He had no opportunity to cross-examine the witness and his rights cannot be affected by the testimony in that cause. There are cases which hold that, where the number of the parties is reduced in the second suit, the identity of those which remain being retained, the testimony may be used. *Wright v. Tatham*, 1 Adol.

& E. 3; *Wilbur v. Selden*, supra. But we have found no case where the testimony has been admitted if new parties, who are not privies, are introduced in the second suit."

*Strutt v. Bovingdon*, 5 Esp. 56, was an action for diverting water from the plaintiff's mills. In 1784 "the present plaintiff had brought another action against the defendant *Bovingdon*, in which he had relied on the same rights." Testimony of a deceased witness on the former trial was held to be competent, even against the two new defendants, for the reason, as stated by Lord Ellenborough, that "the two defendants on this record justified under the defendant *Bovingdon*, who was seised of the land." See, also, *Wright v. Tatham*, 1 Adol. & E. 3, and *Warren v. Nichols*, 6 Metc. (Mass.) 261.

*Boardman v. Reed*, 6 Pet. 327, 8 L. Ed. 415, was an action of ejectment. Defendant's counsel offered to prove that on the trial of a former action of ejectment, brought by the present lessor of the plaintiffs against some of the defendants in the present action, to recover the land now in controversy, a witness on that trial, who had since died, swore to a certain corner tree. "As the testimony of the witness," says the court, "was not given between the same parties, his statement, if admissible, could only be received as hearsay."

Testimony of a deceased witness was received in *Yale v. Comstock*, 112 Mass. 267, because "the parties in the later suit derived their titles, respectively, from Allen S. Yale and Marshall Brace [the parties to the earlier suit], and as to them are privies in estate."

In *Jackson v. Lawson*, 15 Johns. 539, A. devised a farm to his wife during widowhood, remainder to his children. B., claiming under a deed from A., brought ejectment against the widow and another, and recovered on oral proof of the contents of the deed, which was lost. The widow died, and C., a grantee of some of the devisees, brought ejectment against B. The testimony of a deceased witness on the former trial to the contents of the deed was admitted. The court, by Van Ness, J., says:

"Both the widow of Lawson and the lessor of the plaintiff thus claim under the same will; and I am inclined to think that there is such a privity of estate between them; and the verdict in that case was, for certain purposes, evidence, though not conclusive, in this. \* \* \* The estate devised to the widow during her widowhood, and the remainder over, constitute but one estate carved out of the same inheritance, created and subsisting together,—the one in possession, the other in expectancy. \* \* \* If the verdict in the former ejectment was admissible on the trial of this suit, by reason that the tenants for life and the remainder-men are privies in estate, it follows that the evidence given in the first suit by a deceased witness is also admissible. The rule is that such evidence is proper, not only when the point in issue is the same in a subsequent suit between the same parties, but also for or against persons standing in the relation of privies in blood, privies in estate, or privies in law."

In *Jackson v. Crissey*, 3 Wend. 253, the testimony was held incompetent. The court says, per Savage, C. J.:

"What a deceased witness has sworn at a former trial between the same parties in relation to the same issue is proper evidence. Under the term 'parties' are comprehended all persons standing in relation of privies in blood,

privies in estate, or privies in law. Same v. Lawson, 15 Johns. 544. But Barrett, in the suit against whom the testimony was given, was neither. He held, indeed, under the same title (that is, he derived title from Amos Miles through the deeds from his heirs to Zachariah Miles, and the conveyance from the latter to Zeno Carpenter), but his lot and the premises of the defendants are separate parcels of what was once the same farm. Barrett and the defendant do not hold different estates in the same premises. Neither holds as remainder-man or reversioner to the other. There is therefore no privity of estate between them, and there is nothing in the case to show either privity in blood or privity in law."

A convenient definition of this privity which is thus made the essential element in the cases above cited is found in 19 Am. & Eng. Enc. Law, 156, as follows:

"The term 'privity' denotes mutual or successive relationships to the same rights of property, and privies are distributed into several classes, according to the manner of this relationship. Thus, there are privies in estate, as donor and donee, lessor and lessee, and joint tenants; privies in blood, as heir and ancestor, and co-parceners; privies in representation, as executor and testator, administrator and intestate; privies in law, where the law, without privity of blood or estate, casts the land upon another, as by escheat."

Manifestly, no such mutual or successive relationship exists between the infant, claiming damages for his pain and suffering, and his mother, claiming damages for the loss of his services. The causes of action are distinct, and neither claimant could under any circumstances succeed to the other's cause of action. There is a case in 53 Ind. 143 (Railroad Co. v. Stout), where this distinction seems to be overlooked. Peter Stout sued in his lifetime for damages to himself from some accident, which action abated by his death. Thereafter Stout, administrator, sued, under the statute, for injury causing death, and offered the testimony of a deceased witness who testified on the trial of Peter's case. Although the court seems to appreciate the circumstance that one action was based upon the common-law liability, and the other upon the statute, it nevertheless holds the evidence competent, since "our statute makes the administrator the representative of the deceased"; citing only Greenl. Ev. § 164, which extends the word "parties" only to comprehend privies in blood, in law, or in estate. The case is not well reasoned, and seems to be unsupported by authority. The general term, in the Fourth department, held the precise converse in Murphy v. Railroad Co., 31 Hun, 358, which was an administrator's action for injuries causing death, in these words:

"The deposition of the deceased taken in the action prosecuted by him in his lifetime was not competent evidence in the action. That action terminated with the death of the plaintiff therein, and all interlocutory proceedings went down with it, and are not saved by section 881 of the Code of Civil Procedure. While the plaintiff is the personal representative of the deceased, the action is prosecuted for the benefit of those who do not claim under him, but is an original cause of action, that did not exist in the lifetime of the deceased."

It should further be noted that testimony of a witness on a former trial cannot be admitted against one of the parties to a subsequent trial unless it could be admitted against the other. In Atkins v. Humphreys, 1 Moody & R. 523, plaintiff sued to set aside a conveyance as fraudulent and collusive. In a former suit one Stew-

art had sued the same defendants to set aside the same conveyance on the same grounds. Tindal, C. J., loquitur:

"I cannot receive the evidence. There is no reciprocity. If the present defendants had offered depositions taken in the earlier suit, the plaintiffs would have been entitled to object."

*Morgan v. Nicholl*, L. R. 2 C. P. 117, was an action of ejectment. Morgan offered the testimony of a deceased witness on the trial of a former action in ejectment against Nicholl's father brought by Morgan's son, claiming as his heir at law, under the supposition that he was dead, to recover the same premises. It was held that there was no privity of estate between Morgan and his son, and that the evidence, not being admissible against Morgan, was not admissible for him. Willes, J., says:

"The contention of the plaintiff amounts to this: that the rule that evidence given in a former trial upon the same matter and between the same parties, or persons privy to them, is admissible, extends to all cases in which the parties to the two trials are related in blood. The only relation between the plaintiffs in this and the former action is one of blood,—a close one, it is true. But I apprehend the law must be the same as if the plaintiffs had been cousins deriving their title from the same person,—a *reductio ad absurdum*. By 'persons privy to the former parties' is really meant persons claiming under them. Could it be said that this evidence would have been admissible if the former action had turned on whether the then plaintiff was the oldest son, or whether he was legitimate? It is contended that it is not necessary that the parties should be exactly the same, but here the two plaintiffs, for purposes of title, are entire strangers. The cases are collected in *Wright v. Tatham*, *supra*, and that case shows that it is sufficient if the parties to the second cause were parties to the first, though there were other parties joined with them. I agree, also, with the lord chief justice, that the same rule applies as in cases of *res judicata* and *estoppel*, viz. that the evidence cannot be admissible against one party and not against the other; and it is clear that, if this evidence had been tendered by the defendant, the plaintiff would have said that he was not present at the former trial, and did not claim under the former plaintiff."

This case is on all fours with the one at bar. Anne Gumby could have successfully objected to the reading in evidence against her of the testimony of the witness who testified in the suit of Clayton, guardian ad litem of George Gumby against defendant, and therefore she cannot read the same testimony in evidence against defendant. The judgment of the circuit court is reversed, and a new trial ordered.

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#### HOPKINS v. NORTHWESTERN LIFE ASSUR. CO.

(Circuit Court of Appeals, Third Circuit. January 23, 1900.)

No. 7.

#### LIFE INSURANCE—VESTED INTEREST IN BENEFICIARY.

The taking out of a policy of life insurance creates no vested interest in the beneficiary named therein, where the policy permits a change of beneficiaries by agreement between insured and insurer, without the knowledge or consent of the beneficiary.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Bernard Gilpin, for plaintiff in error.

Alexander Simpson, Jr., for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

GRAY, Circuit Judge. This was an action of contract, brought in the circuit court of the United States for the Eastern district of Pennsylvania to recover the sum of \$10,000, with interest from August 8, 1898. The record discloses the following facts: On March 26, 1892, John S. Hopkins, of the city of Philadelphia, applied for membership in the Northwestern Masonic Aid Association, a corporation existing under the laws of the state of Illinois, for a policy of insurance on his life for \$10,000, and on April 14, 1892, the said Masonic Aid Association issued its certificate or policy No. 53,477 on the life of the said John S. Hopkins, the beneficiaries named therein being "his wife, Emily V. Hopkins, if living; if not, to his children, or the survivors of them, equally, if living." The said John S. Hopkins paid the premiums on said policy as they became due until the month of December, 1897. The said policy or certificate of membership No. 53,477 had indorsed thereon the following provision:

"Change of beneficiaries can be made at any time, without charge, upon complying with the by-laws."

The by-laws referred to expressly provide that:

"Any member may secure a change of the beneficiaries named in his certificate upon surrendering said certificate to the secretary for cancellation, and stating to him in writing to whom in said classes of beneficiaries mentioned in said articles of incorporation he desires such benefits paid; whereupon the secretary shall change upon the records the name of such beneficiary, and issue a new certificate accordingly."

The act of the general assembly of Illinois under which defendant company was incorporated provided that:

"Membership in any such corporation shall give to any member thereof the right at any time, with the consent of such corporation, to make a change in his payee or payees or beneficiary or beneficiaries, without requiring the consent of such payee or beneficiary."

The certificate also provided that it should not be binding if the insured "shall suffer death in consequence of any violation by him of any penal law of any state or government." In June, 1896, by resolution of the board of trustees of the Northwestern Masonic Aid Association, and proceedings duly had thereunder, the name of the said association was changed to that of the Northwestern Life Assurance Company. On December 8, 1897, said Northwestern Life Assurance Company, upon application of the said John S. Hopkins, canceled said policy No. 53,477, and issued in lieu thereof to him a new policy on his life for \$10,000, numbered 117,132, payable on his death to "his wife, Emily V. Hopkins, if living; if not, to his surviving children, equally, if living"; said John S. Hopkins paying therefor, on December 2, 1897, the annual premium of \$434.90. This was largely in excess of the premium on the old policy, which, in 1897, had been less than \$250, but there were various provisions in the new policy or certificate which were claimed to make it more desirable than the old, such as extended insurance, cash surrender values, paid-up policy values, loan values, and the cessation of all payments after 20 years. Said policy or certificate No. 117,132, is



sued December 8, 1897, as aforesaid, contained, inter alia, the following stipulation:

"(9) If the insured shall die by his own hand or act, whether sane or insane, within two years from the date of this policy, or shall suffer death in consequence of the violation by him of any penal law of any state or government, then this policy shall be void, and shall cease to be binding upon said company, except for the amount which the insured has paid in premiums on account thereof."

The said John S. Hopkins died by his own hand on March 24, 1898 (the death occurring within two years of the date of the policy), the said Emily V. Hopkins, his wife, and the plaintiff below, surviving him. The company tendered before suit, and has paid into court, the premiums paid by John S. Hopkins. It is claimed by the plaintiff that, the surrender of the old certificate or policy No. 53,477 and the issuance of the new certificate or policy No. 117,132 having been accomplished by and between the said John S. Hopkins and the defendant company without the knowledge or consent of the said plaintiff, the beneficiary in both of said policies, the original certificate or policy was still in force at her option, and constituted the sole measure of the obligation existing on the death of John S. Hopkins between the plaintiff and defendant; and that, therefore, the said plaintiff was not bound by the stipulation of the substituted policy in regard to suicide above recited; that, in the absence of any such stipulation in the original policy or certificate, the fact of suicide constituted no defense to her claim, and that she was entitled to receive the amount to be secured to be paid to her on the death of her husband. In other words, the plaintiff claims that she had a vested interest as beneficiary in the original policy from the date that the contract of insurance was completed, which could not become divested or impaired by any agreement between her husband and the defendant company, made without her knowledge or consent.

Two important questions are raised by this contention: (1) Has a beneficiary a "vested interest" when the certificate or policy itself, the association's by-laws, and the statute under which it was incorporated all provide that the payee or beneficiary may be changed "at any time" without requiring the consent of such payee or beneficiary? (2) If a beneficiary has such a "vested interest" as would have prevented, in this case, the substitution of a new policy for the old, without the plaintiff's consent, and thus enabled the plaintiff to successfully claim that the old policy alone was in force between her and the defendant, then did the contract between the defendant and John S. Hopkins, evidenced by this policy, having in it no express stipulation in regard to suicide, exclude death by his own voluntary act as a condition upon which the policy should become due and payable? There was no evidence presented by the plaintiff touching the question of the sanity of John S. Hopkins at the time of his death, and the case was submitted to the jury by the judge below, as follows:

"The defendant's point, 'The verdict must be for the defendant,' is reserved. We instruct the jury to find in favor of the plaintiff for \$10,400, subject to the reserved question whether there is any evidence to go to the

jury in support of the plaintiff's claim. (Exception noted for defendant to the charge of the court, and to the refusal of defendant's point.)"

On June 7, 1899, the said court filed its opinion, entering judgment in favor of defendant on the question of law reserved on the trial of said cause, notwithstanding the said verdict. 94 Fed. 729.

As to the first question raised by the facts of this case, as disclosed in the record and stated above, we are of opinion that the taking out of the original policy by John S. Hopkins created no vested interest in his wife, Emily V. Hopkins, the beneficiary named in said policy, as was claimed by her in this suit, inasmuch as the contract of the original policy itself permitted a change of beneficiary by agreement between the insured and the company, without the knowledge or consent of the said plaintiff. Without passing upon the question as to whether, without such a stipulation, there is any vested interest in the beneficiary named in such a policy, such as cannot be disturbed by agreement between the insured and the company without the consent of such beneficiary, it suffices to say that in this case, where the policy contains the stipulation recited, there can be no such permanent or vested interest as is claimed by the plaintiff. The control over the contract of insurance given to the insured, independent of the will of the beneficiary, makes impossible the existence of such permanent or vested interest in such beneficiary during the lifetime of the insured. The right of the beneficiary is inchoate, and a mere expectancy, during such lifetime, and does not become vested until the death of the insured happens with the policy unchanged. In this view the original policy was effectually surrendered and canceled by the agreement of December 8, 1897, and the issuance of the new certificate or policy on that date, and said new policy, No. 117,132, was the only one subsisting at the time of the death of said John S. Hopkins, in March, 1898. This being so, there can be no recovery by the plaintiff on either policy, because it is not controverted that the stipulation contained in the new policy against liability where death of the insured is caused by his own voluntary act would prevent recovery by the plaintiff. On this ground, therefore, we think the court below was clearly right in directing judgment to be entered for the defendant upon the point reserved, notwithstanding the verdict. This conclusion renders unnecessary a consideration of the other question above stated, to the discussion of which the learned judge in the court below confined himself in his opinion filed in the case. The judgment entered in the court below is affirmed.

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RONDOT v. ROGERS TP.

(Circuit Court of Appeals, Sixth Circuit. January 2, 1900.)

No. 699.

1. MUNICIPAL BONDS—OMISSION OF SEAL—EFFECT UNDER MICHIGAN STATUTE. Under How. Ann. St. Mich. § 7778, which provides that "no bond, deed of conveyance or other contract in writing signed by any party, his agent or attorney, shall be deemed invalid for want of a seal or scroll affixed thereto by such party," negotiable obligations issued by a township under

a statute authorizing the issuance of bonds, and which are denominated "bonds" on their face, may be treated in law as specialties, and an action of covenant maintained thereon, although they are not in fact sealed.

**2. EVIDENCE—MUNICIPAL RECORDS.**

Where the journal of a township board, which should contain the record of all township meetings and the meetings of the board, is shown to have been incomplete, records of such meetings contained in a highway commissioner's record kept by the same clerk, and certified by him to have been made from records and papers on file in his office, are admissible as prima facie evidence of the proceedings of such meetings, where no record thereof appears in the journal.

**3. MUNICIPAL BONDS—DEFENSES—DEFECTIVE RECORDS.**

The failure of the clerk of a municipal corporation to make a record of proceedings relating to the issuance of bonds cannot avail the corporation, to defeat the enforcement of such bonds, but parol evidence is admissible to supply the place of the missing parts of the record.

**4. SAME—VOTE OF TOWNSHIP—MICHIGAN STATUTE.**

Under Laws Mich. 1867, No. 98, which authorizes townships to raise money by tax for the purpose of building and repairing bridges, and also to borrow money on bonds issued for the same purpose, and provides that the question of exercising such authority shall be determined by vote at a township meeting, where a proposition to levy a tax and also one to issue bonds are submitted and voted on at the same meeting they are not necessarily alternative propositions; and, when it appears that such was the intention, both may legally be adopted at the same time.

**5. FEDERAL COURTS—FOLLOWING STATE DECISIONS—ACTION ON MUNICIPAL BONDS.**

A decision of the supreme court of a state holding invalid a township election authorizing the issuance of bonds, which was not made until after the bonds had been issued and sold, is not conclusive on a federal court in an action to recover on such bonds.

**6. MUNICIPAL BONDS—ESTOPPEL BY RECITALS—IRREGULARITY IN ELECTION.**

A township which issued negotiable bonds containing recitals that they were issued in conformity with an act of the legislature authorizing their issuance, and were authorized by the legal vote of the qualified electors of the township at a special meeting held upon a certain date, and which received and retained the proceeds of such bonds, and for a time paid the interest thereon, is estopped from asserting irregularities in the election or defects in the preliminary proceedings to defeat such bonds in the hands of a bona fide purchaser.

**7. SAME—MANNER OF EXECUTION—RECITALS.**

Where an act authorizing the issuance of township bonds vests the power to issue them, when the conditions precedent have been complied with, in the township board, but without specifying the manner of its exercise, they may direct the bonds to be executed and signed by appropriate officers of the township; and in such case recitals contained in the bonds are to be given as full effect as though made by the board itself.

**8. SAME—BONA FIDE HOLDER—TRANSFER AFTER MATURITY.**

The assignee of a bona fide purchaser of negotiable bonds before maturity takes the same rights his assignor had, whether the assignment was made before or after maturity, and it is immaterial whether he paid a consideration therefor.

**9. SAME—EVIDENCE OF OWNERSHIP—PRESUMPTION FROM POSSESSION.**

The production of negotiable bonds in suit by plaintiff's counsel on the trial raises a presumption that plaintiff is their owner.

**In Error to the Circuit Court of the United States for the Eastern District of Michigan.**

This is a writ of error to review the judgment of the circuit court for the defendant, the township of Rogers, Presque Isle county, Mich., in a suit by Augustus E. Rondot upon 21 bonds purporting to be obligations of the town-

ship. The original declaration, filed April 18, 1881, termed by the pleader a "plea of the breach of covenant," counted on 10 bonds, of \$100 each, dated June 20, 1871, and maturing July 1, 1881, with annual interest coupons unpaid since July 1, 1873; upon 5 more bonds for the same amount, each running for 10 years (until December 1, 1881), with annual interest coupons unpaid since December 1, 1873; and upon 6 more bonds for the same amount, each due January 1, 1882, with unpaid interest coupons since January 1, 1873. A trial was had upon issues duly made upon this declaration, resulting in a verdict and judgment for the defendant. The judgment was brought here for review. This court found that the averments upon which jurisdiction was based were defective, reversed the judgment, and remanded the case, with leave to the plaintiff for amendment and further proceedings. 25 C. C. A. 145, 79 Fed. 676. In the circuit court the plaintiff did amend his declaration so as to show jurisdiction, and also by terming his action "a plea of covenant," instead of "a plea of breach of covenant." In other respects the declaration is the same as the original. All the bonds sued on are in the form following:

"No. 21.

\$100.

"Township Bond for One Hundred Dollars.

"Township of Rogers.

County of Presque Isle.

"Authorized by Act of the Legislature of Michigan Approved March 25th, 1867.

"Know all men by these presents, that the township of Rogers, county of Presque Isle, and state of Michigan, acknowledges itself justly indebted, and promises to pay, to ——— or bearer, one hundred dollars, on the first day of December, A. D. 1881, at the First National Bank of Detroit, with interest at the rate of ten per cent., payable annually, upon the presentation of the coupons hereto annexed, on the first day of December of each and every year, until the principal is paid.

"[Note. Written across the face in red ink] \$100. State of (Issue of \$3,000) Michigan.

"This bond is issued in conformity with an act of the legislature of the state of Michigan approved March 25th, 1867, and authorized by a legal vote of the qualified voters of the township at a special meeting held August 23, A. D. 1871.

"In testimony whereof, the supervisor and treasurer have signed and countersigned this bond this twenty-first day of November, A. D. 1871.

"Christian Bahre, Treasurer.

"Frederick Denny Larke, Supervisor.

"Ten-Dollar Coupon, Due 1881.

"Township of Rogers, county of Presque Isle, state of Michigan, will pay the bearer, at the First National Bank, Detroit, on the first day of December, 1881, being interest on bond No. 21.

Christian Bahre, Treasurer.

"Frederick Denny Larke, Supervisor."

The bonds are not sealed. The bonds dated November 21, 1871, and January 1, 1872, bear the names of Christian Bahre, treasurer, and Frederick Denny Larke, supervisor, as above, and recite a township meeting of August 23, 1871. The 10 bonds issued June 30, 1871, bear the names of Christian Bahre, treasurer, and Albert Molito, supervisor, and are denominated, by words written across the face, "\$1,000 issue." Their recitals refer to a township meeting held June 28, 1871, instead of August 23, 1871, but in all other respects the two series are alike.

The law under which the bonds purport to have been issued (being No. 98 of the Michigan Session Laws of 1867) is as follows:

"An act to authorize the several townships of this state to raise money by tax, or to borrow money, to rebuild or repair bridges.

"Section 1. The people of the state of Michigan enact, that it shall be lawful for any township in this state to vote for and raise by tax a sum not exceeding one per cent. of the assessed value of the real and personal estate for the preceding year, for the purpose of building and repairing bridges; and it shall be lawful for such townships to borrow money for such purposes upon the terms and conditions hereinafter mentioned: provided, the aggregate of such loans shall not exceed three per cent. of the amount of the assessed valuation of the

real and personal property. And further provided, that no larger sum than one per cent. on the valuation shall be raised in any one year to pay the interest or principal of such loans.

"Sec. 2. It shall be the duty of the township clerk, upon the written application of ten legal voters who are freeholders within such township, to give notice, by a written or printed notice, to be by him posted up in five of the most public places in said township at least two weeks previous to the annual township meeting, or of a special meeting, of the intention to vote, by ballot, on the tax or loan, in pursuance of the provisions of this act; and at such meeting the question shall be submitted to the voters, and the majority of the voters voting at such elections may determine as to raising a tax or making a loan, for the purposes in the first section of this act mentioned.

"Sec. 3. The bonds of the township may be issued by the township board upon such conditions, as to time of payment, but in no case to exceed ten years from date, as the legal voters may, by resolution, direct, but shall not be disposed of at a price less than their par value; said bonds to draw interest at a rate not exceeding ten per cent.

"Sec. 4. The money raised by tax, or borrowed upon loan, shall be expended on the bridges within such township, under the direction of the commissioner[s] of highways; but the legal voters of each township may, at the time of voting upon such tax or loan, designate any particular bridge or bridges upon which to expend such money so voted or loaned.

"Sec. 5. This act shall take immediate effect."

In order to show the proceedings preliminary to the issuing of the bonds, the plaintiff served notice upon the defendant to produce its records showing any action in respect to these bonds. In response to the notice, defendant produced two books. One was the journal of the township board. In this book appears the following in relation to the issue of \$3,000 of bonds authorized by township meeting of August 23, 1871:

"Copy of Application of Ten or More Freeholders of the Township of Rogers, County of Presque Isle, Michigan.

"To the Township Board of the Township of Rogers, Greeting: We, the undersigned electors and freeholders of the township of Rogers, request herewith the township board of the township of Rogers to call a special meeting for the purpose of voting to levy a tax of one per centum on the assessed valuation of the real and personal estate of the township, and, further, to vote to raise the sum of three thousand dollars (\$3,000) in bonds of the township of Rogers, bearing ten per centum annual interest, and running (10) ten years; said tax and loan being for the purpose of building bridges across several of the streams, water courses, and swamps within the limits of said township. And your petitioners, as in duty bound, will ever pray.

"C. A. Carpenter, Frederick Denny Larke, J. Paul Mayer, William Meredith, Nozaine Marte, Daniel Swantz, Charles Sammons, Charles Haywood, C. Pfanschmidt, William Gillis, and numerous others not here recorded.

"Dated Rogers City this 7th day of August, 1871."

On page 45 is recorded a notice of a special township meeting called for August 23, 1871, as follows:

"Copy of Notice Posted in Five of the Most Conspicuous Places in the Township of Rogers.

"To the Qualified Electors of the Township of Rogers: Take notice. At the request of ten or more freeholders of the township of Rogers a special township meeting is hereby called to be held at the school house in the village of Rogers City on Wednesday, the twenty-third (23d) day of August, 1871, at nine o'clock in the forenoon, to submit for the approval or rejection by the voters of said township the question of levying a tax of one per centum on the assessed valuation of the real and personal estate of said township, and also to vote upon the question of raising three thousand dollars (\$3,000) in bonds of the township of Rogers, running for the period of ten years, and bearing ten per cent. annual interest, for the purpose of building bridges across several of the streams, water courses, and swamps within the limits of said township; said tax and

loan being in accordance with an act passed by the legislature of this state, and approved March 25, 1867.

"Dated at Rogers City this 8th day of August, 1871.

"Fred Denny Larke, Town Clerk, Ad Interim."

On pages 46 and 47 are recorded the minutes of the special township meeting of August 23, 1871, which read as follows:

"At a special meeting held in accordance with notices previously posted according to law, and recorded herein, at the school house in the village of Rogers City, in the county of Presque Isle, Mich., on the (23d) twenty-third day of August, 1871, at 9 a. m., a ballot was cast to vote upon the propriety of raising a loan of \$3,000, running for ten years, and bearing interest at 10 per cent. per annum, for the purpose of building bridges over the various water courses and swamps in the township of Rogers; also, upon the advisability of raising or levying a tax of one per centum upon the assessed valuation of the real and personal estate of the township of Rogers for the aforesaid end and purpose. Present, John Morrison, Charles Pfannenschmidt, and J. Paul Mayer, inspectors of election; Frederick Denny Larke, acting township clerk; and Wm. H. Buchner, clerk of the inspectors.

"Moved by Frederick Denny Larke, and seconded by John Morrison, that Charles Pfannenschmidt be appointed chairman of this meeting, and afterwards carried by acclamation. Voting commenced. Board adjourned at 12 noon, and reassembled at 1 p. m. At 3 p. m. notice was given that the polls would be closed at 4 p. m., at which time, the ballots having been canvassed and compared, the following result was obtained:

Total number of votes polled.....	45
For the loan.....	45
For the tax.....	45
Majority in favor of the loan.....	45
Majority in favor of the tax.....	45

"Inspectors of election: John Morrison, Charles Pfannenschmidt, J. Paul Mayer.

"Clerk to the board: Wm. H. Buchner.

"Acting town clerk: Frederick Denny Larke."

This is followed by the copy of an affidavit of one showing the posting of notices of this meeting in five conspicuous places in the township on the 8th of August, 1871, 15 days before the meeting. The journal covering the year 1871 contains no other reference to the proceedings taken to issue this series of bonds. It does not contain a record of any meeting of the township board held after the township meeting directing the issue of the bonds. The journal is incomplete. Blank spaces are left between entries, evidently to be filled in with minutes of meetings not recorded. Fred Denny Larke, who was township clerk for three or four months preceding September, 1871, when he became supervisor, was a witness, and testified that the journal does not contain a record of all the transactions of the township board. He was positive in his statement that at a meeting of the township board a resolution was passed authorizing him, as supervisor, and Bahre, as township treasurer, to execute the \$3,000 issue of bridge bonds which they afterwards executed.

The other record book produced by the defendant bears on its title page the words "Highway Commissioners of the Township of Rogers." On its first page is the following statement:

"This book extended from June 25, 1870, and was carefully compiled from the original records and minutes of proceedings from said date up to the 9th day of October, 1871, by Rudolph Hintermeister, under my supervision. After said date this book has been the only record of proceedings.

"Albert Molitor,

"Town Clerk at the Time of Hintermeister's Compilation, and Whose Affidavit Appears Herein.

"[Signed]

Frederick Denny Larke,

"Supervisor of the Township of Rogers.

"Dated Rogers City, December 30, 1871."

The pages of this book to and including page 38 are in the same handwriting, and contain minutes of meetings of the highway commissioners, of the township meetings, and of the township board prior to October 9, 1871. On page 39 of said book is contained the following:

"I, Albert Molitor, township clerk of the township of Rogers, and clerk of the board of highway commissioners of said township, being duly sworn, deposes and says that all the foregoing contents of this book are fac similes and true copies of the records, minutes, and proceedings of said board of highway commissioners, which I collected from the books and papers on file, and caused to be collected together and transcribed into this one book.

"[Signed]

Albert Molitor,

"Clerk of the Township of Rogers, and Clerk of the Board of Highway Commissioners.

"State of Michigan, County of Presque Isle—ss.: Subscribed and sworn to before me, a notary public in and for Alpena county, by the above-signed Albert Molitor, a person to me well known, this second day of January, 1872.

"Frederick Denny Larke,

"Notary Public, Alpena County, Michigan."

Larke testifies that the township clerk and officers were in doubt as to whether the records of the board and of the road commissioners should not be contained in the same book, and that confusion arose from this.

On pages 9 and 10 of the record is a "copy of application" of 12 or more citizens of the township of Rogers to the township board, requesting them to call a special town meeting:

"To the Township Board of the Township of Rogers, County of Presque Isle, Michigan: We, the undersigned, electors of the township of Rogers, request herewith the township board of the township of Rogers to call a special township meeting for the purpose of voting to raise the sum of one thousand dollars (\$1,000) in bonds of the township of Rogers bearing 10 per centum interest annually, and running ten years, for the purpose of building bridges across several streams and water courses in the township of Rogers. And your petitioners, as in duty bound, will ever pray. [Then follow the names of 12 persons.]

"Entered by temporary town clerk.

J. Paul Mayer."

On page 10 is a "copy of notice" posted in three of the most conspicuous places in the township of Rogers, county of Presque Isle, Michigan:

"At the request of twelve or more qualified electors of the township of Rogers, a special township meeting is hereby called, to be holden at the boarding house of Messrs. Rogers & Molitor, in the village of Rogers City, on Wednesday, the 28th day of June, A. D. 1871, at nine o'clock in the forenoon, to take into consideration the matter of raising the sum of one thousand dollars (\$1,000) in bonds of the township of Rogers, running ten years, at 10 per centum interest, for the purpose of building bridges over and across the several streams and water courses in the township of Rogers. Said proposition to be voted upon by ballot.

"[Signed]

Albert Molitor.

"Samuel Blake.

"William Meredith.

J. Paul Mayer."

"Entered by township clerk ad interim.

On page 11 of the record is a "copy of affidavit":

"State of Michigan, County of Presque Isle—ss.: Henry Slack, constable for the township of Rogers, county of Presque Isle, state of Michigan, being duly sworn, deposes and says that, in pursuance of the order of the township board of the township of Rogers, he posted on the tenth day of June, A. D. 1871, in three of the most conspicuous places in the township of Rogers, three notices calling for a special meeting of the electors of the township of Rogers, in order to vote upon the matter of raising one thousand dollars (\$1,000) in bonds of the township of Rogers, running ten years, and bearing ten per centum interest, to build bridges across several streams in the township of Rogers. Said special meeting to be holden in the village of Rogers City, county of

Presque Isle, Michigan, on Wednesday, the twenty-eighth day of June, A. D. 1871. And furthermore deponent sayeth not.

"[Signed]

Henry Slack."

"Sworn and subscribed before me, a notary public for the county of Presque Isle, Michigan, on this twenty-ninth day of June, 1871.

"[Signed]

Fred Denny Larke,

"Notary Public for Alpena Co., Mich.

"Fred Denny Larke,

"Town Clerk Ad Interim."

On page 12 of the record is a "copy of minutes of special township meeting for the township of Rogers" on occasion of voting on the raising of the \$1,000 bridge bonds:

"June 28th, 1871, 9 a. m.

"This meeting was called to order by Fred Denny Larke, acting town clerk, President William Meredith, Samuel Blake, and Albert Molitor, commissioners on roads. Albert Molitor having occasion to leave the meeting, William Meredith took his place as chairman, and J. T. Bravant was appointed as one of the clerks of the meeting. Voting commenced at 10 a. m., and, as all present had cast their votes by 10:55 a. m., notice was given that at 11:15 a. m. the polls would be closed. This was accordingly done, and, the canvass of the ballots having been taken, the result was as follows:

Votes cast.....	29
For the bonds.....	29
Against the bonds.....	0
Majority in favor of the bonds.....	29

"Inspectors of election: William Meredith, Samuel Blake, Albert Molitor, who had returned.

Fred Denny Larke,

"Acting Town Clerk of the Township of Rogers."

There is no minute of a meeting of the township board to exercise the authority conferred and to issue the bonds. It appeared from the uncontradicted evidence that the signatures of the officers purporting to sign the bonds were genuine; that the persons so signing were, at the dates of signing, actually discharging, respectively, the duties of the offices indicated in the bonds; that the money paid for the bonds went into the township treasury, and was expended in the erection of township bridges; that the first two interest coupons attached to all the bonds were paid; that the bonds were bought and paid for by the People's Savings Bank of Detroit at their face value in 1872, before their maturity; and that the purchaser had no knowledge whatever of any infirmity in the proceedings resulting in their issue. The bonds were produced in court by plaintiff's counsel, but there was no other circumstance or evidence to show that plaintiff had acquired title to the bonds, or how he did so.

C. A. Lightner, for plaintiff in error.

Henry M. Duffield, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts as above). The first question for our consideration in this case was made by demurrer to the declaration on the ground that the cause of action was barred by the statute of limitations. The cause of action in this cause is conceded to have accrued more than 6 and less than 10 years before the issuing of summons. By the law of Michigan (How. Ann. St. § 8713), actions of debt on contracts not under seal and of assumpsit must be brought within 6 years next after the cause of action accrues. By section 8719, all personal actions on any contract not limited by previous sections must be brought within 10 years. This applies



to actions of covenant and to actions of debt on a sealed instrument. *Stewart v. Sprague*, 71 Mich. 50, 38 N. W. 673. By section 7778 it is provided that:

"In all cases arising upon contracts under seal or upon judgments when an action of covenant or debt may be maintained, an action of assumpsit may be brought and maintained, in the same manner, in all respects, as upon contracts without seal."

It follows from the foregoing sections that in Michigan an action of assumpsit on a sealed instrument is barred in 6 years, while an action of covenant on the same cause of action is not barred for 10 years; the form, and not the cause, of action fixing the bar. *Stewart v. Sprague*, 71 Mich. 50, 38 N. W. 673.

The present action is in covenant. If it is properly brought in this form, then the bar of the statute is avoided. It is contended, however, that covenant will not lie on an unsealed instrument, and the bonds here sued upon were not sealed. The statute under which the instruments purport to have been issued provides for the issuing of bonds. A bond is a deed whereby the obligor obliges himself, his heirs, executors, and administrators, to pay a certain sum of money to another at a day appointed. 1 Bl. Comm. 340. A deed is a writing sealed and delivered by the parties. 2 Bl. Comm. 295. The word "bond" imports a seal, and the word, when used in a statute authorizing the issue by a municipal corporation of written obligations negotiable in character, means specialties or writings under seal. *Koshkonong v. Burton*, 104 U. S. 668, 673, 26 L. Ed. 886. The officers issuing evidences of township indebtedness purporting to comply with the statute of 1867 must therefore be presumed to have intended to issue sealed instruments. They have not done so in this case. But section 7778 of Howell's Annotated Statutes of Michigan, part of which has already been quoted, provides further that no bond, deed of conveyance, or other contract in writing signed by any party, his agent or attorney, shall be deemed invalid for want of a seal or scroll affixed thereto by such party. In *Jerome v. Ortman*, 66 Mich. 668, 33 N. W. 759, it was held that an action of covenant in Michigan, as at common law, was an action upon a deed; that the purpose of the clause of section 7778, just quoted, was to permit parties intending to make a deed or specialty to have the writing signed by them, though without seal, treated in law as a deed or specialty; and therefore that covenant might be maintained thereon. See, also, *McKinney v. Miller*, 19 Mich. 142. We think the case at bar is within *Jerome v. Ortman*. The officers signing the instruments here in suit intended them to be bonds (i. e., deeds), for the statute so denominates the securities to be issued, and the instruments themselves bear the name "bond" on their face; and therefore they may be given effect as such, and will support an action of covenant. The circuit court was right in overruling the demurrer based on the statute of limitations.

The next questions arising in this case are those of evidence. The plaintiff's counsel served notice upon the defendant to produce the township records covering the periods when the bonds in this case purport to have been authorized and issued. Two books are produced, one purporting to be the journal of the township board, and

the other a record of the proceedings of the commissioner of highways. The journal of the township board is evidently a defective record, and fails to show all of the proceedings of the township board, and the minutes of certain of the township meetings. The record of the highway commissioner is made up under the supervision of the township clerk. In this book the clerk, who became clerk in September, 1871, certifies that the records preceding his signature and sworn certificate were carefully copied from papers and books on file in the office of the township clerk. Part of these records are, on their face, minutes of the proceedings of the township board and of township meetings. It was a palpable mistake to include them in the highway commissioner's record, but, as the clerk kept both records, it is easy to understand how, in the loose methods of keeping the books, the error occurred. In the absence of the originals, we think these sworn copies, authenticated by the clerk in whose custody the originals should have been, and produced by the township whose records they purport to be, are at least *prima facie* evidence of the facts they record. 1 Dill. Mun. Corp. § 304, and cases cited. They show on their face their incompleteness, and this is, moreover, directly testified to by Fred Denny Larke, who was during the year 1871 at one time town clerk, and at another, supervisor. In this condition of the record, it is permissible to supply the missing parts by parol evidence. It was the duty of the township clerk to keep the record of the proceedings of the township board, and also of the township meetings (How. Ann. St. §§ 739, 740, 748); but the law does not anywhere make the recording of the proceedings a condition precedent to their validity. It is well settled that, under such a statute, creditors of a corporation, private, municipal, or quasi municipal, cannot be defeated because of the neglect of their debtor's clerk properly to record the evidence of the orders and resolutions constituting the contract on the faith of which they have rendered service or advanced money to the corporation. *Bank v. Dandridge*, 12 Wheat. 64, 6 L. Ed. 552; *Bridgford v. City of Tuscumbia* (C. C.) 16 Fed. 910; *School Dist. v. Clark*, 90 Mich. 437, 51 N. W. 529; *Taymouth Tp. v. Koehler*, 35 Mich. 22; 1 Dill. Mun. Corp. § 300.

It is objected to the validity of the bonds issued by authority of the township meeting of August 23, 1871, that the meeting was a nullity, and that the vote was not a vote of the majority of the electors present in favor of the issuing of bonds. It is said that the supreme court of Michigan, in *Loomis v. Rogers Tp.*, 53 Mich. 135, 18 N. W. 596, so decided. From a careful examination of that case, we do not think that the consideration of the validity of the meeting or its effect was necessary to the decision. The proceeding there was in mandamus to compel the township board of Rogers to levy a tax to pay the relator's bonds, which, like those in suit, purported to have been authorized by the township meeting of August 23, 1871. The issues were framed and submitted to the jury, but they did not cover the issues made by the pleadings. The township had answered, averring, among other things, that it had not received any money for the bonds, and that the relator was not a bona fide holder of them, and had not paid value for them. The relator did not request the submission of

these issues to the jury, and the court held that the effect of his failure so to do was an admission of those averments of the answer. The court distinctly declined to pass on the validity of the bonds in the hands of a bona fide purchaser. The judge delivering the opinion did express the view that the meeting of August 23, 1871, was a nullity, because the vote was not solely for the issue of bonds, but was in favor of two contradictory propositions, to wit, the proposition to levy a tax, on the one hand, and to issue bonds, on the other, and that as 45 voted for the one, and 45 for the other, there was a tie vote, and neither proposition was carried. With deference to the learned judge, it seems to us that this construction of the action of the meeting cannot be supported. The notices for the meeting showed clearly that it was the intention of those calling the meeting that both a tax should be levied, and bonds should be issued for the same purpose, and this was undoubtedly the purpose of the electors who voted. The first section of the act gives the power to tax and power to issue bonds in the conjunctive, not in the alternative. There is nothing in the act anywhere which forbids a township to issue bonds in the same year in which a tax has been levied. The only limitation is the amount of tax in one year, or the total amount of bonds to be issued, and it is not claimed in this case that either limitation was exceeded. The second section provides what notice shall issue for township meetings, to authorize the exercise of powers conferred in the first section, and mentions the purpose to tax or to loan with the disjunctive, not to show that the powers were to be exercised alternatively, but by way of distributive reference to the two powers conferred in the first section. We find nothing in this to prevent the holding of two township meetings on successive days,—one to authorize a tax, and the other to authorize a loan; and, if so, there would seem to be no legal objection to the holding of a special meeting for both purposes. Even if the exact point were in judgment before the supreme court of Michigan, we should not be concluded by its decision in a case like this. The bonds were issued and bought by those through whom the complainant claims in 1872, and this decision was not rendered until 1884. In such a question the courts of the United States exercise an independent judgment. *Pleasant Tp. v. Aetna Life Ins. Co.*, 138 U. S. 67, 11 Sup. Ct. 215, 34 L. Ed. 864; *Folsom v. Ninety-Six Tp.*, 159 U. S. 611, 16 Sup. Ct. 174, 40 L. Ed. 278; *Pana v. Bowler*, 107 U. S. 541, 2 Sup. Ct. 704, 27 L. Ed. 424; *Louisville Trust Co. v. City of Cincinnati*, 47 U. S. App. 36, 22 C. C. A. 334, 76 Fed. 296. It certainly appears from these records that a majority of the voters in attendance at the township meetings called for the purpose approved the issue of the bonds sued upon.

Objection is made, however, that the meetings were not properly called, in several particulars. We do not think it necessary to consider the defects urged by counsel in respect either of the meeting of June 28, 1871, or that of August 23, 1871, for the reason that we think the township is estopped, as against a bona fide purchaser, by the recitals in the bonds, by its payments of interest coupons, and by its retention of the money paid in good faith for the bonds, to set up any defects in the steps preliminary to the issue of the bonds.

The bonds recite that they were issued in conformity with the special act of the legislature already referred to, and were authorized by the legal vote of the qualified voters of the township at a special meeting held upon a certain date. The special act requires that the bonds should be issued by the township board. The recital is in effect, therefore, that the bonds are issued by the board. There is direct evidence that the township board authorized the supervisor and treasurer, by resolution, to execute the bonds issued in accordance with the vote, and at the township meeting held August 23, 1871. This fact is further shown by the action of the board in paying the interest on the bonds for two years after their issue. There is no direct evidence of the passage of a resolution by the township board directing the execution of the bonds authorized by the meeting of June 28, 1871, but the action of the board in paying coupons upon these bonds certainly tends to show that they were executed by authority of the board. The law did not specify the manner in which the bonds should be executed, but left that to the board, who were directed to issue them. The board might act in issuing the bonds either by all of its members, or it might act in executing the bonds by one of its members, or by some township officer whose duties made it natural and proper for him to act in such a capacity. The supervisor who signed these bonds was the executive officer of the township. He was ex officio a member of the board, was the agent of the township upon whom all service of processes must be made, and, while not the president of the township board, was distinctively the general representative of the township in its dealings with others. The township treasurer was the financial officer of the township, whose duty it was to receive the proceeds of the bonds and to disburse them. If the fact was that the board directed the executive officers to sign the bonds on its behalf, and they did so, the binding effect of the bonds and their recitals on the township board is none the less because the agency of the supervisor and treasurer for the board is not as fully set forth as might be on the face of the bonds. In accepting the bond as the bond of the township board, whether signed by the officials under a fully-recited authority, or under one less elaborately set forth, the purchaser ran the risk of the actual existence of such authority. If the board had not directed their execution, the bonds were void, however fully the signing officers witnessed the fact. If it had directed the execution of them, then, so far as the board was concerned, it had given validity to them. Hence it follows that, if the fact be that the board directed the execution of the bonds as they were executed, the recitals on the face of the bonds are to be given as full effect as if made in terms by the board itself. The board under the special act was given authority to issue the bonds. It was its duty to order the special township meeting in accordance with the written application of the 10 legal voters who were freeholders within such township. It was therefore within its implied authority to pass upon the validity of such application. Before issuing the bonds, it must decide that the proper vote had been taken at the township meeting, upon a notice properly issued. As it was the tribunal to decide these questions, it necessarily had authority to recite its decision in the face of the

bonds. These conclusions bring this cause within the numerous cases in which municipal corporations having statutory power to issue bonds have been held estopped to deny the validity of bonds issued by them, by the recitals of the issuing officer or body in the face of the bonds that all the steps preliminary to the lawful issue of the bonds have been complied with. The scope of the recitals here is quite as wide as in a number of cases decided by the supreme court and by this court. *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Ashley v. Board*, 16 U. S. App. 656, 8 C. C. A. 455, 60 Fed. 55; *Risley v. Village of Howell*, 12 C. C. A. 219-222, 64 Fed. 453; *City of Cadillac v. Woonsocket Inst. for Savings*, 16 U. S. App. 545, 7 C. C. A. 574, 58 Fed. 935.

There are other circumstances in this case, in addition to the recitals, which would support an estoppel. There are the receipt of the money, its use for the public purpose, and the payment of interest coupons for two years. Such circumstances, under the decision of the supreme court in the case of *Supervisors v. Schenck*, 5 Wall. 772-781, 18 L. Ed. 556, were held to estop the county from setting up the irregularity of the proceedings by which an election under the law authorizing the issue of bonds was held. See, also, *State v. Trustees of Goshen Tp.*, 14 Ohio St. 569; *State v. Van Horne*, 7 Ohio St. 327; *State v. Trustees of Union Tp.*, 8 Ohio St. 394.

But it is pressed upon the court that the plaintiff does not occupy the position of bona fide purchaser, because he became their owner after their maturity. It is conceded that the People's Savings Bank purchased these bonds before their maturity, and paid full value for them, without knowledge of any defect in the proceedings resulting in their issue, but the contention is that one who acquires negotiable paper after its maturity from one who bought it in good faith before its maturity may not enjoy the same immunity from equitable and other defenses as his transferrer. This contention cannot be sustained. The assignee of a bona fide purchaser before maturity takes the same rights as his assignor had, no matter when the assignment was made. No cases have been cited which sustain the position assumed by counsel. Reliance is had upon general language applicable only to a purchase after maturity from an original party to the contract, or from one who is not a bona fide purchaser, and has no rights as such. The exact question was before the court in *Cromwell v. Sac Co.*, 96 U. S. 58, 24 L. Ed. 681. See, also, *Scotland Co. v. Hill*, 132 U. S. 116, 117, 10 Sup. Ct. 26, 33 L. Ed. 261; *Wood v. Starling*, 48 Mich. 592, 12 N. W. 866. The plaintiff, by his counsel, produced the bonds, and thus arose the presumption that he was their owner. *Dawson Town & Gas Co. v. Woodhull*, 14 C. C. A. 464, 67 Fed. 451; *Brigham v. Gurney*, 1 Mich. 351. No evidence was introduced to show the contrary. The evidence conclusively showed that a prior owner had been a bona fide purchaser for value. The plaintiff, in becoming the owner of the bonds, acquired the benefit of the title of the intermediate bona fide purchaser, and it is immaterial how the title came to him,—whether by gift or otherwise.

These views lead to a reversal of the judgment for the township. The case should have been submitted to a jury on the issue whether

the township board did authorize the execution of the bonds as they were executed, and, if they found this to be the fact, with directions to return a verdict for the plaintiff; otherwise, to return a verdict for defendant. Judgment reversed, with costs, with instructions to order a new trial.

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UNION TRACTION CO. v. FETTERS.

(Circuit Court of Appeals, Third Circuit. January 15, 1900.)

No. 10.

**NEGLIGENCE—LIABILITY FOR CAUSING DEATH—ACTION FOR DAMAGES.**

Defendant contracted for the construction of a smokestack, to consist of a shell of steel lined with brick. When the contractors for the steel part were near the top, those for the brickwork commenced work below, upon the assurance of the defendant that the workman should be protected from danger from those above, by a floor to be constructed above them. Such floor was constructed, but defendant, for a temporary purpose, cut a hole through it; and subsequently a timber falling from above passed through the floor and killed plaintiff's husband, who was a bricklayer working below. *Held*, that it was the duty of defendant to restore the platform to a safe condition within a reasonable time, and if it failed to do so, and the killing of the deceased was the result of such failure, defendant was liable therefor, and that both of such questions were properly submitted to the jury.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Thomas Leaming, for plaintiff in error.

James M. Beck, for defendant in error.

Before **ACHESON**, **DALLAS**, and **GRAY**, Circuit Judges.

**DALLAS**, Circuit Judge. This writ of error brings up for review the judgment of the circuit court for the Eastern district of Pennsylvania in an action which was there brought by the defendant in error to recover for the death of her husband,—caused, as alleged, by negligence of the plaintiff in error. The Union Traction Company, defendant below, entered into contracts for the erection of a power house. Morton, Reed & Co. contracted for the erection of the steel smokestack, and sublet the contract to the Connery Boiler Works. Keen, Frazier & Co. were the contractors for lining the stack with brick. The men of the Connery Boiler Works were working at the top of the stack while Keen, Frazier & Co.'s men were working at its bottom. Both were inside of the stack. When it was about 100 feet high, a heavy piece of lumber was dislodged from or near its top, which descended through its interior and struck and killed the plaintiff's husband, who was a bricklayer in the employ of Keen, Frazier & Co. The facts just stated are undisputed, and the instructions of the court concerning them are not, and could not be, complained of by the plaintiff in error; for the learned judge charged that, "if the man who dislodged this stringer at the top of the stack was negligent, \* \* \* his negligence would not be a ground of recovery in the present case, because he

is not to be taken as in the employ of the traction company." But there were additional facts. The contractors for the brickwork knew that it would be unsafe to work at the bottom of the stack while the other work was going on at its top, and it was not until they were assured by the chief engineer of the traction company "that they would be protected, by a floor which was to be constructed in the stack, while they were working underneath the iron workers," that they consented to proceed before the work overhead had been completed. Such a floor having, accordingly, been constructed, the defendant, shortly before the happening of the accident, caused an opening to be made in it to enable the engineer of the defendant to plumb the stack; but the court charged that this was rightfully done, and that the action was not maintainable if, "under all the circumstances in this case, the defendant used due and proper care to close the aperture,—to restore this platform to the condition in which it found it,"—and this question was left wholly to the jury to "determine according to all the circumstances as detailed by the witnesses."

The defendant submitted two points. The first was refused. The second was reserved, and, subject thereto, a verdict was taken for the plaintiff. Subsequently the defendant's motion for judgment notwithstanding the verdict was overruled, and judgment was entered for the plaintiff. The assignment of errors relates only to the refusal of the court to sustain these points, and therefore attention may be confined to them. The first one is in these words:

"There is no evidence that the beam fell through an opening. The uncontradicted evidence is that it broke through. Therefore whether or not an opening was made is immaterial, and your verdict should be for the defendant."

A verdict for the defendant upon the hypothesis upon which this proposition is founded could not have been directed without the assumption of facts which certainly had not been conclusively established. There was testimony from which it could reasonably be inferred that the beam "fell through an opening," or, if it "broke through," that such breaking resulted from the omission of the defendant "to restore this platform to the condition in which it found it." The question is not what we might consider to be the weight of the evidence, but whether there was any evidence upon which the verdict that was in fact rendered could be sustained; and upon this question we entertain no doubt. The refusal of the court to rule that under all the evidence the plaintiff was not entitled to recover would perhaps be sufficiently supported if rested upon the ground that the defendant's interference with the platform amounted to such an assumption of direction and control as to preclude it from asserting that the work was being done wholly by an independent contractor. *Pender v. Raggs*, 176 Pa. St. 337, 35 Atl. 1135. But our judgment rests upon a broader basis. It is not necessary to hold that the duty of the defendant to exercise reasonable care for the avoidance of injury to the bricklayer resulted from any doctrine which is peculiar to the relation of master and servant; for the general rule that every one is, in his acts and conduct, bound to be duly careful to avoid doing hurt to others, was made plainly applicable

by the circumstances of this case. Feters did not go into the stack as a mere volunteer, but upon the invitation of the defendant, and in reliance upon its assurance that a protective platform would be provided to secure his safety. The defendant justified this reliance by erecting a suitable platform; but, having done this, its conceded right to impair the efficacy of the structure, temporarily and for a rightful purpose, was coupled with the duty to restore it to its original condition within a reasonable time after that purpose had been accomplished. The question whether the defendant did or did not discharge this duty, and whether, if it did not, the killing of Feters resulted from its failure to do so, was properly left to the jury for determination. Bigelow, Cas. Torts (1875) notes, p. 708, and cases there cited. The judgment is affirmed.

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**MULLIGAN v. HOLLINGSWORTH et al.**

(Circuit Court, W. D. Missouri, W. D. January 15, 1900.)

**1. LANDLORD AND TENANT—PAYMENT OF RENT—GIVING OF NOTE.**

Where a lease provided that the lessee should execute his note for the amount of the rent, and should also pay the taxes on the land, "as additional rent," the execution of the note constitutes payment of the rent, so far as relates to the rights of the parties under the lease.

**2. SAME—BREACH OF LEASE—WAIVER OF FORFEITURE.**

To render the acceptance of rent by a lessor a waiver of a right of forfeiture on account of a prior breach of the lease by the lessee, it must have been with knowledge of the breach; and evidence that a son of the lessor, not shown to have been his agent, had such knowledge, is not sufficient to charge the lessor with it.

**3. SAME—CONTINUING BREACH.**

The use of land by a lessee, or those claiming under him, for a purpose prohibited by the lease, which under the statute renders the lease forfeitable, constitutes a continuing ground of forfeiture; and the acceptance of rent by the lessor with knowledge of such use is not a waiver of the right of forfeiture on account of its subsequent continuance.

**4. SAME—SUBLEASE—ASSIGNMENT OF LEASE.**

To constitute a sublease, the lessor must retain some reversionary interest in the premises; and a lease by a lessee to a third person, extending beyond his own term, is not a sublease, but is in legal effect an assignment of his lease, within the meaning of Rev. St. Mo. 1889, §§ 6368, 6369, which make an assignment without the consent of the lessor a ground of forfeiture.

This is an action of ejectment, in which the jury, by direction of the court, returned a verdict for the plaintiff. On motion for new trial.

Daniel B. Holmes, for plaintiff.

J. M. Davis, L. H. Waters, and Wm. Leeper, for defendants.

**PHILIPS**, District Judge. The plaintiff, an aged man, residing in Lexington, Ky., for many years has owned a section of land in Caldwell county, in this district, which, the circumstances indicate, he regarded as an investment, and intended as an inheritance for his children. To this end, he seems to have desired that the land



should be so used as to return a small income, but should not be so used as to exhaust or impoverish the soil. For a number of years prior to 1889 he had rented it to one Kenney, to be used as grazing land. On the 1st day of March, 1889, he made a written lease thereof to said Kenney for a term of one year, to expire on the 1st day of March, 1890, in payment for which Kenney executed to him a note for \$600, to be paid on the 1st day of March, 1890. This lease contained the following provision: "It is agreed that no part of the land shall be cultivated, and that the land shall alone be used for grazing during the year aforesaid." Without any written renewal, the tenant held over from year to year, which was but a continuation of the written lease from year to year. It is quite apparent from the correspondence between these parties that Mr. Mulligan reposed the utmost confidence in the friendship and integrity of Kenney, and relied upon him to well guard his property. By reason of extreme old age, the physical and mental powers of Mr. Mulligan in the past few years became greatly impaired, so that he was little capable of attending to any business affairs. About two years ago he became so enfeebled, bodily and mentally, that his business was taken charge of by his wife, under power of attorney from him. In the fall of 1898 his son James Mulligan, of Lexington, Ky., of his own motion came to Missouri, to see and ascertain the condition of said property. Then, for the first time, he discovered that Kenney on the 23d day of January, 1894, had made a written lease of this land to J. A. Linville and Jacob Switzer until the 1st day of March, 1898, at an annual rental of \$1,400, and that during this period the land had been plowed and cultivated each year, and crops of corn raised thereon; and this lease was continued by written indorsement thereon for the year 1898, ending March 1, 1899; and on the 28th day of February, 1899, the said Linville, Switzer, and one Austin leased a part of said premises to the defendants, R. W. Hollingsworth and W. A. Hollingsworth, for one year from March 1, 1899, to March 1, 1900, and they made a like lease to other persons of the residue of said section. This was done with the sanction of said Kenney. After giving 10 days' notice to the tenants to quit, the plaintiff on April 7, 1899, instituted this action of ejectment. On a trial before a jury, the jury, under direction of the court, returned a verdict for the plaintiff on the issue of the right to the possession, and the jury assessed the damages, and fixed the rental value of the premises. The defendants have filed a motion for new trial.

Section 6368, Rev. St. Mo. 1889, declares that:

"No tenant for a term not exceeding two years, or at will, or by sufferance, shall assign or transfer his term or interest, or any part thereof, to another without the written assent of the landlord; neither shall he violate any of the conditions of his written lease, nor commit waste upon the leased premises."

The evidence showed that five successive crops of corn had been raised upon this land, which constituted waste, as its effect was to impoverish the soil and injure the land. Such cultivation was also a clear violation of the conditions of the written lease between plaintiff and said Kenney. The succeeding section (6369) declares that:

"If any tenant shall violate the provisions of the preceding section, the landlord, or person holding under him, after giving ten days' notice to quit possession, shall have a right to re-enter the premises and take possession thereof, or to oust the tenant, sub-tenant or under-tenant by the proper procedure."

The principal contention of defendants' counsel is that, notwithstanding the acts aforesaid amounted to a violation of the conditions of the lease and to a commission of waste, the plaintiff has lost his right of action under said section 6369, for the reason that after the forfeiture the plaintiff received from Kenney the annual rental. This contention is predicated of the fact that said James Mulligan, while in Missouri in the fall of 1898, learned of said violations of the lease, and that he required the tenants to secure the payment of the note given by Kenney to the plaintiff for the rental for the year 1898. The evidence shows that said Kenney did send a draft drawn by some home bank on some bank in Lexington, Ky.; and as Kenney's note was thereafter returned to him, paid, the presumption is to be indulged that the plaintiff received the money. There is no question of the correctness of the general proposition of law that if, after a forfeiture accrued against the tenant, the landlord, with knowledge of the forfeiture, receives rent money from the tenant, he thereby waives the forfeiture. There are several complete answers to this contention. In the first place, it cannot be said, as a matter of fact and law, that the plaintiff, in receiving payment of said note, collected from Kenney the rental for said land. In the written lease between plaintiff and Kenney there is no stipulation for the payment of rental at the end of the rental year, but the covenant of the lessee was as follows:

"The second party [that is, Kenny] agrees to, and has this day executed to said first party [that is, the plaintiff] his promissory note for the sum of six hundred dollars, of even date herewith, and due and payable one year after date, to wit, on the 1st day of March, 1890, with interest at the rate of ten per cent. per annum from maturity until paid, which note said second party is to promptly pay at maturity."

This stipulation went with and qualified every subsequent renewal from year to year, so that as matter of law the only covenant of the lessee in this respect was to execute his promissory note, which he did on the 1st day of March each year, for the sum of \$600, which he was to pay in this instance on or before the 1st day of March, 1899. Therefore the note itself was taken in payment of the rent at the time it was delivered, March 1, 1898. "Payment" is defined in Rawle's Revised Edition of Bouvier's Law Dictionary as "the fulfillment of a promise, or the performance of an agreement." Black, in his Law Dictionary, says, "By 'payment' is meant, not only the delivery of some money, when such is the obligation of the contract, but the performance of that which the parties respectively undertook, whether it be to give or to do." The lease contains no promise to pay any money as rent for the land, but the covenant by Kenney was to give his note for a certain sum of money, payable one year after date. The lease contains the further clause, immediately following the one above quoted, to wit, "Said second party agrees to pay, as additional rent, all the taxes assessed on said land for and during the term aforesaid," etc. This confirms

the idea that the note itself was given and accepted as rent, as the covenant to give the note is immediately followed by the stipulation to pay certain taxes as "additional rent," thus clearly indicating that the rent reserved consisted in the giving of the note and the payment of the taxes. "That is payment which the parties contract shall be accepted as payment. It may be made in anything else than money." And. Law Dict. "If a note is taken in absolute payment of rent, the landlord's only remedy is upon the note." 2 Tayl. Landl. & Ten. (8th Ed.) § 565. As said by Chief Justice Marshall in *Sheehy v. Mandeville*, 6 Cranch, 264, 3 L. Ed. 215:

"That a note, without a special contract, would not, of itself, discharge the original cause of action, is not denied. But it is insisted that if, by express agreement, the note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it. This principle appears to be well settled. The note of one of the parties, or of a third person, may, by agreement, be received in payment."

The express agreement here was that in consideration of the lease the lessee was to give his note for \$600, which he did, and the fact of its being payable at a subsequent date could not alter the effect of its acceptance for rent. The very fact that the note was taken implied that it was to be paid at a subsequent date. More than this, the acceptance of rent money after the forfeiture, in order to constitute a waiver, must have been done with knowledge on the part of the payee of the facts constituting the forfeiture. The evidence in this case is not sufficient to show that the plaintiff, when the note was paid, had any knowledge of such fact. The burden of this proof rests upon the defendants; and in view of the great outrage done this old man by Kenney in taking advantage of his age and enfeebled condition in renting his land for farming purposes, in violation of the express covenant in his lease, whereby he was receiving \$800 per annum more than the rental he was paying the plaintiff, and impoverishing the soil, it is not too much to say that the defendants should be held to strict proof on this issue. The uncontradicted evidence is that at the time of the payment of this note, and for two years prior thereto, the plaintiff was little more than an imbecile; and it does not appear from the evidence that James Mulligan at the time he was on the premises in 1898 was either acting as agent for the plaintiff, or that he communicated to him the facts he then learned. Unless he was then clothed with full authority as the agent of the plaintiff, he was under no obligation to communicate to him any information he may have learned; and the most that can be inferred from the visit of James Mulligan to the premises is that he came of his own motion, as a person interested in the property of the owner. This situation is well illustrated by the case of *Nash v. Birch*, 1 Mees. & W. 402, in which ejectment was brought against the tenant on forfeiture of the lease, which obligated the tenant to erect a certain shop front within a prescribed time, with the right of re-entry for breach. Because of the landlord's illness, his son acted for him, with knowledge of breach of the covenant, and he did acts which the court was of opinion would have amounted to a waiver of the forfeiture if the son had

sufficient authority from the landlord. There was no evidence that the landlord himself had knowledge of the breach. The court held that the forfeiture had not been waived. Lord Abbinger, C. B., said:

"But the court think there is very great difficulty as to the question of the son's agency, and we are of opinion that there is not sufficient evidence of his authority to waive the forfeiture."

Park, B., said:

"The whole turns on the point whether the son had authority to waive the forfeiture. It seems to me that the son had probably an authority to receive the rent, but not to grant a new lease by waiving a forfeiture of the former one. If it had been proved that the father had notice of the alterations, and he had still allowed the son to receive the rent, the forfeiture might have been waived. But that was not proved, and the question of waiver does not, therefore, directly arise in this case. If it had, the authorities cited show that this was a lease voidable at the election of the landlord. Then I think an absolute, unqualified demand of rent by a person having sufficient authority would have amounted to a waiver of the forfeiture, and it would have been like the case I cited from Croke's Reports [Cro. Eliz. 3]."

In *Jackson v. Schutz*, 18 Johns. 174, the lease in question contained a covenant against the right of assignment, with the right of re-entry for breach. The lessee assigned to one Wager, and the landlord thereafter brought ejectment. The evidence showed that the landlord's agent collected rent from Wager two successive periods, and gave him a receipt "in full for rent." There was no evidence that the agent had communicated his knowledge of the assignment to the landlord. The court ruled against the contention that these receipts of rent constituted a waiver of the forfeiture. The court said:

"It was proved that the lessee, by indorsement on the original lease, assigned the premises to one David Wager on the 1st day of September, 1812, without license, and without offering pre-emption to the lessors, and without paying one-tenth of the price of such assignment. An attempt was made to prove by the subsequent receipts of rents that the forfeiture had been waived, but that ground of defense failed, because there was no evidence that the lessors were then consensant of the assignment. We are therefore compelled to decide upon the validity and effect of the covenant before recited."

Clearly enough, this ruling was predicated of the proposition that, even where there is an agency to collect rent, that of itself is not sufficient to confer upon the agent the power to waive the forfeiture. James Mulligan, who visited this land, was not even deputized by the landlord, the plaintiff, to collect rent, nor to make any arrangement whatever with the lessees, nor did he collect rent; nor does it appear that he informed the plaintiff of the acts done constituting the forfeiture. The evidence does not even show that James Mulligan was acting for his mother, or that he informed her of the acts of forfeiture. Although she may have held a power of attorney from her husband to attend to his business, he was not under judicial guardianship, and was yet, in contemplation of law, *sui juris*. More than this, even if it could be said that the rental was received after knowledge of the forfeiture, the continued use of the land thereafter for farming purposes would have created a continuing forfeiture, existing at the time the notice to quit was given, and ejectment was brought. In *Farwell v. Easton*, 63 Mo. 446, the lessees,

as trustees of the order of Good Templars, held under a lease which required the premises to be used for the Templars, and for a law and land office. One of the lessees opened on the premises a justice of the peace court. It was held that his use of the property for a justice court was a prohibited use, and during its continuance a cause of forfeiture was not waived by the receipt of rent after the original breach. The court said:

"If the use of the premises by Easton for court purposes was a prohibited use, the continued use thereof for such purposes was a continuing cause of forfeiture, of which the landlord cannot be precluded from taking advantage by reason of his having received rent which accrued after the breach was originally committed."

So, in *Ambler v. Woodbridge*, 9 Barn. & C. 376, the court said:

"The conversion of the house into a shop is a breach, complete at once, and the forfeiture thereby incurred is waived by a subsequent acceptance of rent. But this covenant is that the room shall not be used for certain purposes. There was therefore a new breach of the covenant every day during the time that they were so used, of which the landlord might take advantage."

At the time the action of ejectment in the case at bar was brought, the defendants were in possession; and they defend themselves under the lease from Kenney to Linville et al., which lease expressly provided that Kenney "does by these presents lease and to farm let" the premises in controversy. And the lease from Linville et al. to the defendants contained this express provision: "The parties of the first part [that is, Linville et al.] reserve the stalk fields for pasture; the corn to be gathered not later than January 1st, 1900." Therefore the conclusion is inevitable that for the year 1899 these defendants were continuing to cultivate the lands for farming purposes, and raising corn. In the absence of any attempt on the part of the defendants to a contrary showing, it is clearly to be presumed that when this action was brought the defendants were in possession, using the land for the purposes contemplated by their lease; and as a part of the rent reserved by Linville et al. was the stalk fields from the annual crops, which crops were to be removed "not later than January 1st, 1900," to enable Linville to turn his stock in upon the stalk fields, the conclusion follows that the lease from the plaintiff to Kenney was being forfeited during every day of the occupancy of the land by the defendants, which, as a part of the rent, required them to raise a crop of stalks for Linville's cattle.

While it is not deemed essential to the support of the verdict in this case that the discussion should go further, yet it is but respectful, perhaps, that the court should give expression to its view respecting the contention made in the brief of one of defendants' counsel, that the lease from Kenney to Linville et al. was a sublease, as distinguished from the assignment mentioned in said section 6368 of the Revised Statutes; that, as there is no provision in the lease from the plaintiff to Kenney prohibiting a subleasing, no forfeiture can arise from the mere act of subleasing. The lease from Kenney to Linville et al., of March, 1894, was originally for a period of four years; and it was extended from March 1, 1898, for a period ending March 1, 1899, from which it is apparent that the term for

which Kenney let to Linville et al. extended beyond his own term of lease from the plaintiff. This being so, the transaction takes away the character of a sublease, and amounted to an assignment. It is a well-settled principle of law governing the relation of landlord and tenant that, to constitute a sublease, the lessor must retain some reversionary interest in the premises sublet. "If the tenant parts with the demised premises for the whole of his term, although his deed purports an underlease, yet it is, in legal effect, an assignment, and operates as a breach of his covenant." 1 Wood, Landl. & Ten. (2d Ed.) p. 714. "It is essential to a lease that some reversionary interest be left in the lessor; for if by the instrument purporting to be a demise he parts with the whole interest in the premises, or makes a lease for a period exceeding his own term, it will in either case amount to an assignment of the term." 1 Tayl. Landl. & Ten. (8th Ed.) § 16. The motion for a new trial is denied.

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WELLS v. NATIONAL LIFE ASS'N OF HARTFORD.

(Circuit Court of Appeals, Fifth Circuit. January 9, 1900.)

No. 812.

1. CONTRACTS—ACTION FOR BREACH—DAMAGES.

A party to a contract has but one cause of action for its breach, which is indivisible, and in an action thereon he is entitled to recover whatever damages he can prove within the rules of evidence. Where, in accordance with the rules of pleading of the court in which he sues, he sets out a statement of the facts, he cannot be required by the party guilty of the breach to elect whether he will claim for losses and expenses incurred on the faith of the contract, or for the loss of profits, but he may claim for both; and, in case the profits cannot be proved with sufficient certainty to warrant a recovery therefor, he may at least recover for the money and labor reasonably expended in good faith in reliance on the contract.

2. DAMAGES—BREACH OF CONTRACT—LOSS OF PROFITS.

Plaintiff entered into a contract by which he became the general agent for defendant (a life insurance company) for a term of years, within a specified territory. He was to have sole charge of such territory, to devote his services to the business, establish subagencies at his own expense, and receive as his sole compensation commissions on the initial and renewal premiums received from the business he secured. *Held*, in an action for a breach of the contract by defendant by transferring the business to other agents during the term without just cause, that plaintiff was not limited, as to damages, to compensation for the money and time expended, but was entitled to claim for loss of commissions, which were by the contract made the measure of his compensation; that he might show the commissions which would have accrued to him under the contract from renewal premiums on policies actually taken by him (the presumption being, as between the parties, that all would be continued in force), and also the amount of new business done by defendant within the territory through the new agents, which was proper to be considered by the jury, together with other relevant evidence, in determining the probable amount of commissions which would have been earned but for the breach of the contract by defendant, and if, on the whole evidence, the jury found that plaintiff had suffered loss of profits in excess of the amount of his outlay of personal services and expenses, he was entitled to recover such excess.

In Error to the Circuit Court of the United States for the Northern District of Texas.

The petition in this case shows, substantially, that the defendant, the National Life Association of Hartford, on June 6, 1894, entered into a contract in writing with Adolph J. Miller, whereby it appointed him its manager for the state of Arkansas and a part of the state of Texas, designated in the contract. This writing expressly provided that the contract then entered into might be sold, assigned, or transferred, with the written consent of the company, and not otherwise, and provided that the contract should terminate by limitation 10 years from and after the date above written. Thereafter Miller did sell, assign, and transfer this contract to the plaintiff, W. T. Wells, and one W. T. Shaw; and on March 23, 1896, the defendant expressed in writing its assent to this transfer, and by the same writing agreed to extend the time of the contract so as to run 10 years from the date of this written assent. On June —, 1896, the plaintiff and Shaw, by and with the consent of the defendant, released their right under the contract to represent the defendant in the state of Arkansas; and the defendant, in lieu thereof, conceded to them all rights under the contract and agreements to solely represent the defendant throughout the entire state of Texas for and during the 10-year period dating from March 23, 1896. On August —, 1896, the plaintiff, for a valuable consideration, purchased the entire interest of Shaw in the contract, by and with the consent and approval of the defendant, and thereby became the sole manager of the defendant for the entire state of Texas. By the terms of the contract it was made the duty of the manager to solicit and procure applications of persons to become members of the defendant company; to procure the appointment of agents in the territory under his charge, whose duty it should be to solicit applications; to forward all such applications to the home office of the company for approval or rejection by the officers thereof; to receive policies and deliver the same, and to receive the first premium; and to thoroughly inspect all business written by any agents appointed by him. It was made his duty, and he bound himself, to account for, deliver, and pay over on demand, according to the instructions or requirement of the company, all sums of money which he might receive as premiums, advances, or otherwise, and all policies of insurance and other effects which he might receive on account of the company, whether such sums of money or other property were received by him or by any clerk, agent, or other person employed by him. He agreed that during the continuance of this contract he would devote his entire time and energies to the service therein mentioned, and would perform such other duties as should be required of him by the officers of the company in order to thoroughly develop and work the territory confided to his management. The authority of the manager and his agents was strictly limited, to the extent that neither he nor his agents should make, alter, or discharge any contract between the company and others, or waive forfeiture, extend credit, or make collections of money for its account (the first premium excepted), unless he should first be provided with receipts signed by the secretary of the company. For his compensation he was to receive a specified per cent. of the original and the renewal premiums charged on the different classes of insurance to be written by the company. It was expressly provided that he should receive no further remuneration for any service than as stated in the contract, and that he should not contract debts in the name of the company, unless specially authorized in writing, and that, in consideration of the specified compensation, he should pay any and all agency expenses, medical examination fees, and all license fees in the state in which he was to do business, together with the state, county, and municipal taxes which might be required upon the first year's business or premium receipts. It was provided further that, if the manager should neglect or refuse to thoroughly develop and work the territory allotted to him, then the company, at its option, might employ other agents in any portion of the territory so neglected, without otherwise affecting the contract, and that the manager should have no claim on the business so effected by such other agent or agents so employed; that otherwise the company should not appoint other agents within his territory.

The petition avers: That the plaintiff, since he first became manager for the defendant, has devoted his entire time and energies to representing the defendant, and in carrying out and performing all of the duties devolving on him by virtue of the contract to thoroughly develop and work the territory allotted to him. That from the time he first became manager for the defend-

ant, up to the breach of the contract by it, he thoroughly worked and developed the business in all of the territory allotted to him, and has not neglected or refused to do the same. That during the time he was so engaged he had correspondence with no less than 800 subagents in regard to canvassing, soliciting, and securing policies of insurance for the defendant in the state of Texas, and during that time has had not less than 100 agents actively at work soliciting and securing for the defendant policies of insurance of the classes described in the contract. That the defendant is the only insurance company of the natural premium and old-line insurance companies that writes under-average insurance and substandard insurance (that is, insurance upon negroes; saloon keepers; persons of over and under weights; persons of light physical impairment; debtors or creditors; persons of heart murmur; telephone, telegraph, sawmill, and railroad men and women), and that by reason thereof the plaintiff's contract with the defendant was a most advantageous and profitable one to the plaintiff, as all of these risks are much more easily procured than first-class risks or standard insurance. That up to the time of the breach by the defendant the plaintiff had fully and faithfully carried out his part of the contract, and performed all other duties required of him by the officers of the company. That he has made a scientific study of the insurance business for years, and is a person of great experience in that business, and possessed of more than ordinary push and energy, tact and sagacity, and is in every way well fitted for the duties that devolved upon him under the contract. That at the time he purchased the contract he paid therefor \$1,500 in cash, with the knowledge and consent of the defendant. That the contract could not have been purchased for less money, and that the price paid for it was reasonable. That in order to put the business of the defendant on a firm footing in Texas, so as to readily procure applicants to take policies in that company, it was necessary to advertise the same, and to place the merits thereof before the people of Texas, and that in order to do this he had many thousands of circulars printed, setting forth the advantages of the company, and the benefits to be derived therefrom by those who would take policies therein. That he had these circulars distributed all over the state of Texas; sending them to many thousands of persons who would be likely to take insurance in the company, and especially to a great many insurance agents. That, in addition to his correspondence with a great many insurance agents in different parts of Texas, and his employment of over 100 men to work under him to solicit and sell insurance for the defendant company in that state, he was compelled to go in person to different cities of the state, and see the agents, and give them proper instructions for procuring applicants for insurance in the defendant company, and was compelled to incur reasonable expenditures incident to such traveling and establishing subagencies for the defendant company. That the publication and distribution of such literature, the cost of postage and stationery to send the same, and his traveling expenses incurred, amounted to the reasonable sum of \$1,000, made up as follows: Expended for postage, \$700; for printing circulars and stationery, \$100; and for traveling expenses, \$200. That, from the time he acquired the contract until the same was breached by the defendant, he gave all of his time to the faithful performance of the services required, and that for the period thus engaged, namely, 10 months, his services were reasonably worth \$250 per month, making for the 10 months \$2,500, which is an entire loss to the plaintiff, by reason of the defendant's breaching its contract. That it was necessary to do a great deal more work during the first 12 months after the plaintiff acquired the contract, in order to establish the company in Texas, than at any other time thereafter. That during the time of the plaintiff's service he did succeed in writing about \$150,000 of insurance for the defendant company, and applicants in Texas acquired policies of insurance in the defendant company aggregating that amount by and through his efforts prior to the date of the breach of the contract by the defendant, and while he was advertising the company and establishing agencies. That the greater part of the insurance thus written by him were rejected risks from the Hartford Life & Annuity Association and from other insurance companies. That the business of the defendant company in Texas was daily increasing, and that after the date of the breach of the contract by the defendant, by reason of the premises in his petition alleged, it would have involved comparatively little trouble and expense for the plaintiff to have fully performed his contract in Texas for the



remainder of the 10 years, and to have constantly increased the amount of business, after having so advertised the company, established agencies, and placed the business of the defendant on a solid basis in the state. That, notwithstanding the facts in the premises, the defendant did on December —, 1896, violate and breach its contract, in the following flagrant manner, to wit: It did on that date, without the knowledge and consent of the plaintiff, employ the Hartford Life & Annuity Association, and the firm of Harris & Patterson, of the city of Dallas, insurance agents, and a great many other agents and insurance companies doing business in the state of Texas, to solicit and procure applicants for policies of insurance for the defendant, and especially to procure substandard risks or insurance for it, and to solicit and procure applications of persons to become members of or policy holders in the defendant company, and did on that date, and since that time, through these other agents, issue, without the knowledge and consent of the plaintiff, a great many policies of insurance to persons in the state of Texas, and did on that date, without the knowledge and consent of the plaintiff, employ said insurance companies and agents to become permanent representatives and agents for the defendant, in direct opposition to the plaintiff, and to procure applicants for substandard and other insurance, and to deliver policies thereon for it in that state, and agreed with the first-named company, the Hartford Life & Annuity Association, that the defendant would not employ or seek to employ any agent employed by that company, or accept business offered to the defendant by or through any such agents, thereby depriving the plaintiff of the services of the agents who were at and prior to that time in the employment of the plaintiff, and depriving him, also, of his commissions and renewals on said insurance, and willfully violating the most material provisions of his contract, and flagrantly breaching the same, to the great damage of the plaintiff. That, after the defendant had so breached the contract, it employed Adolph J. Miller, and many other agents and agencies, whose names are unknown to the plaintiff, in Texas, to solicit applications and to sell insurance for it, and to do the work that the plaintiff could and would have done, were it not for said breach. That the defendant, through its agents and agencies, after the date of the breach, procured applicants for policies in the defendant company, and delivered policies to persons in Texas to the amount of about \$1,000,000 prior to the time of the filing of this petition, and the premiums on all of said policies, as stipulated in said contract, were for the first year collected by the defendant and its said agents. That by the terms of the contract the plaintiff could and would have written such insurance, and have collected on all the same an average of \$20 premium per \$1,000, the average amount charged and required by the defendant, in accordance with said contract, as premium therefor for the first year of said insurance, and said premium has been and will be collected by the defendant on said policies for each year after the first year, and that by the terms of his contract he would have earned and been entitled to receive an average of 70 per cent. of the first year's premiums on all of said insurance, to wit, the sum of \$14 on the \$1,000, as provided by the contract. That the costs and expenses of every nature whatever in procuring and writing said insurance, and paying the subagents for their work, would have amounted to not exceeding 50 per cent. of the gross amount of the first year's premiums, leaving net profits to the plaintiff of \$4 on the \$1,000, and that by reason of the premises there is due to the plaintiff as commissions on said policies so procured and issued by the defendant, and which could and would have been procured by the plaintiff since said breach, the sum of \$4,000. That the policy holders who actually took insurance by and through the efforts of the plaintiff, and through the efforts of the defendant and its agents, after the breach of the contract, have paid the annual premium to the defendant on said policies for the first year, and will continue to pay the premiums on said policies for each and every year thereafter for the period of at least 10 years from the date of such policies, and that by reason of paying the premium for the first year, or "renewing the insurance," as it is commonly called, the plaintiff would have been entitled to and have earned by virtue of his contract the sum of \$2.50 as renewals on each \$1,000 of insurance, according to the face value of the policies, for all policies renewed or continued by the insured each year after the first year, and that by reason thereof he is entitled to renewals on all of the policies already written and issued by the

defendant to persons in Texas since March 23, 1896, to the date of the filing of his petition, for and during the period of 10 years after the respective dates of the first anniversary thereof, in accordance with the contract, aggregating the sum of \$20,000, by reason of the breach of the contract.

The plaintiff prays damages in the sum of \$5,000 on account of his expenditures and the value of his services as set out in his petition, and for the sum of \$24,000, loss of profits, based upon insurance actually written by the defendant since its breach of its contract, which the plaintiff could have written but for that breach, and by reason of the loss of renewals upon all the insurance so written, as well as that written by the plaintiff prior to the breach. This petition was filed on September 9, 1898.

On November 22, 1898, the defendant submitted a general demurrer and 16 special exceptions. On November 25th the parties filed a written stipulation "that the jury is waived." The judgment recites that "this cause was regularly called for trial on November 25th, and, the jury having been waived, the matters of fact as well as of law were submitted to the court, who, after hearing the pleadings, evidence, and argument of counsel, took the cause under advisement." Except so far as it may be shown by the formal recitation in the judgment, it does not appear that any evidence was offered by either party, and there is no minute entry, other than the final judgment, of any action by the trial court on the demurrer and exceptions submitted by the defendant. In the final judgment it is further recited that "the court, having duly considered this cause, is of opinion that special exceptions Nos. 2, 5, 7, and 8 of the defendant to the plaintiff's petition are well taken; \* \* \* and, it appearing to the court that the exceptions sustained in this cause reach the foundation of the plaintiff's claim," the cause was dismissed, and judgment rendered against the plaintiff and the sureties on his cost bond for all costs incurred in the cause. It appears from the one brief bill of exceptions in the record that the court sustained the seventh of the defendant's special exceptions before acting on the others. It shows that, in sustaining this exception, the court ordered the plaintiff (orally, of course, as no minute entry thereof appears) to make an election as to whether he would ask for damages for the loss of profits alleged to have been sustained by him by reason of the alleged breach of the contract, and only such profits, or whether he would relinquish his prayer for such profits, and ask merely for the alleged damages occasioned by the alleged breach, based upon the amount alleged to have been paid by him, with defendant's knowledge, for the contract, together with the necessary expenses alleged by him to have been incurred in preparing to carry out the contract, and the reasonable value of his services in so doing (the court holding the petition to be defective, in that it prayed for both classes of damages), and required that the plaintiff eliminate absolutely from his pleadings either his prayer for damages based upon the profits lost, or his prayer for damages based upon the expenditures incurred and the value of his services, to which action of the court the plaintiff excepted. The bill of exception further shows that thereupon the plaintiff asked leave to amend his petition so that the prayer thereof should read as follows: "Plaintiff prays for judgment for damages by loss of profits resulting from said breach in the sum of, to wit, \$24,000, based upon said insurance actually written by the defendant, as hereinbefore alleged, since said breach, and which plaintiff could have written but for said breach, and the renewals upon such insurance, as well as upon the renewals on the insurance written by plaintiff prior to said breach. But if, for any reason, the court should be of the opinion, after hearing the evidence, that plaintiff is not entitled to judgment for damages based upon the loss of said profits, then he prays that he have judgment for his damages in the sum of, to wit, \$5,000, based upon the sum paid by him for said contract, to wit, \$1,500; his expenses incurred in preparing to carry out said contract, to wit, \$1,000; and the reasonable value of his services in carrying out the same, as hereinbefore set forth."—which amendment the court refused to allow, and required that the plaintiff eliminate absolutely from his pleadings either his prayer for damages based upon profits lost, or his prayer for damages based upon said expenditures and the value of his services as aforesaid, to all of which action of the court the plaintiff excepted. And without waiving his exceptions, and in obedience to the order of the court, the plaintiff then, under protest, amended his petition by striking out so much thereof as prayed for damages based upon the expendi-

tures made by him in preparing to carry out, and in carrying out, his contract, and upon the reasonable value of his services, and the amount paid for the contract, except such part thereof as corresponded with the unexpired term of the contract (that is to say, amended the same so as to pray only for damages for loss of profits, and such part of the \$1,500 paid for the contract as corresponded with the unexpired term of the contract), which last amendment, though not actually written in the petition, was considered as having been written therein by both parties to the case, and agreed to by the court, and was so considered by the court. After the petition had been amended as just stated, the court sustained the defendant's special exceptions Nos. 2, 5, and 8 to the plaintiff's petition, to which action of the court in sustaining each of the exceptions the plaintiff duly excepted.

On the prayer for a writ of error the plaintiff assigned errors as follows: "(1) The court erred in sustaining defendant's seventh special exception to plaintiff's petition, which is as follows: 'Defendant specially excepts to the entire petition because the same proceeds upon two entirely inconsistent causes of action, to wit, the alleged breach of the contract for which damages are sought to be recovered, and the alleged value of services charged to have been rendered the defendant herein.' (2) The court further erred, when acting on said seventh special exception, in ordering the plaintiff to make an election as to whether he would pray for damages for loss of profits alleged to have been sustained by reason of the defendant's alleged breach of the contract, relinquishing his prayer for the other elements of damages asked for in the petition, or whether he would relinquish his prayer for such profits, and ask only for the damages alleged to have been occasioned by such breach, based upon the \$1,500 claimed by him to have been paid for the contract with defendant's knowledge, together with the necessary expenses alleged by him to have been incurred in preparing to carry out said contract, and the reasonable value of his own services in so doing, all of which is shown in plaintiff's bill of exceptions. (3) The court erred, after having sustained said seventh special exception, and having made the order complained of in the last preceding assignment, in refusing to allow plaintiff to amend the prayer of his petition wherein he prays for damages based upon loss of profits as well as upon his expenses and value of services, so as to pray for damages in the alternative, as follows: 'Plaintiff prays for judgment against defendant for damages by loss of profits resulting from said breach in the sum of, to wit, \$24,000, based upon said insurance actually written by the defendant, as hereinbefore alleged, since said breach, and which plaintiff could have written but for said breach, and the renewals upon such insurance, as well as upon the renewals on the insurance written by plaintiff prior to said breach. But if, for any reason, the court should be of the opinion after hearing the evidence that plaintiff is not entitled to judgment for damages based upon the loss of said profits, then he prays that he have judgment for his damages in the sum of, to wit, \$5,000, based upon the sum paid by him for said contract, to wit, \$1,500; his expenses incurred in preparing to carry out said contract, to wit, \$1,000; and the reasonable value of his services in carrying out the same, as hereinbefore set forth,'—all of which is shown in plaintiff's bill of exceptions. (4) The court erred in sustaining the defendant's second special exception to plaintiff's petition, the exception being as follows: 'Defendant specially excepts to said entire petition because it appears therefrom that the damages claimed are purely speculative, there being no possible way to arrive at such damages, save upon the supposition that certain work would have been in the future performed by him; that this work would have, in turn, secured certain applications; and that these applications would have been such, that the company would have, in the exercise of its discretion under the contract, accepted such applications.' (5) The court erred in sustaining defendant's fifth special exception to plaintiff's petition, the exception being as follows: 'Defendant specially excepts to said entire petition because, if the acts alleged therein as a breach on the part of this defendant did constitute a breach, then the plaintiff has entirely misconceived the measure of damages in such cases, and falls in law to show any right to recover any of the sums alleged in said petition as damages, or any portion of the same.' (6) The court erred in sustaining defendant's eighth special exception to plaintiff's petition, the exception being as follows: 'Defendant specially excepts to the entire petition because the remedy for the alleged acts on the part of the

defendant complained of as a breach is agreed upon in the contract, and plaintiff had no right to abandon the contract as contemplated therein for such cause, and because such acts as those complained of are not vital, and do not go to the foundation or essence of the contract, and compensation may be made therefor in damages."

Drew Pruitt and L. A. Smith, for plaintiff in error.

W. B. Gano, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge (after stating the facts as above). The rulings of the trial court, and the errors assigned thereon, present substantially two questions: (1) Can the plaintiff join in one action for damages for breach of the contract a claim for the loss of anticipated profits with the claim to recover his losses for actual outlay and expenditures? (2) Are the anticipated profits for the loss of which he claims damages in this case too remote to sustain an action? Conforming to the practice and pleadings in the state of Texas, the plaintiff's case is presented by a petition setting up fully all the facts on which he bases his claims for damage.

The first of the questions above stated seems to us to be answered by the reasoning and review of authorities in the opinion of the court in the case of *U. S. v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168. Adopting substantially the language of the very learned judge who delivered that opinion, without quoting with literal accuracy, we observe that he therein says:

When a party injured by the stoppage of a contract elects to go for damages for the breach thereof, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. "Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for losses and expenditures. If he chooses to go further, and claim for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed. It does not lie, however, in the mouth of the party who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged, at least to the amount of what he has been induced fairly and in good faith to lay out and expend, including his own services.

\* \* \* At least, it does not lie in the mouth of the party in fault to say this unless he can show that the expenses of the party injured have been extravagant and unnecessary for the purpose of carrying out the contract.

\* \* \* The claim for profits, if not sustained by proof, ought not to preclude a recovery for the claim for losses sustained by outlay and expenses. In a proceeding like the present, in which the claimant sets up by way of petition a plain statement of the facts, without technical formality, and prays relief either in a general manner, or in an alternative or cumulative form, the court ought not to hold the claimant to strict technical rules of pleading, but should give to his statement a liberal interpretation, and afford him such relief as he may show himself substantially entitled to, if within the fair scope of the claim as exhibited by the facts set forth in the petition."

In the case of *Dennis v. Maxfield*, 10 Allen, 138, which presented a question closely analogous to the one we are now discussing, it is said in the opinion by the chief justice:

"The breach of the contract by the defendants has created only one cause of action in favor of the plaintiff. His compensation for this breach necessarily embraces all that he is entitled to recover under the contract. Indeed, his right

to recover anything—as well that which was earned before as that which would have been earned if he had not been discharged—depends on the question whether he has performed his part of the contract. A party cannot sever a claim for damages arising under one contract so as to make two distinct and substantive causes of action.”

The second question presents more difficulty. We quote again from *U. S. v. Behan*, *supra*:

“The claimant was not bound to go for profits, even though he counted for them in his petition. He might stop upon a showing of losses. The two heads of damage are distinct, though closely related. When profits are sought, a recovery for outlay is included, and something more. That something more is the profits. If the outlay equals or exceeds the amount to be received, of course there can be no profits.”

It is clear that the plaintiff and the defendant, in entering into the contract which is made the basis of this action, each had in contemplation not only the outlay of expenses and personal service to be contributed by the plaintiff, but, and equally, the earning of profits from the per cent. on the premiums to be allowed the plaintiff as his sole compensation for his expenditures and service. As was said in the case of *Dennis v. Maxfield*, *supra*:

“These earnings or profits were therefore within the direct contemplation of the parties when the contract was entered into. They are undoubtedly in their nature contingent and speculative, and difficult of ascertainment; but, being made by express agreement of the parties of the essence of the contract, we do not see how they can be excluded in ascertaining the compensation to which the plaintiff is entitled. Would it be a good bar to a claim for damages for breach of articles of co-partnership that the profits of the contemplated business were uncertain, contingent, and difficult of proof, and could it be held for this reason that no recovery could be had in case of a breach of such a contract? Or, in an action on a policy of insurance on profits, would it be a valid defense, in the event of loss, to say that no damages could be claimed or proved, because the subject of insurance was merely speculative, and the data on which the profits must be calculated were necessarily inadequate and insufficient to constitute a safe basis on which to rest a claim for indemnity? The answer is that in such cases the parties, having by their contract adopted a contingent, uncertain, and speculative measure of damages, must abide by it, and courts and juries must approximate as nearly as possible to the truth in endeavoring to ascertain the amount which a party may be entitled to recover on such a contract in the event of a breach. If this is not the rule of law, we do not see that there is any alternative short of declaring that where parties negotiate for compensation or indemnity in the form of an agreement for profits, or a share of them, no recovery can be had on such a contract in a court of law,—a proposition which is manifestly absurd.”

In the case of *Bagley v. Smith*, 10 N. Y. 489, in which claim for damages for loss of profits by the wrongful dissolution of a partnership was sought, the judge who delivered the opinion of the court said:

“The object of commercial partnership is profit. This is the motive upon which men enter into the relation. The only legitimate beneficial consequence of continuing a partnership is the making of profits. The most direct and legitimate injurious consequence which can follow upon an unauthorized dissolution of a partnership is the loss of profits. Unless that loss can be made up to the injured party, it is idle to say that any obligation is imposed by a contract to continue a partnership for a fixed period. The loss of profits is one of the common grounds, and the amount of profits lost one of the common measures of the damages to be given upon a breach of contract.”

In *Insurance Co. v. Nexsen*, 84 Ind. 347, it was held that, in a suit by an agent against an insurance company for damages resulting from his wrongful discharge during the existence of the contract, his recovery is not restricted merely to commissions on premiums collected prior to his dismissal, but may include the probable value of the renewals on policies obtained by him, upon which future premiums would, in the ordinary course of business, be received by the insurance company.

In *Hitchcock v. Knights of Maccabees* (Mich.) 58 N. W. 640, on a trial of an action against a mutual benefit society for breach of contract, the plaintiff showed that he was employed by the defendant to establish lodges in an exclusive territory, at his own expense, and what his proportion of the membership fees and per capita dues would have been, had he established the lodges established by defendant in his territory during the unexpired term for which he was employed, and the cost of like work he had already done. Held, that the question of his damages should have been submitted to the jury. In the opinion the court say:

"In case of a breach by plaintiff, defendant could perform the work, and recover as damages the difference between the price agreed upon and the cost of completion. In case of a breach by defendant, the profits lost constitute the legitimate measure of damages. The law is not so blind to justice as not to require the defendant to respond in damages, if there is any reasonable basis for their ascertainment. There is no presumption, legal or otherwise, that the plaintiff could not have completed the work. The defendant was satisfied with the success of the plaintiff. It is a fair presumption that he would have succeeded. It is a fair inference from the evidence that the defendant's officers broke the contract because of the success, and the belief that they could secure the accomplishment of the work cheaper, which they in fact did. The defendant took charge of the work which the plaintiff had done, and completed it. The defendant may not now say, 'It is true, I completed the work, but there is no certainty you could.' \* \* \* It has been demonstrated not only that the work could be, but that it has been, done. It is a fair inference that it could have been done as well by the plaintiff as by the defendant. One element of damage is established by the contract, and the evidence from the defendant's own books, namely, the amount agreed to be paid, and the benefits reaped by it. The only other element is the cost of doing the work, which, deducted from the amount to be paid, would establish the profits. The expense of what plaintiff did is some evidence upon which to base a judgment of the expense of doing the rest of the work. If that be the only evidence as to the cost, and plaintiff can establish by experience that it is more difficult and expensive to accomplish the first part of the work than the last part, defendant cannot complain if the jury take that as a basis to determine the cost. On the contrary, such a basis would be favorable to the defendant; and, if this were the only basis, we think, under the circumstances of this case, it was sufficient to justify a submission of the case to the jury. He who breaks his contract may not deny to the injured party the fair inferences to be drawn from the part performed."

In *Lewis v. Insurance Co.*, 61 Mo. 534, the action was to recover damages for breach of a contract by the provisions of which the plaintiff agreed to work exclusively for the insurance company for the term of five years, and also bound himself to work the territory with a full corps of energetic and reliable agents. He had all the authority of a general agent in soliciting insurance and collecting premiums. As a compensation for his services and expenditures, he was to have a certain per cent. on premiums, as specified in the con-

tract. The plaintiff was only permitted to conduct his agency about half the time agreed on by the stipulation; the defendant having voluntarily sold and transferred the whole of its business to another company, thereby discontinuing its business and depriving itself of the power to keep and perform its part of the contract. The court held that the inability of the defendant to continue its business was no excuse for its breach of the contract with the plaintiff, who could recover such damage as was done him by the breach. In the trial court he had been allowed to show how much he had realized during the existence of the contract, and the estimate in that verdict seems to have been placed upon the past actual earnings, together with the testimony of actuaries as to what probably would be the value of the renewals on policies already obtained. With reference to the admissibility and value of this testimony the court, in its opinion, says:

"A custom or usage has sprung up and exists with insurance companies by which adjustments are made as to the value and renewals of policies for any given length of time. By the use of statistical tables and comparisons, a remarkable degree of accuracy obtains; and, where a connection ceases between an agent and the company, it is the only mode of ascertaining or adjusting the agent's interest. The calculation by the actuary has been reduced to scientific principles, and it must be resorted to, else there would be a failure of justice, on one hand, or, on the other, the damages would be purely speculative."

Touching a further feature in the case, we find this language in the opinion:

"The plaintiff was permitted to show the amount of his collections from time to time from July 1, 1869, to March 1, 1872, and the amount of his commissions during that time, both in the aggregate and per month, on the average. These commissions were all paid, and it is evident from the amount of the verdict that the jury must have considered the commission on premiums for the above-named period as a fair criterion of what plaintiff would have earned in the future had the contract not been broken. Without some other evidence of the probable amount of the business, these damages would be too much of a speculative character. The new business might depend on various circumstances, and be affected by numerous contingencies; and these should be shown, as entering into the computation of damages."

In *Mueller v. Spring Co.* (Mich.) 50 N. W. 319, it was held that where the plaintiff had been constituted the defendant's sole agent for the sale of its mineral water for the period of one year, within a defined territory, and before the year expired the agency was transferred to another, the plaintiff's measure of damages was the profits he might have realized if defendant had not breached its contract, and that, in arriving at the amount of plaintiff's damage, proof of the actual sales of water by the new agent during the plaintiff's unexpired term would not be speculative. In this connection it is said in the opinion:

"While it may be true that Mueller could not have disposed of as much of the article as this firm did, yet the amount of their sales, while not conclusive upon defendant, was competent evidence to go to the jury upon the question of plaintiff's damages. It would have been proper to draw out upon cross-examination what special effort had been made by this firm to introduce and push this commodity, but the sales for the season named may have been greater than for the previous season, because of a demand created by what Mueller did, rather than by any special effort by this firm. Here was a commodity of which defendant was the sole proprietor, and for which Mueller was made sole agent. All of this commodity reaching the territory named

came from the defendant directly to Mueller, and through his agency. The agency of the firm of Bassett & L'Hommedieu succeeded that of Mueller. They took it up where he left off, and continued it for the five months for which he was to enjoy those fruits. Proof as to the amount actually sold by them for that five months cannot be said to be speculative."

The case of *Wakeman v. Manufacturing Co.*, 101 N. Y. 205, 4 N. E. 264, bears so close an analogy to the case at bar, and the authority of that court is so high, as to justify our quoting from the opinion at considerable length:

"This action was brought to recover damages for the breach of an agreement made in the city of New York in February, 1878, which is set forth in the complaint as follows: 'That if the plaintiffs shall succeed in placing (that is to say, selling) fifty of the defendant's sewing machines to one firm or party in the republic of Mexico during the next trip of their agent to that country, then about to be made, they (the plaintiffs), for every fifty machines so sold, shall have the sole agency for the sale of the defendant's sewing machines in that locality and its vicinity in that republic; and the defendant should furnish to the plaintiffs machines at the lowest net gold prices.' The defendant denied the agreement, but the jury found it substantially as alleged, and it is conceded that we must assume here that such an agreement was made. The plaintiffs at once entered upon the performance of the agreement, purchased a sample machine of the defendant, caused their agent to be instructed in its mechanism and management, and then sent him to Mexico. After reaching there he sold fifty machines to one Mead, of San Luis Potosi, on his promise to Mead that he should be the general agent of the defendant for that locality and its vicinity. The order for the fifty machines was sent to the defendant and filled by it, and those machines were forwarded to Mexico and paid for. Shortly thereafter plaintiffs' agent made another sale of fifty machines for another locality in Mexico, and an order for those machines was sent to the defendant, which it absolutely refused to fill. Plaintiffs' agent procured another order for one machine, and sent that to the defendant, which it also refused to fill; and then it refused to fill any further orders from the plaintiffs or their agents, and absolutely refused to perform and repudiated its agreement. Upon the trial of the action the plaintiffs made various offers of evidence to show the value of their contract with the defendant, the most of which were excluded. In his charge to the jury the judge held, as matter of law, that the plaintiffs could recover damages only for the refusal of the defendant to fill the orders actually given; and, the plaintiffs' profits having been shown to be \$4 on a machine, their recovery was thus limited to \$204. They excepted to the rule of damages thus laid down, and the sole question for our determination is what, upon the facts of this case, was the proper rule of damages? Were the plaintiffs confined to the damages suffered by them in consequence of the refusal of the defendant to fill the two orders for fifty-one machines, or were they entitled also to recover the damages which they sustained by a total breach of the agreement on the part of the defendant? The judge limited the damages, as stated in his charge, because any further allowance of damages for the breach of the agreement would, as he claimed, be merely speculative and imaginary. It is frequently difficult to apply the rules of damages, and to determine how far and when opinion evidence may be received to prove the amount of damages, and the difficulty is encountered in a marked degree in this case. One who violates his contract with another is liable for all the direct and proximate damages which result from the violation. The damages must be not merely speculative, possible, and imaginary, but they must be reasonably certain, and such only as actually follow or may follow from the breach of the contract. They may be so remote as not to be directly traceable to the breach, or they may be the result of other intervening causes, and then they cannot be allowed. They are nearly always involved in some uncertainty and contingency. Usually they are to be worked out in the future, and they can be determined only approximately upon reasonable conjectures and probable estimates. They may be so uncertain, contingent, and imaginary as to be incapable of adequate proof; and then they cannot be recovered,



because they cannot be proved. But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of such uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability because the amount of the damages which he has caused is uncertain. It is not true that loss of profits cannot be allowed as damages for a breach of contract. Losses sustained and gains prevented are proper elements of damage. Most contracts are entered into with the view to future profits, and such profits are in the contemplation of the parties, and, so far as they can be properly proved, they may form the measure of damage. As they are prospective, they must, to some extent, be uncertain and problematical, and yet on that account a person complaining of breach of contract is not to be deprived of all remedy. It is usually his right to prove the nature of his contract, the circumstances surrounding and following its breach, and the consequences naturally and plainly traceable to it; and then it is for the jury, under proper instructions as to the rules of damages, to determine the compensation to be awarded for the breach. When a contract is repudiated, the compensation of the party complaining of its repudiation should be the value of the contract. He has been deprived of his contract, and he should have in lieu thereof its value, to be ascertained by the application of rules of law which have been laid down for the guidance of courts and jurors. [The judge then reviews and cites a number of reported cases, and thereafter proceeds with his opinion.] It is quite clear that the rules of damages having the sanction of these authorities were violated upon the trial of this action. The plaintiffs had the right, under their agreement, to establish agencies for the sale of defendant's machines anywhere in Mexico where they could sell fifty machines. An agency, when thus established, was to be exclusive, and was to have some permanency. It could not be broken up at the will of the defendant, without some default on the part of the plaintiffs. That the agreement had some value to the plaintiffs is very clear, and of that value, whatever it was, they were deprived by the act of the defendant. It is quite true that that value, or, in other words, the damages caused to the plaintiffs by the total breach of the agreement by the defendant, is quite uncertain and difficult to be estimated. But the difficulty is not greater than it was in several of the cases above cited. There are some facts upon which a jury could base a judgment, not certain nor strictly accurate, but sufficiently so for the administration of justice in such a case. The agent whom plaintiffs sent to Mexico was apparently intelligent, capable, and well acquainted with Mexico. Machines could be delivered there for about \$30 per machine, and could then be sold at retail for about \$125. The profit of the plaintiffs on each machine was about \$4. Plaintiffs' agents readily made sales of one hundred and one machines, and were about to make other sales. One of defendant's agents subsequently sold in a single city twenty machines in six months, at \$125 each. The plaintiffs had established two agencies, and to the value of such agencies, at least, they were entitled. Mead, who had one of the agencies, testified that he had made arrangements with several parties to sell the machines; that he had all the facilities for carrying on an extensive and profitable business, and was well acquainted with the country. The population of several of the Mexican cities in which plaintiffs' agent was engaged in establishing agencies was shown. From all these and other facts proved, it cannot be doubted that the plaintiffs suffered damages to at least several hundred dollars, and they should not have been deprived of the damages which they made to appear because they could not make clear the full amount of their damages. All the facts should have been submitted to the jury, with proper instructions; and their verdict, not based upon mere speculation and possibilities, but upon the facts and circumstances proved, would have approached as near the proper measure of justice as the nature of the case and the infirmity which attaches to the administration of the law will admit."

From the nature of the case, the language of the contract, and all the dealings of the parties, it is clear that the provision naming 10 years from the date of the original contract, and afterwards extend-

ing it to 10 years from the 23d of March, 1896, is of the essence of the contract. It is equally apparent, from the same premises, that the provision which stipulated that the defendant company should not appoint other agents within the manager's territory, unless he neglected or refused to thoroughly develop and work the same, is likewise of the essence of the contract between these parties. It follows, therefore, that if the proof supports the plaintiff's allegation as to his faithful performance of his covenants in the contract up to December ———, 1896, the action of the defendant at that date in employing other agents and agencies to work the territory assigned to the plaintiff was a breach of the contract on the part of the defendant which rendered the defendant liable for such damages as directly resulted therefrom. Assuming that the alleged breach of the contract is supported by the proof, the plaintiff having elected to go for damages for the breach of the contract, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services; and it does not lie in the mouth of the defendant to say that he has not been damaged at least to that amount, unless it can show that the expenses which the plaintiff incurred were extravagant and unnecessary for the purpose of carrying out the contract. On reason and authority, we are of opinion that the plaintiff may, as he does, seek to recover for loss of profits. The law no more than equity will endure the thought that it was in the contemplation of the defendant that the plaintiff should work for naught; and, as the contract expressly provides that he shall get no compensation other than the specified rate of per cent. on the first and subsequent premiums on the policies of insurance issued, it was necessarily in the contemplation of the parties that a breach of the contract upon the part of the defendant would inflict upon the plaintiff this loss of profits. As the recitals in the judgment plainly show, the case went off in the circuit court substantially on the demurrer to the petition. The record of the judgment indicates that probably no testimony was offered by either party, and, if testimony was in fact heard, it is certain that the judge did not reach a consideration of it, because the case, as it was made in the pleadings, did not, according to his view thereof, present a cause of action. It is likely that his oral announcement in passing on exception 7 so clearly indicated to the parties that the issues made by the exceptions would, in the court's judgment, conclude the plaintiff's right to recover, that it induced the parties to make and file the stipulation waiving a jury on that trial. It appearing so distinctly that the judge did not reach such a consideration of the case as required or permitted him to pass on the issues of fact made by the pleadings, we have to assume, as his action does assume, that all the allegations of the plaintiff with reference to his performance of the contract and the defendant's breach thereof are true. This being so, the plaintiff is entitled to recover the value of his contract at the time of the breach. The parties, having contracted in contemplation of the plaintiff making profits to compensate him for his outlay and personal service, have themselves stipulated the standard for fixing such profits on the work contracted to be done; thus

leaving as the only uncertain element in the investigation the amount of work actually done, or which the plaintiff with reasonable probability might and would have done but for the breach of the contract by the defendant.

This inquiry in this case has two branches: First, to find the amount of profit which the plaintiff, under the stipulations of the contract, is entitled to receive on all premiums subsequent to the premium for the first year on the policies actually written through the agency of the plaintiff and his employes prior to the date of the breach of the contract by the defendant. It is evident that all the schemes of insurance referred to in the contract to be offered to the public contemplated the keeping of the policies alive by payments made from time to time subsequent to the first year's premium. Between the parties to the contract, the presumption is that the policies would be kept alive, and these subsequent payments—"renewal premiums," as they are called—would be received by the defendant company. The conduct of that company in breaching the contract entitles the plaintiff to this presumption, and puts upon the defendant the burden of showing the contrary, if it exists, and the extent to which it does exist. So all uncertainty is eliminated from this branch of the plaintiff's claim for loss of profits. As to the other branch, assuming, as we must for the present do, that the defendant breached the contract as alleged in the petition, entered the territory allotted to the plaintiff, and has through other agents and agencies since the date of the breach written a large amount of other insurance, such as the contract between the parties contemplated would be obtained by and through the action of the plaintiff and his sub-agents, the amount of such insurance so taken and carried by the defendant up to the time of the trial may be exactly shown by the testimony of the managing agents of the defendant, or by its books, or by both, which at this day the plaintiff has a right to call for and demand as well in an action at law as formerly in a suit in equity. There can be, therefore, no substantial difficulty in arriving at this amount, at least with substantial accuracy; and, the amount having been found, the terms of the contract between the parties fix the standard for measuring the interest which the plaintiff would have had therein, had he been permitted to do the work as his contract contemplated. Whether he could, and with reasonable probability would, have done all or a definite portion of this work, had the defendant not breached the contract, is a proper subject for the finding of a jury on the proof that may be offered as to the means which the plaintiff had organized and was using for the efficient prosecution of this work, compared with the means and effort which the defendant has used in its accomplishment of the work so done by it in the territory allotted to the plaintiff. He is not necessarily or even probably entitled to receive the full specified rate of per cent. on the first year's and subsequent premiums paid and to be paid on policies so issued by the defendant through its other agents and agencies; for some deduction must necessarily be made on account of the fact that he could incur no current expenses, nor render any personal service, in the procurement of this insurance thus obtained by the defendant through

its other agents and agencies. The condition of the business in Texas at the time of the breach; the means that had been used and were being used by the plaintiff to work the territory allotted to him; the machinery which he had organized for the purpose of that work; the reasonable cost of its continued operation; the extent of the territory allotted to him; the number of persons therein who were fit subjects for such insurance as the defendant proposed to write; the reasonable relative proportion of cost for the first year of organizing the business and putting it in operation, to the cost of continuing its conduct during the subsequent years; the machinery actually used by the defendant after it entered the territory allotted to the plaintiff, and its success, through the use of this machinery and the agencies it established, in obtaining applicants for insurance and holders for its policies,—should all be given to the jury, under the proper instructions of the court, that the panel of 12 reasonable men, in the effort to do justice between the parties, may find, from a full consideration of the relations of the parties, and their respective relations to the work, as shown by the proof, the reasonable amount of damage that the plaintiff has suffered by the defendant's breach of the contract. This indication of the elements of proof to be admitted in the case is not, and is not intended to be, exhaustive. Other kindred matter may and doubtless will be offered. The subject is not one for what is technically called "expert testimony." Witnesses should not be permitted to give what may properly be called "opinion evidence" as to the value of the contract at the date of its breach. Where, however, witnesses have had actual experience in the transaction of such business, their testimony as to the particulars and result of that experience is not necessarily "opinion evidence," within the meaning of the term as here used, but may be direct evidence to a substantial fact bearing directly upon the issues here involved,—as, for instance, the showing of the reasonable expectancy of continuing in force a definite proportion of the amount of insurance issued on the various schemes or classes of insurance contemplated in the contract between these parties to have been issued by the defendant. The aggregate amount of damage, if any, found by the jury on both branches of this inquiry, must exceed the amount of the plaintiff's outlay of capital and personal service, as hereinbefore indicated, in order to show any recoverable profits lost to the plaintiff; for if that outlay was made in good faith, and is not shown by the defendant to have been extravagant and unnecessary for the purpose of carrying out the contract, it must be recoverable in any event. Assuming, as we have said we must for the purpose of this hearing, that the proof will support the allegations of the petition in reference to the breach of the contract by the defendant, unless the loss of profits as found by the jury shall exceed this amount for outlay and personal service, the plaintiff can make no further recovery on the basis of loss of profits. If, however, the jury find that by the breach of the contract the plaintiff has suffered loss of profits to an amount in excess of the amount that the proof shows he is entitled to recover for outlay of personal service and expenses, he may, in addition thereto, recover such excess of damages so incurred and found by the jury on account of his loss of

profits. Of course, if the proof does not support the plaintiff's allegations as to his performance of the covenants binding him in the contract, then no breach thereof by the defendant has been shown, and the plaintiff can have no recovery in this action.

We are of opinion that the views we have here expressed are supported by the cases of high authority which we have partially reviewed in the foregoing opinion, and the many citations of other precedents to which the cases we have reviewed refer, many of which we have carefully examined. Our decision is, therefore, that the judgment of the circuit court is reversed, and the cause remanded to that court, with directions to it to award the plaintiff a new trial, and thereafter to proceed according to law, and in conformity to the views expressed in this opinion.

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UNITED STATES v. FREEL.

(Circuit Court of Appeals, Second Circuit. January 5, 1900.)

No. 78.

**PRINCIPAL AND SURETY—RELEASE OF SURETY—ALTERATION OF CONTRACT.**

Where a contract for the construction of a dry dock for the United States, "to be located at such place on the water line of the navy yard, Brooklyn, N. Y., as shall be designated by the party of the second part," had attached thereto and made a part thereof the plans and specifications for the dock, reserving the right to the United States to make changes in such plans and specifications, the difference in the contract price on account of any such changes to be determined as therein provided, and contained a further provision that "no change herein provided for shall in any manner affect the validity of this contract," a supplemental contract, changing the location of the entire dry dock from the water line, as fixed by the initial contract, to a point 64 feet inland, and requiring the contractor to make all necessary excavations and connections with the water at an increased payment of \$5,000, and with an increased time for performance, was not within the terms of such provision, but was a change in substance of the contract, not contemplated thereby, which released the sureties on the contractor's bond, who did not assent thereto, from liability.

In Error to the Circuit Court of the United States for the Eastern District of New York.

George H. Pettitt, for plaintiff in error.

Howard A. Taylor and James R. Soley, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the plaintiff in the court below to review a judgment for the defendant, Freel, as executor of Edward J. Freel, entered upon a demurrer to the complaint. (C. C.) 92 Fed. 299. The action was brought to recover upon a bond executed to the plaintiff by Edward J. Freel as surety for one Gillies, whereby Freel, as such surety, undertook that Gillies would well and truly perform the stipulations of a contract of even date therewith. It was averred in the complaint that Gillies entered upon the performance of the contract, but thereafter failed and neglected to fulfill it, to the damage of the plaintiff.

The contract referred to in the bond, and bearing the same date, was executed by Gillies as party of the first part and the United States as party of the second part, and was one by which Gillies undertook to construct a dry dock for the United States at the price of \$412,000. The contract contained, among others, the following clauses:

"First. The contractor will, within twenty days after he has been tendered the possession and the occupancy of the site by the party of the second part, commence, and within twenty-seven calendar months from such date construct and complete, ready to receive vessels, a timber dry dock, to be located at such place on the water line of the navy yard, Brooklyn, N. Y., as shall be designated by the party of the second part."

"Seventh. The construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereto annexed, and shall be deemed and taken as forming a part of this contract, with the like operation and effect as if the same were incorporated herein. No omission of the plans or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect in accordance with the true intent and meaning hereof shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the contractor, and all claims for extra compensation by reason of or for or on account of such extra performance are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said plans and specifications shall not be changed in any respect except upon the written order of the bureau of yards and docks; and that if at any time it shall be found advantageous or necessary to make any change, alteration, or modification in the aforesaid plans and specifications, such change, alteration, or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof which the contractor shall receive, if any: provided, that whenever the said changes or alterations would increase or decrease the cost by a sum exceeding five hundred dollars (\$500) the actual cost thereof shall be ascertained, estimated, and determined by a board of naval officers to be appointed by the secretary of the navy for the purpose, and the contractor shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation he shall be entitled to receive in consequence of such change or changes: provided, further, that if any enlargement or increase of dimensions shall be ordered by the secretary of the navy during the construction of said dry dock, that the actual cost thereof shall be ascertained, estimated, and determined by a board of naval officers, to be appointed by the secretary of the navy, who shall revise said estimate, and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract: and provided, also, that no further payment shall be made unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred, and until after its approval by the party of the second part: and further provided, that no change herein provided for shall in any manner affect the validity of this contract."

June 16, 1893, a supplemental contract was entered into between Gillies and the United States to lengthen the dry dock from 600 feet, as called for in the specification, to 670 feet. It provided for additional compensation to the contractor of \$45,556.

August 17, 1893, a second supplemental contract was entered into between Gillies and the United States. By this contract "the location of the dry dock now being constructed at the United States navy yard at Brooklyn, N. Y., under contract with the said John Gillies,

party of the first part," was changed, and Gillies stipulated to change its location to one 64 feet further inland "than that laid down and staked out when the said contract was entered into," and to perform all the additional excavation necessary, and supply all the labor and materials incident thereto. By this contract he was to be paid the sum of \$5,063.83 as full compensation for the additional work and materials. Freel was not a party to either of the supplementary contracts.

The demurrer of the defendant was sustained in the court below upon the ground that Freel was discharged from his obligation as surety for the performance of the contract by the change introduced by the supplementary contract of August 17, 1893, whereby a new location for the dry dock was substituted for the contract location. The very careful and exhaustive opinion of the learned judge who decided the case in the court below renders unnecessary any extended discussion of the questions presented by this appeal.

By the first contract the site of the dry dock was to be on the water line, at some point to be thereafter designated. Its location was to that extent definitely fixed. It was the purpose and purport of the last agreement to change the original location, which was to be "at such a place on the water line" as might be designated by the United States, to a place not on the water line, but "sixty-four feet further inland." This change necessarily entailed an increased expense upon the contractor, as was recognized by the extra compensation allowed him in the agreement. That it altered the requirements of the first contract in matters of substance is self-evident.

The proposition is elementary that the obligation of a surety does not extend beyond the terms of his undertaking, and, when this undertaking is one to assure the performance of an existing contract, if any change is made in the requirements of such contract in matters of substance, without his assent, his liability is extinguished. This proposition is not controverted in the argument for the plaintiff in error, but the contention is that the change which was made in the requirements of the principal contract was within the contemplation of that contract, and therefore was sanctioned by the undertaking of the surety. If the provisions of the principal contract authorized such a change, undeniably the surety assented to it in advance. The case is reduced to the single question whether the principal contract did authorize the change. This inquiry depends upon the effect of the seventh clause. The most that can be claimed for that clause is that it permits the party of the second part to make any change, alteration, or modification "in the agreement, plans, and specifications," which are referred to as "annexed," and made a part of the contract, and provides that no such change shall in any manner affect the validity of the contract. Whether the clause warrants such a latitudinarian construction as to embrace the extensive departure from the plans and specifications provided for by the first supplemental contract, we do not determine. We are clear that it does not warrant the change made by the last supplemental contract, and, that being so, whether the first change was

authorized is a question which does not require decision. The plans and specifications mentioned in clause 7 are not set forth in the complaint, and we cannot doubt they would have been if they purported in the remotest degree to deal with the location of the site. The context shows, however, that the plans and specifications mentioned in the clause are those which relate to the construction of the building, its accessories and appurtenances.

The supplemental contract does not purport to make any change in the plans and specifications annexed to the original contract. It recites that the location had been "laid down and staked out" when that contract was entered into, and, if the location had been shown or referred to in the plans or specifications, that recital would have been unnecessary, and one referring to the plans would naturally have been inserted instead.

Undoubtedly it would have been within the contemplation of the original contract to change the location of the dry dock from the place originally laid down and staked out to any other place upon the water line of the navy yard which might have been thereafter designated by the United States. The terms of the contract would have warranted such a change, because they provide for the construction of a dry dock at such place on the water line of the navy yard "as shall be designated" by the United States. Such a change would not have required the "additional excavation necessary at the entrance" mentioned in the supplemental contract, and the very considerable incidental extra expense.

We agree with the court below that the alteration extinguished the liability of the surety. The demurrer was correctly decided, and the judgment is affirmed.

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NEIDLINGER et al. v. YOOST.

(Circuit Court of Appeals, Second Circuit. January 5, 1900.)

No. 68.

1. APPEAL—REVIEW—RULING ON MOTION FOR NEW TRIAL.

An order denying a motion for new trial is not reviewable by writ of error in the federal courts.

2. MASTER AND SERVANT—ACTION FOR INJURY TO SERVANT—EVIDENCE.

In an action by a servant against the master to recover for a personal injury caused by his clothing being caught in machinery while in the performance of a duty directed by the master, it is not error to permit an engineer, who was familiar with the machinery, and who reached plaintiff immediately after the injury, to testify as to the probable manner in which the accident occurred.

In Error to the Circuit Court of the United States for the Southern District of New York.

This is a writ of error to review a judgment of the circuit court, Southern district of New York, entered upon the verdict of a jury awarding to defendant in error, who was plaintiff below, the sum of \$5,000 damages for personal injuries. The facts sufficiently appear in the opinion.



Eugene L. Richards, for plaintiffs in error.  
William P. Maloney, for defendant in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The defendants, who are plaintiffs in error, owned and operated a malt house, and the plaintiff was in their employ; his usual duties being the stirring, straining, and turning of malt. He was at work in the cellar, in the larger or east room, which contained vats, and two sets of apparatus known as "conveyors." This conveyor was a wooden box about 18 inches square, extending the length of the room, 6 feet 6½ inches from the floor, having suspended within it a shaft wound with a spiral groove, which by its revolutions transferred the grain from one end of the room to the other. On the top of the box, at intervals of from 8 to 12 feet, were holes for oiling the shaft of the conveyor where it revolved through hangers from the top of the box. All these holes for oiling were in the large, east room, where plaintiff was regularly employed. The conveyor, with its boxing, ran through a partition wall into the adjoining or machinery room. The box projected a little way into this room, and the shaft continued on for about 8 feet from the wall, until it engaged, by a gear wheel, with gear wheels on the main shaft, which was driven by the engine. There were no holes for oiling in so much of the conveyor box as projected into this room, but the place of engagement of the gear wheels on the conveyor shaft with those on the main shaft required frequent oiling. On the day of the accident the plaintiff was engaged in his usual occupation in the large, east room, when the superintendent directed him "to oil the conveyor." He thereupon got an oil can, a lamp from the engine room, and a stepladder; and, commencing at the end of the conveyor furthest from the west room, containing the machinery, he placed the ladder under, and poured the oil into the oiling places on the top of, the conveyor box. Having poured oil into all these places, he proceeded to the machinery room, and was about to oil at the end of the conveyor shaft where it engaged with the main shaft, when in some way his clothing was caught by the moving machinery, and he was seriously injured. There was evidence that it was rather dark in that part of the cellar. The theory of the action was that plaintiff was instructed to perform a service outside of the line of his duty, which exposed him to a danger from the machinery to which his ordinary avocations would not expose him, and that he was directed to do this without proper warning and instructions. His testimony and that of his principal witness, the engineer, tended to support this theory. The fact that no instructions or warnings were given to him is not disputed; the contention of the superintendent being that he did not expect he would go to the west room, and that he had told him before not to oil the wheels. No warnings or instructions were needed for oiling in the east room. There it was a perfectly safe operation.

The first point argued upon this review is that the verdict should have been set aside, and new trial ordered, on the ground that the

verdict was against the weight of evidence. This need not be discussed. Orders denying motions for new trial are not reviewable by writ of error in the federal courts.

The second point assigns error in the trial judge in denying a motion to direct a verdict for the defendant at the close of the case. The substance of this is the contention that the direction given to plaintiff, viz. "Oil the conveyor," could not fairly be construed by him as a direction to oil elsewhere than in the east room. What that direction implied was a question of fact, to be determined upon a consideration of all the evidence, there being a sharp conflict between some of the witnesses. The jury were fully and properly charged on that branch of the case, and their finding must be taken as conclusive. It would have been error in the trial judge to have withdrawn that question from the jury, in view of the circumstance that the engineer, presumably the man best informed as to nomenclature of the mechanical apparatus, refers to the conveyor as extending to the place where it came into connection with the wheel on the shaft.

The proposition next advanced, that plaintiff cannot recover because he cannot point out the precise screw or cog or moving part which caught him, is wholly without merit.

The question of contributory negligence was fairly for the jury, especially in view of the testimony of the engineer as to the difficulty which would be encountered by an inexperienced man undertaking to oil this particular part of the apparatus. The engineer testified that he protested to the superintendent against the proposed assignment of plaintiff to do the oiling, on the ground of his inexperience.

We see no error in allowing the engineer, who was familiar with the minute details of the machinery, and who came almost instantly after the catastrophe, to testify, from his knowledge of the machinery and the situation in which he found the plaintiff, "what there was on the shaft that could have caught him." The judgment of the circuit court is affirmed.

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#### HUNT v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. January 5, 1900.)

##### No. 4.

##### 1. INSURANCE—WARRANTY.

Provisions, in a contract of insurance against loss through embezzlement by assured's agent, that assured will make monthly comparison and verification of cash in agent's hands with his accounts and vouchers, is a warranty.

##### 2. SAME—QUALIFICATION.

Declaration that the answers in an application for insurance against embezzlement by agent are true, "to the best of the knowledge and belief" of assured, does not qualify the effect of the answer that assured will make monthly comparison and verification of cash in agent's hands with his accounts and vouchers.

##### 3. SAME—FULFILLMENT OF WARRANTY.

Promise of assured to make monthly comparison of money in its agent's hands with his accounts and vouchers is not fulfilled by a monthly comparison of the checks sent it by him by the accounts and vouchers sent by him two months before.

**4. CUSTOM—QUALIFYING CONTRACT.**

Where a written contract of insurance against loss by embezzlement of assured's agent contained a plain provision for monthly comparison of money in agent's hands with his accounts and vouchers, it cannot be shown that it is not the custom of companies engaged in the same business as assured to go to an agent's office and examine his accounts, bank book, and cash, but that it was customary to examine his statements and vouchers, and compare them with his remittances.

In Error to the Circuit Court of the United States for the Southern District of New York.

Jonathan C. Ross, for plaintiff in error.

Chas. C. Nadal, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. Upon the trial of this action the court directed a verdict for the defendant. The assignments of error challenge the correctness of this ruling.

The action was brought upon a policy of insurance issued by the defendant to the People's Fire Insurance Company of Manchester, N. H., to indemnify the latter against any loss that might occur through the embezzlement of one Kingman, its general agent in the city of New York. The policy was issued upon a declaration, signed by the assured, containing statements in the form of answers to questions relative to the subject-matter of the policy. The statements were, by the terms of the policy, to "constitute an essential part and form a basis of the contract." The declaration also stated that the answers were true, to the best of the knowledge and belief of the assured, and were to be taken as the basis of the contract between the insurer and the assured. Among the statements in respect to the mode of doing business between the agent and the assured were the following:

"Question. How will moneys reach his hands? Answer. Paid to him in the course of business for transmission to the company.

"Question. State largest sum which may be held at any one time. Answer. Two months' premiums.

"Question. To whom does he pay moneys received? Answer. To the company or to its representative.

"Question. How often will moneys be deposited in bank? Answer. As collected.

"Question. By whom will they be drawn out? Answer. By him for transmission as stated.

"Question. How often and by whom will cash be compared and verified with accounts and vouchers? Answer. Monthly."

Among the defenses interposed by the answer of the defendant, it was alleged that the first and last of the foregoing statements were false and untrue, and that the promises and agreements thereby made by the assured were not fulfilled.

It was proved upon the trial that during the period of the insurance Kingman kept at the office of the assured, at New York City, accounts of the business done by him as its agent, showing the policies issued and the moneys collected and paid out by him, and deposited from time to time the moneys collected to his credit in the St. Nicholas Bank of New York; that, in accordance with instruc-

tions, he sent to the assured regularly, from day to day, a statement of the policies issued by him; that he sent to the assured regularly, on or about the 1st day of the month, what purported to be a statement of the premiums on policies issued by him during the preceding month, together with vouchers for all expenditures shown on such statement to have been made by him; that at the end of two months thereafter he sent to the assured regularly a check for the balance shown by such statement to be due from him; that each month this check was compared and verified by the assured in its offices at Manchester with the statement and vouchers, and this was done monthly, during the period of said policy; that during said period the agent retained in his hands, for 60 days from the date of each month's statement, all moneys collected between the 1st day of the month for which the statement was made and the end of such 60 days, on business embraced in such statement; and that during the period of the insurance the assured did not at any time compare and verify the cash in its agent's hands, or his bank balance, with the accounts and vouchers kept by him at the office in the city of New York. It was further proved that during the period of the insurance Kingman died, and, upon an examination of his books, accounts, records, and vouchers, it was found that there was a deficiency in his accounts, and that he had collected and converted to his own use the moneys of the assured.

The court below directed a verdict for the defendant, upon the ground that it was established that there had been no monthly examination by the assured of the cash and accounts of its agent, in compliance with the promise of the assured.

Reading the several statements of the assured together, it is plain that the statement that the cash would be compared and verified monthly with accounts and vouchers meant that the assured would monthly examine the accounts and vouchers of its agent, and compare and verify them with the cash in his hands, in order to ascertain the correctness of his accounts. Such an examination would have shown what he had received by way of premiums, what he had disbursed by way of expenses, what he had transmitted to his principal, and how the balance compared with his moneys on hand. A monthly verification of that character would tend to exercise a salutary check upon the transactions of the agent in dealing with the funds of his employer, and might prevent, as well as reveal, any irregularities or dishonest manipulation on his part. It would to some extent, at least, have been a safeguard to the employer and to the insurer, who was to become responsible for any defalcation of the agent. Corporations engaged, like the assured, in the business of fire insurance, generally conduct their business in different states through local agents, under the supervision of a general agent. It would seem to be the meaning of the statement that the office of the New York agent of the assured, an office located in the most important business center of the country, should be subjected to this supervision for the purpose of verifying his accounts. But, if this is not its meaning, it is, at all events, a promise that either at the New York office, or at its general office, or at some other place,

the assured would attempt to make a monthly examination, in order to ascertain whether the cash in its agent's hands corresponded with the balance which should be there, according to his accounts. The promissory statement, having been made part of the contract between the parties, by the terms both of the policy and the declaration, was, in effect, a warranty, which the assured was bound to fulfill in substance and according to its meaning. *Jeffries v. Insurance Co.*, 22 Wall. 53, 22 L. Ed. 833; *Insurance Co. v. France*, 91 U. S. 513, 23 L. Ed. 401; *Brady v. Association*, 9 C. C. A. 252, 60 Fed. 727; *Missouri, K. & T. Trust Co. v. German Nat. Bank*, 23 C. C. A. 65, 77 Fed. 117. It is quite immaterial that the statement is not called a warranty. It is a stipulation embodied in the contract, by the words of the policy, for the performance of future acts, and, as such, is an express warranty. *Arn. Ins.* (6th Ed.) 599; *Ang. Ins.* §§ 140, 141. Undoubtedly, the language in the declaration that the answers were true, "to the best of the knowledge and belief" of the assured, qualifies the effect of several of the warranties, restraining them to a breach of such representations as were not honestly made by the assured. Several of the statements were in respect to facts existing at the time or previously. As to those the assured did not stipulate unconditionally. But the language has no reference to the warranties for the performance of subsequent acts, because, as applied to them, it would be meaningless.

It appeared beyond question upon the trial that its promise to examine its agent's cash monthly had not been fulfilled by the assured. The monthly comparison of the checks sent to it by its agent with the accounts and vouchers sent by him two months previously was not a comparison of the cash in his hands with his receipts and disbursements, but was merely a comparison of a part of it,—the part which he had transmitted. It did not involve any examination of his accounts in order to ascertain whether his cash on hand corresponded with the premiums received within the last two months. No attempt was made to ascertain this by the assured. What was done was of no value in comparing the cash actually in the agent's hands with the amount which he ought to have on hand at that time. In ruling that the promise of the assured had not been fulfilled, and that the defendant was therefore entitled to a verdict, the court below was clearly correct.

Error is also assigned of the refusal of the court to admit evidence offered by the plaintiff upon the trial to show that it was not the custom of insurance companies to go to an agent's office and examine his accounts, bank book, and cash on hand, but that it was customary to examine the statements of business done, and the vouchers sent by the agent to the home office, and compare and verify them with his remittances. Where a written contract is susceptible on its face of a plain and unequivocal interpretation, resort cannot be had to evidence of custom and usage to explain its language or qualify its meaning. *Barnard v. Kellogg*, 10 Wall. 383, 19 L. Ed. 987; *Bigelow v. Legg*, 102 N. Y. 653, 6 N. E. 107. To use the language of the supreme court in *Insurance Co. v. Wright*, 1 Wall. 471, 17 L. Ed. 505: "When we have satisfied ourselves that

the policy is susceptible of a reasonable construction, on its face, without the necessity of resorting to extrinsic aid, we have at the same time established that usage and custom cannot be resorted to for that purpose." The effect of the evidence offered would have been to transmute an agreement to compare at stated times the cash in an agent's hands with his vouchers and accounts into one to compare his statements with the remittances he has made to his principal. If the evidence had been received, it would not have helped the case for the plaintiff, because, upon the conceded facts, there was no attempt by the assured to verify, by the statements, vouchers, and checks, the cash in the agent's hands represented by the two-months premiums there intermediate the sending of the statement and check. The court properly excluded the evidence.

The assignments of error are not well taken, and the judgment should be, and accordingly is, affirmed.

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HARRIS et al. v. CITY OF ST. JOSEPH.

(Circuit Court, W. D. Michigan, S. D. January 15, 1900.)

**MUNICIPAL CORPORATIONS—CONTRACT—VALIDITY OF ORDINANCE.**

Under a city charter which does not require the signature of the mayor to an ordinance, but makes it effective unless vetoed within a certain number of days, an ordinance is conditionally valid from its passage; and where it authorizes a contract, and the contract is entered into before the expiration of the time allowed for a veto, such contract is not void, but, on the expiration of the time without a disapproval of the ordinance by the mayor, becomes valid and binding from the beginning, and cannot be affected by a subsequent attempt by the city to rescind it or to repeal the ordinance.

This was an action to recover damages for the breach of a contract made by the defendant to sell to the plaintiff certain bonds which it had by ordinance of its common council determined to issue for the purpose of refunding former indebtedness of the city. The defense was, among other things, that the bonds were issued before the ordinance authorizing the contract had become operative. A verdict and judgment having passed for the plaintiff, the defendant moved for a new trial.

Gore & Harvey, for plaintiffs.

Charles W. Stratton, for defendant.

SEVERENS, District Judge. The contention of counsel for the defendant is that the ordinances of October 12, 1898, had not become operative when the contract upon which this suit is brought was made, and that therefore the contract was without valid support when made, and is void. The charter of the city of St. Joseph (see section 3084, Comp. Laws 1897) does not require the signature of the mayor to the record of the proceedings of the common council, as a condition to the validity of an ordinance or resolution passed by it. The case, therefore, differs from those in which the charter expressly requires his signature as a condition to the ordinance or resolution taking effect. By the charter of St. Joseph, the ordinances of the common council have effect without the mayor's sig-

nature, unless within a certain time the mayor signifies his dissent. In this case the mayor did not disapprove, but in fact concurred in the action taken, though he did not sign the record. The ordinances for calling in the old bonds, and contracting for the sale of new ones to refund them, were passed on October 12, 1898. Not until the 18th of October was there any repudiation of what had been done, and the mayor had taken no action by way of vetoing the ordinances of the 12th. At that time—the 18th of October—the common council was tendered a better bargain, which was thereupon accepted. My opinion is that the proceedings of the common council and the contract with the plaintiff of the 12th of October were parcels of one transaction, and that they were conditionally valid from the date of the transaction, the condition being that the mayor did not within the time allowed by the charter veto the ordinances, and that when that time elapsed the condition fell, and the proceedings became valid *ab initio*. They had become valid before the 18th, when the common council undertook to rescind them,—a thing which the common council had then no power to do. As this is the only ground on which a new trial is asked, the conclusion follows that the motion should be denied.

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SCOTT et al. v. HOOVER.

(Circuit Court, S. D. California. January 15, 1900.)

No. 872.

1. VENUE—WAIVER OF OBJECTION.

Filing of demurrer to complaint on the ground that it does not state a cause of action is a waiver of objection to the action not being brought, as provided by 1 Supp. Rev. St. (2d Ed.) p. 612, in the circuit court in the district of which defendant is an inhabitant.

2. SAME—STATE STATUTE.

Under Code Civ. Proc. Cal. § 398, providing that, if the county in which the action is commenced is not the proper county for the trial, it may be had there, unless defendant, when he appeals and answers or demurs, files an affidavit of merits, and demands trial in the proper county, objection to trial where the action is brought is waived by demurrer without such affidavit and demand.

At Law.

Dillon & Dunning, for complainants.  
Hunsaker & Freeman, for defendant.

WELLBORN, District Judge. A demurrer to the complaint on the ground that it does not state facts sufficient to constitute a cause of action was interposed March 24, 1899. Thereafter, May 29, 1899, defendant filed an answer containing various pleas to the merits, and also the following:

"The plaintiffs ought not to be permitted to maintain this action in this court, for that the defendant was not at the time of the commencement of said action, is not now, and never has been, a resident and inhabitant of the Southern district of California, but that at all of said times the defendant was, and is now, a citizen and resident of the state of Colorado."

Plaintiff now moves to strike out, and also demurs to, that part of the answer above quoted, and the present hearing is on said motion and demurrer.

The single question to be determined is whether or not the filing of the demurrer to the complaint waived the objection that the action was not brought in the proper district, i. e. the district of the defendant's residence. The general proposition that the federal statute, which provides that no civil suit shall be brought in a circuit court of the United States against any person in any other district than that whereof he is an inhabitant (1 Supp. Rev. St. [2d Ed.] p. 612), only confers a personal privilege on the defendant, which he may waive, is so well settled and familiar to the profession that it is unnecessary to cite authority in its support. Defendant, however, insists that according to the practice of the state courts in California (Code Civ. Proc. Cal. §§ 430, 433), which section 914 of the Revised Statutes of the United States adopts as the practice of the federal courts in said state, the personal privilege above mentioned is matter of defense, which, when not appearing upon the face of the complaint, is available only through an answer, and therefore not waived by demurrer. The assumption that the above-mentioned sections of the Code of California furnish a suitable procedure for the assertion in the circuit court of the United States by a defendant of his privilege to be sued in the district of his residence is, in my opinion, erroneous, while the closest, and perhaps only, analogy to such procedure in said Code is found in its provisions (section 396 below quoted) relative to a change of the place of trial.

Section 20 of the practice act of 1851 of said state was as follows:

"Sec. 20. In all other cases, the action shall be tried in the county in which the defendants, or any one of them, may reside at the commencement of the action. \* \* \*

Section 21 of said practice act was as follows:

"Sec. 21. The court may, on motion, change the place of trial in the following cases: First. When the county designated in the complaint is not the proper county. \* \* \*

While said practice act was in force the supreme court of the state held:

"If a defendant, sued in a county where he does not reside, demurs to the complaint, and the demurrer is sustained, and he then demurs to an amended complaint before giving notice of a motion for a change of venue, he waives the right to have the case tried in the county where he resides." *Jones v. Frost*, 28 Cal. 246.

The provisions of the section of the practice act first above quoted, to wit, section 20, are still in force, being re-enacted in section 395, Code Civ. Proc. Cal.; and the doctrine of the case last cited (*Jones v. Frost*) is now substantially embodied in section 396 of the same Code, which is as follows:

"Sec. 396. If the county in which the action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county."

With reference to that section the supreme court of the state has said:

"Section 396 of the Code of Civil Procedure provides, in effect, that a defendant may be held to have waived his right to a change of the place of trial on the ground that the action has not been commenced in the proper county, unless at the time he first appears, either by answer or demurrer, he files an affidavit



of merits, and demands in writing a transfer to the proper county." *Cook v. Pendergast*, 61 Cal. 78.

From the foregoing citations it appears that under the state practice in California a right similar in character to the personal privilege claimed in the case at bar is asserted, not by an answer, but by a written demand for a change of venue, and, if demand is not so made before the filing of a demurrer, the right is waived. If, therefore, pursuant to section 914 of the Revised Statutes of the United States, the practice of the federal courts in respect to the matter now under consideration is to be conformed, "as near as may be," to that of the state courts (*Railway Co. v. Pinkney*, 149 U. S. 194, 13 Sup. Ct. 859, 37 L. Ed. 699), the objection that suit has been brought in a district other than the one of defendant's residence should be raised by motion to dismiss, or in some other suitable way, before demurrer or other general appearance by the defendant, and, if not so raised, should be deemed waived.

The case of *Roberts v. Lewis*, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579, relied on in this connection by defendant, does not, in my opinion, conflict with the conclusion just announced. The second paragraph of the syllabus in that case is as follows:

"(2) Since the act of June 1, 1872, all defenses are open to a defendant in the United States circuit court, under any form of plea, answer, or demurrer, which would have been open to him under like pleading in the courts of the state within which the circuit court is held."

We have just seen, however, that, in the state practice, where a defendant, sued in a county other than that whereof he is a resident, desires to insist upon his privilege to have the suit tried in the county of his residence, he must do so by special motion, before answer or demurrer, and that answer or demurrer without such special motion is a waiver of the privilege.

Again, in *Roberts v. Lewis*, supra, the court says:

"The necessary consequence is that the allegation of the citizenship of the parties, being a material allegation properly made in the petition, was put in issue by the answer, and, like other affirmative and material allegations made by the plaintiff and denied by the defendant, must be proved by the plaintiff."

The allegation of the place of defendant's residence, unlike that of citizenship, is not a material allegation. *Express Co. v. Todd*, 5 C. C. A. 432, 56 Fed. 104. I quote from that case as follows:

"The eleventh section of the judiciary act of 1789 (1 Stat. 79) provided that no person should be arrested in one district for trial in another in any civil action before a circuit or district court, and that no civil suit should be brought before either of said courts against an inhabitant of the United States, by any original process, in any other district than that whereof he was an inhabitant or in which he should be found at the time of serving the writ. In *Gracie v. Palmer* (decided in 1823) 8 Wheat. 699, 5 L. Ed. 719, an action was brought in the circuit court of the district of Pennsylvania. The plaintiffs were described to be aliens, and subjects of the king of Great Britain; and the defendants, Gracie and others, to be citizens of the state of New York; and it did not appear that the defendants were inhabitants of or found in the district of Pennsylvania at the time of serving the writ. Daniel Webster moved to dismiss the writ of error for want of jurisdiction. Chief Justice Marshall delivered the opinion of the supreme court, and said: 'That the uniform construction, under the clause of the act referred to, had been that it was not necessary to aver on the record that the defendant was an inhabitant of the district or found

therein. That it was sufficient if the court appeared to have jurisdiction by the citizenship or alienage of the parties. The exemption from arrest in a district in which the defendant was not an inhabitant or in which he was not found at the time of serving the process was the privilege of the defendant, which he might waive by a voluntary appearance. That, if process was returned by the marshal as served upon him within the district, it was sufficient, and that where the defendant voluntarily appeared in the court below, without taking the exception, it was an admission of the service, and a waiver of any further inquiry into the matter."

That the procedure approved in *Roberts v. Lewis* on the jurisdictional issue of citizenship does not apply to an assertion of the personal privilege of a defendant to be sued in the district of his residence is further shown by the fact that in subsequent cases the supreme court has uniformly adhered to the rule, so often declared in earlier cases, that said privilege is waived by plea to the merits or other general appearance. In one of these cases the court said:

"The defendant not only demurred, but answered, and the second ground of demurrer was that the petition did not set out a cause of action. Under such circumstances, they could not thereafter challenge the jurisdiction of the court on the ground that the suit had been brought in the wrong district." *Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829.

In another case the court said:

"It may be assumed that the exemption from being sued in any other district might be waived by the corporation by appearing generally, or by answering to the merits of the action, without first objecting to the jurisdiction." *Pacific Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 377.

Further on the court quotes approvingly from *Harkness v. Hyde*, 98 U. S. 476, 25 L. Ed. 237, as follows:

"Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when, being urged, it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only where he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

In a still later case the supreme court has said:

"But the defendant company did not choose to plead that provision of the statute, but entered a general appearance, and joined with the complainant in its prayer for the appointment of a receiver, and thus was brought within the ruling of this court, so frequently made, that the exemption from being sued out of the district of its domicile is a personal privilege, which may be waived, and which is waived by pleading to the merits." *Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98. See, also, *Carter-Crume Co. v. Peurung*, 30 C. C. A. 174, 86 Fed. 439, and *Van Doren v. Railroad Co.*, 35 C. C. A. 282, 98 Fed. 260.

The same doctrine was again affirmed by the supreme court of the United States as late as the year 1895, the opinion being written by Justice Gray, who wrote the opinion in *Roberts v. Lewis*, supra, as follows:

"The circuit courts of the United States are thus vested with general jurisdiction of civil actions, involving the requisite pecuniary value, between citizens of different states. Diversity of citizenship is a condition of jurisdiction, and, when that does not appear upon the record, the court, of its own motion, will order the action to be dismissed. But the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction

of the court over such a cause between such parties, but affects only the proceedings taken to bring the defendant within such jurisdiction, and is a matter of personal privilege, which the defendant may insist upon or may waive, at his election; and the defendant's right to object that an action within the general jurisdiction of the court is brought in the wrong district is waived by entering a general appearance without taking the objection." *Improvement Co. v. Gibney*, 160 U. S. 219, 16 Sup. Ct. 272, 40 L. Ed. 401.

This question is also discussed, and precedents carefully reviewed, by the circuit court of appeals, Eighth circuit, in an opinion delivered May 15, 1893, in *Express Co. v. Todd*, 5 C. C. A. 542, 56 Fed. 104. After quoting from various decisions, the court says:

"Thus it will be seen that for more than 60 years the supreme court has uniformly held that a general appearance or an answer to the merits by the defendant was a waiver of the objection that the action was brought in the wrong district, and that it was too late thereafter to insist upon it."

The defendant in the case at bar, having by demurrer voluntarily submitted himself to the jurisdiction of this court, thereby waiving the objection that he has been sued in a district other than that of his residence, will not now be heard to raise said objection; and plaintiffs' motion to strike out that part of the answer above quoted will be allowed.

### CHESAPEAKE & O. RY. CO. v. KING.

(Circuit Court of Appeals, Sixth Circuit. January 22, 1900.)

No. 747.

#### 1. CARRIERS—INJURY OF PASSENGER AT STATION—CONTINUANCE OF RELATION.

If a passenger on a railroad train alights by direction of the company, or by its implied invitation, at a place where, in order to leave the premises of the company, it is necessary to cross intervening tracks, he remains a passenger until he has crossed such tracks, provided he uses the means of egress which the company has provided, or which is customarily used with its knowledge and consent; and there is an implied agreement that the trains of the company shall not be so operated as to make the exit unnecessarily dangerous.

#### 2. SAME—CARE REQUIRED OF PASSENGER.

A passenger alighting under such conditions, while not absolved from the duty of exercising care to avoid danger, may be justified in presuming, in the absence of circumstances of warning, that the trains of the company will not be so operated as to impose on him the same high degree of care which he would be required to exercise if he were not a passenger, but a traveler crossing the railway at a public crossing.

#### 3. SAME—ACTION FOR INJURIES—QUESTIONS FOR JURY.

Plaintiff, who was a passenger on defendant's railroad, alighted at a station from which it was necessary to cross the tracks to reach the street leading to the town. She passed behind the train, and started diagonally across the tracks at a place which the evidence tended to show was customarily used for that purpose, and when upon the adjoining track was struck by a freight train approaching from the opposite direction, and injured. A rule of the company required freight trains to stop when approaching a passenger train discharging passengers at a station, and there was evidence that such rule was not observed in this instance. *Held*, that the question whether plaintiff was still constructively a passenger when she was injured, and therefore entitled to a higher degree of care on the part of the company for her protection, and also the questions of the company's negligence and plaintiff's contributory negligence, were properly submitted to the jury.

**In Error to the Circuit Court of the United States for the District of Kentucky.**

Only the facts essential to the consideration of the single question upon which a reversal is sought need be stated. The plaintiff below, a young woman, sustained very serious injuries by collision with a railroad train while crossing a railway track which intervened between the station of the company at Central City, W. Va., and the nearest public highway or street connecting the village and station. She had taken passage at Ashland, Ky., upon an accommodation train, for Central City, a station east of Ashland. Between Central City and Ashland the tracks are double, and about seven feet apart. The track next the station is used only by east-bound trains, while the other, or northern, track is used only by trains going in the opposite direction. The village of Central City lies wholly north of the railroad tracks, while the station or depot is on the opposite or south side of the railroad. The streets of the town running at right angles with the railroad do not cross its tracks, but extend from them south to the Ohio river. This station house is situated between two streets extending from the railroad to the town, and is about 100 feet from Fourteenth street, which is the nearest of them. Fourteenth street is, therefore, the one used chiefly, if not altogether, by the travel between the depot and the town, and has a pavement or sidewalk only on its western side. The station consists of three connected rooms—a waiting room, a ticket office, and a freight room—extending along the track east and west for a distance of 50 feet. In front of this station is a wooden platform about 6 feet wide. Between this platform and the nearest track is a cinder path, also about 6 feet wide, which extends west beyond the station to a point 7 feet west of the eastern line of Fourteenth street. Persons going from the town to the station and from the station to the town were accustomed to cross the tracks at any point between the station and Fourteenth street, and this mode of going to and from the station, which was only 100 feet east of Fourteenth street, was well known to the railroad company, and was unobjected to. The plaintiff's train stopped as usual in front of the station, and she alighted, as was customary, on the cinder path next the station platform. Following this path to the rear of her train, which had come from the west, she crossed the most southerly track immediately behind the standing train, and diagonally in the direction of Fourteenth street, and continued this diagonal course across the space between the two tracks. This diagonal direction threw her back partly towards the direction from which a freight train was approaching. Just as she was crossing the second track, she was struck and seriously injured by a train rapidly passing in a direction opposite to that from which her own train had come. This train approached the station with all the usual and proper signals, and her danger was not observed until too late to avert the accident. The evidence made it clear that she could not have seen the train until after she came out from behind the standing train, and there was also evidence tending to show that the noise made by the standing engine, through escaping steam, was likely to deaden the effect of the signals given by the approaching train, as well as the noise made by its travel. Plaintiff testified that she neither heard nor saw the train which collided with her, and that she was looking from the time she started across these tracks. But it is clear that she did not look in the direction from which the colliding train approached, for it was broad daylight, and after she came out from behind the standing train the approach of a train on the other track from the east could have been seen for half a mile, if she had looked in that direction. There was a rule of the company that all "trains approaching a station where a passenger train is receiving or discharging passengers must be stopped before reaching the passenger train." There was evidence tending strongly to show that on this occasion this rule was not observed by the train which collided with the plaintiff, and that it passed the standing train, from which plaintiff alighted, while it was still receiving and discharging passengers, at a speed of from 10 to 12 miles per hour. At the conclusion of all the evidence the defendant below asked for a peremptory instruction against the plaintiff upon the ground of her contributory negligence. This was overruled, and is the principal error now assigned. The court submitted the case to the jury upon the

theory that the plaintiff was still a passenger while making her egress from the station over the premises of the company to the nearest public highway, and therefore entitled to a reasonably safe way of exit, and only required to exercise ordinary care in avoiding danger from the movements of trains over tracks which she was obliged to cross in order to make her way to the public street. The charge of the court in respect to the continuance of the relation of a passenger, after safely alighting at the station, and the degree of care incident to such continued relation, was also excepted to, and presents the same question which arose upon the incontestable facts of the case by the motion for a peremptory instruction.

A. M. J. Cochran, for plaintiff in error.

D. W. Steele, for defendant in error.

Before LURTON and DAY, Circuit Judges, and THOMPSON, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

This case must turn here, as it did below, upon the single question as to whether the defendant in error, at the time she was injured, stood in the relation of a passenger to the railroad company. The insistence of counsel for the company is that when Miss King alighted from the train on the cinder path, between her train and the depot platform, she was in a place of safety, and the relation of carrier and passenger at an end. It is true that when upon the cinder path there was no obstacle between her and the depot platform. But can it be said that she was clear of train and tracks when it was necessary to cross two tracks before she could get off of the company's premises and upon the public highway? The cinder path was on the company's right of way. She might have pursued that path until she reached a point opposite Fourteenth street, and then crossed. That was doubtless the safer course, for it would have given her a clear view of both tracks. But the evidence tended to show that passengers alighting where she did more usually crossed the tracks immediately in front of the depot, or crossed them obliquely in the direction of the head of Fourteenth street, and that any of these ways of going from the station were equally approved by the company. The question as to whether the company had provided a particular way of egress from its premises, or acquiesced in the crossing of its tracks at any point between the station and the head of the public street, was a question of fact submitted to the jury. If it was equally open to her to cross diagonally to Fourteenth street as she did, the question is whether the company was under any obligation to her to so operate its trains that that way off of the company's premises should not be unnecessarily dangerous. If, while making her way from the station to the public street, she was constructively still a passenger, then the company did come under a higher obligation to provide a reasonably safe mode of exit than if she was a mere traveler crossing at a public highway or elsewhere by license of the company. Did the relation of passenger and carrier continue while making her way across these tracks, or did it terminate when she alighted upon a path between which and the public street these tracks intervened? Upon this subject the learned circuit judge instructed the jury as follows:

"But the defendant railway company owes more to a passenger than merely to provide a place to alight. It must provide a place reasonably adapted for alighting on its own grounds, from which there is access to some public highway. While passengers are upon its premises, using that convenient means of access which the company furnishes for passengers to alight and reach the highway, they continue passengers, provided they obey the rules of the company, and use that means of access to the highway from the place of alighting in the manner that the company intends and gives them reason to believe they are to use it."

Upon the subject of the duty of the passenger to use the way of egress from its premises provided for that purpose, the court said:

"Now, if you find that there was a way provided along the track running down to a place opposite Fourteenth street, and that that was the way which the company intended that their passengers should go, and that this crossing of the track where she did cross it was not with the permission of the company, then the company is not responsible for the accident which occurred by reason of her going a different way from that which was provided; because, you will observe, if she had gone down on the south side of the track to Fourteenth street she would have avoided the danger of crossing the track just behind a train in such a way that she could not have seen the train coming on the other track; but, if the company permitted another way, so that it was well recognized as the way for the passengers to leave the station, by crossing the track directly back of the train, and not going clear down to a point opposite Fourteenth street, then you would be justified in finding that this plaintiff was using a way which the company intended she should use, and was a passenger."

On the same subject the court said:

"Now, if you find that the company permitted the way to be used which was used by the plaintiff in reaching Fourteenth street, then I charge you that she was a passenger, and entitled to that care from the company which passengers under the law have a right to expect. That care is much higher than the care due to a mere traveler crossing the tracks, or to a trespasser on the track."

In respect to the alleged contributory negligence of the defendant in error, the court said:

"Now, was she negligent? Did she do something in crossing that track that a reasonably prudent person would not have done, and which, if she had not done, she would not have been injured? If so, she cannot recover. Of course, you would not have reached this point in the case without finding that she was a passenger. As a passenger she had a right to expect that the company would look after her welfare more than if she were a mere traveler, and so you must consider that relation that she bore to the company in determining whether she was guilty of negligence. How far she ought to have relied on the company to prevent her injury in this case is for you to determine. Of course, she cannot rely absolutely on that, otherwise she might thus just blindfold her eyes, and wander about there on the passageway provided for her without any regard whatever to whether she would be injured or not; but, on the other hand, it is an element which you are to consider that she had a right to put some reliance on the care of the company. The ordinary rule of a traveler crossing the track is that he must look and listen. That rule, in the case of a passenger crossing the track under these circumstances, is modified by the reliance which he or she is entitled to put upon the care the company will exercise to save him or her from injury. It is for you to judge how much she ought to have relied upon that in this case. If you find that she relied too much on it, and that she ought to have used her senses more, and that, if she had, she would have avoided the injury, then she cannot recover here."

This was a clear and sound exposition of the law relating to the facts of this case, and is fully supported by *Railway Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281, 38 L. Ed. 131; *Warner v. Railroad Co.*, 168 U. S. 339, 18 Sup. Ct. 68, 42 L. Ed. 491; *Graven v. MacLeod*,

35 C. C. A. 47, 92 Fed. 846; *Railway Co. v. Coggins*, 32 C. C. A. 1, 88 Fed. 455; *Browell v. Railroad Co.*, 84 N. Y. 241; *Railroad Co. v. Anderson*, 72 Md. 519, 20 Atl. 2, 8 L. R. A. 673; *Railway Co. v. Johnson*, 59 Ark. 122, 26 S. W. 593; *Pennsylvania Co. v. McCaffrey*, 173 Ill. 169, 50 N. E. 713; and *Burnham v. Railway Co.*, 91 Mich. 523, 52 N. W. 14. The case is not distinguishable on principle and is clearly analogous in its facts to that of *Graven v. MacLeod*, decided by this court, and cited above. In that case, Graven, after alighting in safety upon a cinder path between two tracks, left that place of safety, and crossed the track intervening between that place and the street, which crossed both tracks some distance to the right of his point of alighting. It is true that when he had thus alighted he was not clear of train and track, because one track intervened between him and the public highway. Neither was the defendant in error clear of train and track, for two tracks intervened between her and the only highway by which she could leave the premises. If counsel for plaintiff in error is right in construing the Graven Case as one in which the facts showed that the "act of alighting was incomplete" until Graven reached the outside of the other track, and was clear of it, then the same condition existed in respect to the defendant in error. If a passenger alights by direction of the company, or by its implied invitation, at a place where, in order to leave the premises of the company it is necessary to cross an intervening track, there is an implied agreement that in using that mode of egress from the premises its trains shall not be so operated as to make the exit unnecessarily dangerous. This is the doctrine of the *Lowell* and *Warner* Cases, cited above, and is the principle which governed the Graven Case, and which was so well expressed in the charge of the circuit judge below. A passenger alighting under such conditions may, in the absence of circumstances of warning, be justified in presuming that the trains of the company will not be so operated as to impose on him the same high degree of care which he would be obliged to exercise if he were not a passenger. Neither is this reliance upon the care of the company dependent wholly upon a knowledge of a rule forbidding trains to pass another while receiving or discharging passengers. That rule is but an expression of that degree of care which a passenger would have a right to expect from a railroad company under such conditions. In *Terry v. Jewett*, 78 N. Y. 338-344, it was said that:

"It may be assumed that a railroad corporation, in the exercise of ordinary care, so regulates the running of its trains that the road is free from interruption or obstruction where passenger trains stop at a station to receive and deliver passengers. Any other system would be dangerous to human life, and impose upon those who might have occasion to travel on the railroad."

This language was quoted and approved in *Warner v. Railroad Co.*, cited above, where it was said, in speaking of the implied invitation extended by a situation such as that shown in this case, that:

"The railroad, under such circumstances, in giving the invitation, must necessarily be presumed to have taken into view the state of mind and of conduct which would be engendered by the invitation; and the passenger, on the other hand, would have a right to presume that in giving the invitation the railroad itself had arranged for the operation of its trains with proper care."

The failure to look and listen before crossing a railway track is negligence per se in a traveler at a highway. *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213; *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Railroad Co. v. Griffith*, 159 U. S. 603, 16 Sup. Ct. 105, 40 L. Ed. 274; *Railway Co. v. Cody*, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132; *Railroad Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; *Blount v. Railway Co.*, 9 C. C. A. 526, 61 Fed. 375; *Railway Co. v. Farra*, 13 C. C. A. 602, 66 Fed. 496. But there is a difference in the degree of care and caution demanded from a traveler crossing a railway at a public crossing and that demanded from a passenger in crossing tracks which intervene between the usual place of alighting from cars and the public highway. In the latter case the company should furnish the passenger with reasonable and adequate protection against accident in the exercise of the privilege of a safe exit from its premises. But such a passenger, in either going to or crossing from the cars, is not absolved from the duty of exercising care and caution in avoiding danger according to the circumstances. The failure of a passenger to look or listen under such circumstances may or may not be negligence, according to the peculiar facts, and is, as held in the cases of *Warner v. Railroad Co.* and *Graven v. MacLeod*, cited above, ordinarily a question of fact for the jury. It was not error to refuse the peremptory instruction asked by the plaintiff in error, and the judgment must be affirmed.

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In re MASON.

(District Court, W. D. North Carolina. February 5, 1900.)

**1. BANKRUPTCY—JURISDICTION—OBJECTIONS WAIVED.**

Creditors desiring to object to the jurisdiction of the court over the person of a voluntary bankrupt must present their objection promptly, by motion to dismiss the petition or to vacate the adjudication; otherwise, the objection will be taken to have been waived.

**2. SAME—OPPOSITION TO DISCHARGE.**

An objection to the jurisdiction of a court of bankruptcy on the ground that the bankrupt had not resided or had his domicile within the district for the requisite period of time before the filing of the petition cannot be interposed, for the first time, in opposition to the bankrupt's application for discharge, by a creditor who proved and filed his claim, participated in the election of a trustee, and shared in the distribution of the estate.

**In Bankruptcy.** On bankrupt's application for discharge, and opposition thereto by creditors.

H. N. Pharr, for bankrupt.

T. J. Rickman, for creditors.

EWART, District Judge. Sidney Davis, trading as Davis & Son, of London, England, is a judgment creditor of Mason, bankrupt, to the amount of \$2,132.45. Mason filed a petition in bankruptcy



March 4, 1899; alleging in his petition that he was a resident of the county of Lincoln, state of North Carolina, for the preceding six months, or the greater portion thereof. Davis & Son filed their proof of claim with the referee in bankruptcy of that district. On the final meeting of creditors to show cause why a discharge should not be granted, Davis & Son appeared, and filed the following specifications, which were duly verified by their counsel, T. J. Rickman, Esq.:

"(1) Because the said bankrupt has not had his principal place of business or resided or had his domicile within the respective territorial jurisdiction of this court for the preceding six months, or the greater portion thereof, from the time of filing his said petition in bankruptcy, as required by chapter 2, § 2, of the bankruptcy act of 1898. (2) Because the said bankrupt acquired no domicile or residence at all in the county of Lincoln, North Carolina, in the said jurisdiction of this court; he having arrived there on the 4th of January, 1899, as a visitor only, and left there on the 8th of March, 1899, and having filed his petition and been adjudicated a bankrupt on the 4th day of March, 1899, just prior to leaving for his true place of residence, which petitioners are advised is in the city of Baltimore, Maryland. (3) Because said petitioner is a resident of another jurisdiction, and has filed his petition in this jurisdiction for the purpose of making it more inconvenient for creditors to assert their lawful rights in the said proceedings,—said bankrupt having willfully sworn falsely in relation to his domicile, residence, and place of business; and the same is hereby set up by this said petitioner, creditor, in order to show a want of jurisdiction in this court, and consequently as a legal ground for withholding the discharge of said bankrupt."

The specifications are disallowed. Creditors, when bankruptcy proceedings have been commenced, must promptly, by motion or petition to vacate the adjudication, object to the jurisdiction of the court, or the objection is waived. A creditor cannot prove his debt and file the same, as in this cause, participate in the election of a trustee, distribute the estate, use the proceeds for his benefit, and then, on the application of the bankrupt for a final discharge, for the first time, object to the jurisdiction. Entire want of jurisdiction over the subject-matter may be taken advantage of at any time, and it is never too late to make the objection, and it may be collaterally attacked. *Freem. Judgm. 120-117 et seq.* But, where objection goes merely to a want of jurisdiction of the person or the thing, there may be a waiver of the objection, or restriction as to the manner and time of making it. In proceedings in bankruptcy, an adjudication, and necessarily an implied judgment that the court has jurisdiction, follow upon the filing of a petition. No notice is necessary that an adjudication will be made. After an adjudication, by notice, creditors become parties; and, if they do not, they are precluded. If this is not the rule, not only does the discharge fail, but, the court being without jurisdiction of the original proceeding, all that is done under it is void. The assignment is vacated, all sales invalid, titles made worthless. These consequences are inevitable. The case of *In re Little*, 2 N. B. R. 294, Fed. Cas. No. 8,391, cited by counsel for the contesting creditor, is not applicable. In that case *Little* was actually a resident of New Jersey, while he had an office in New York; and, besides, it does not appear that the contesting creditor had proven or filed his claim, and thus raised the question of jurisdiction, as in this case. *In re Penn*, 3 N. B. R. 582, Fed. Cas. No.

10,926, is also cited by counsel for Davis & Son. That appears as a mere dictum, and directly contra is *Allen & Co. v. Thompson* (D. C.) 10 Fed. 116. The bankrupt is entitled to his discharge. It is so ordered.

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**BENEDIX v. UNITED STATES.**

(Circuit Court, S. D. New York. January 22, 1900.)

No 2,458.

**CUSTOMS DUTIES—COMPOSITION METAL.**

Sheets of composition metal, of which copper is the component material of chief value, are free under Act 1894, par. 452, putting on free list "old copper, fit only for manufacture, clipping from new copper, and all composition metal of which copper is a component material of chief value, not specially provided for," and not under paragraph 177.

Curie & Smith, for complainant.  
H. C. Platt, Asst. U. S. Atty.

WHEELER, District Judge. These are sheets of composition metal, of which copper is the component material of chief value. They seem to be included by paragraph 452 of the act of 1894, putting in the free list "old copper, fit only for manufacture, clipping from new copper, and all composition metal of which copper is a component material of chief value, not specially provided for," rather than by paragraph 177, putting a duty on "manufactured articles or wares not specially provided for in this act composed wholly or in part of any metal and whether partly or wholly manufactured," as they have been assessed. The specifying of composition metal, of which copper is the component material of chief value, takes it out of the broader provision for manufactures or wares composed wholly or in part of any metal. Decision reversed.

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**WELLS et al. v. UNITED STATES.**

(Circuit Court, S. D. New York. December 28, 1899.)

No. 2,822.

**CUSTOMS DUTIES—COD LIVER OIL.**

Oil from the intestines and livers of the cod is properly assessed as fish oil, under Act 1897, par. 42.

Jacob Fromme, for complainants.  
D. Frank Lloyd, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The merchandise in question is oil made from the intestines and livers of the cod, and was assessed for duty as fish oil, under paragraph 42 of the act of 1897, and claimed as free as not being fish oil, but an article commercially known as "cod oil," and therefore included under the provisions of paragraph 568 of said act, for grease and oils used for stiffening

and treating leather. The sole substantial ground on which this court is asked to reverse the decision of the board of general appraisers is that there was no conflict in the evidence as to commercial designation. The witness called on behalf of the government stated that he had familiarized himself with the commercial designation of the different kinds of oil produced from fish, and that the term "fish oil" included and described any oil derived from fish, whether from the whole fish or parts thereof. This witness was not cross-examined, and no evidence was introduced in this court to contradict his testimony. It appears from the finding of the board of general appraisers that oils other than cod oil, made from parts only of the fish, are known as "fish oil." In these circumstances, this court is bound by said decision of the board of general appraisers, and the same is affirmed.

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## HENSEL v. UNITED STATES.

(Circuit Court, S. D. New York. January 22, 1900.)

No. 2,902.

## CUSTOMS DUTIES—GLASS BOTTLES.

Glass bottles, filled with a medicinal preparation, dutiable at 25 per cent. ad valorem, are dutiable under the exception in paragraph 99 of the act of 1897, relating to glass bottles and vials, filled or unfilled, "such as contain merchandise subject to an ad valorem rate of duty, or to a duty based in whole or in part on the value thereof, which shall be dutiable at the rate applicable to their contents."

Comstock & Brown, for complainant.  
Chas. D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. These are glass bottles, filled with a medicinal preparation dutiable at 25 per cent. ad valorem. They have been assessed at 40 per cent. under the proviso of paragraph 99 of the act of 1897. That paragraph enacts that glass bottles, vials, jars, demijohns, and carboys, filled or unfilled, not otherwise specially provided for, "and whether their contents be dutiable or free (except such as contain merchandise subject to an ad valorem rate of duty, or to a duty based in whole or in part upon the value thereof, which shall be dutiable at the rate applicable to their contents) shall pay duty as follows: [which is by weight] provided that none of the above articles shall pay a less duty than forty per centum ad valorem." This construction contradicts the exception, which seems to place a special duty upon this kind of bottles, when filled with dutiable contents, the same as that upon the contents, by making that upon the bottles different from that on the contents. The exception is out of the whole paragraph, and leaves the proviso to operate upon the rest. This gives effect to the whole, while the other construction does not. Decision reversed.

**UNITED STATES v. BOUTTELL.**

(Circuit Court, S. D. New York. January 18, 1900.)

No. 2,977.

**CUSTOMS DUTIES—FELT CARPETING.**

Felt carpeting, though not woven, is a carpeting of wool, dutiable under Act 1897, par. 381, and not under paragraph 370.

Curie & Smith, for importers.

H. P. Disbecker, Asst. U. S. Atty.

**WHEELER**, District Judge. This is felt carpeting, and, although not woven, it is carpeting of wool, and is provided for as such in paragraph 381 of the act of 1897. Therefore it does not come under paragraph 370, providing for a higher duty on "felts not woven and not specially provided for." Decision affirmed.

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**FISHER v. UNITED STATES.**

(Circuit Court, S. D. New York. January 22, 1900.)

No. 2,545.

**CUSTOMS DUTIES—MUSIC BOOKS.**

Music books, with exclusively German words, are on the free list, under Act 1894, par. 411, putting on such list "books and pamphlets printed exclusively in language other than English."

Curie & Smith, for importers.

H. C. Platt, Asst. U. S. Atty.

**WHEELER**, District Judge. These are music books with exclusively German words. The act of 1894, by paragraph 311, provides for a duty on "books, including pamphlets and engravings, bound or unbound, photographs, etchings, maps, music, charts, and all printed matter not specially provided for"; and, by paragraph 411, puts on the free list "books and pamphlets printed exclusively in languages other than English; also books and music, in raised print, used exclusively by the blind." The music specified in paragraph 311 is placed among photographs, etchings, maps, and charts, and seems to be music in sheets, rather than in books. Music books would be included in "all printed matter," if not otherwise specially provided for. All the language of these German music books is printed in a language exclusively other than English. They seem to be specially provided for in paragraph 411, and so to be taken out of paragraph 311. Decision reversed.

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**STERN BROS. v. UNITED STATES.**

(Circuit Court, S. D. New York. January 22, 1900.)

No. 2,959.

**CUSTOMS DUTIES—LAMP SHADES.**

Glass ornamented or decorated lamp shades and chimneys are dutiable, under Act 1897, par. 100, as articles of glass, ornamented or decorated, and not under paragraph 112, as all glass or manufactures of glass "not specially provided for."

Curie & Smith, for importers.  
D. Frank Lloyd, Asst. U. S. Atty.

WHEELER, District Judge. These glass ornamented or decorated lamp shades and chimneys seem to fall within paragraph 100 of the act of 1897, as "articles of glass," "ornamented" or "decorated," where they have been assessed, rather than within "all glass or manufactures of glass not specially provided for," of paragraph 112, where they are claimed to belong. They appear to be specially provided for in the former paragraph. Decision affirmed.

MATHESON v. UNITED STATES.

(Circuit Court, S. D. New York. January 18, 1900.)

No. 2,874.

CUSTOMS DUTIES—CLOTH SAMPLES.

Small samples of cloth goods, arranged on cardboards, and folded into book form for gratuitous distribution, are not free of duty, as publications of individuals for gratuitous private circulation, under Act 1897, par. 501.

Comstock & Brown, for importers.  
H. P. Disbecker, Asst. U. S. Atty., for the United States.

WHEELER, District Judge. These are small samples of cloth goods, arranged on cardboards, with printed descriptions of the goods around the samples, and the boards folded into book form, with short explanations at the beginning, for gratuitous distribution. They are claimed to be free of duty, as "publications of individuals for gratuitous private circulation," under paragraph 501 of the act of 1897. They do not, however, in any proper sense, appear to be "publications," as of books, maps, charts, etc., but, rather, exhibitions of the samples for advertising purposes. Decision affirmed.

PETRY v. UNITED STATES.

(Circuit Court, S. D. New York. January 18, 1900.)

No. 2,848.

CUSTOMS DUTIES—KILN-DRIED BEETS.

Sliced beets, kiln-dried, are "vegetables prepared," and dutiable under Act 1897, par. 241, rather than vegetables in their natural state, under paragraph 257, or vegetable substances, crude or manufactured, under paragraph 617.

Curie & Smith, for importers.  
H. P. Disbecker, Asst. U. S. Atty.

WHEELER, District Judge. These are sliced beets, kiln-dried. They seem to be "vegetables prepared," under paragraph 241 of

the act of 1897, where they have been assessed, rather than "vegetables in their natural state," under paragraph 257, or "vegetable substances, crude or manufactured," under paragraph 617. Decision affirmed.

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UNITED STATES v. LAMB.

(Circuit Court, S. D. New York. January 16, 1900.)

No. 2,726.

CUSTOMS DUTIES—CANVAS.

Canvas woven with double warp and single filling, each of single jute yarn, is a plain woven fabric, dutiable under Act 1897, par. 341, rather than a manufacture of vegetable fiber, not otherwise provided for, under paragraph 347.

Stephen G. Clarke, for importers.

H. P. Disbecker, Asst. U. S. Atty.

WHEELER, District Judge. This is canvas woven with double warp and single filling, each of single jute yarn. The weaving appears to be plain, notwithstanding the double warp. Consequently, it appears to be a plain woven fabric of paragraph 341 of the act of 1897, as it has been assessed, rather than a manufacture of vegetable fiber, not otherwise provided for, under paragraph 347. Decision affirmed.

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UNITED STATES v. RICHARD.

(Circuit Court, S. D. New York. January 16, 1900.)

No. 2,867.

CUSTOMS DUTIES—BLEACHED GRASSES.

Natural grass, sun bleached, used for emblems, is not a manufactured article, and is put on the free list, under Act 1897, par. 566, as textile grasses "not manufactured in any manner, and not specially provided for."

Comstock & Brown, for importers.

H. C. Platt, Asst. U. S. Atty.

WHEELER, District Judge. Paragraph 566 of the act of 1897 puts on the free list "Istle or Tampico fiber, jute, jute butts, manila, sisal grass, sunn, and all other textile grasses or fibrous vegetable substances not manufactured in any manner, and not specially provided for." This importation is of natural grass, sun bleached, used for emblems. It has been classified as free under this paragraph, instead of under paragraph 251, which puts a duty on natural flowers of all kinds, preserved or fresh, suitable for decorative purposes. In *Frazee v. Moffitt*, 20 Blatchf. 267, 18 Fed. 584, Judge, afterwards Mr. Justice, Blatchford held that hay containing sugar converted by the heat of the sun from starch in the grass by being dried was not a manufactured article. So this grass, bleached by mere exposure to the sun, is not a manufactured article. It is not made into any new thing. Decision affirmed.

UNITED STATES v. SILBERSTEIN.

(Circuit Court, S. D. New York. January 18, 1900.)

No. 2,903.

CUSTOMS DUTIES—POCKETKNIVES.

Pocketknives, with all but the scales for the sides of the handles, are dutiable under Act 1897, par. 153, as pocketknives, or parts thereof, partly or wholly manufactured.

Comstock & Brown, for importer.

H. P. Disbecker, Asst. U. S. Atty.

WHEELER, District Judge. These are pocketknives, all but the scales for the sides of the handles. They are nothing but pocketknives now, and will be pocketknives when completed. They therefore appear to be specifically provided for as pocketknives, or parts thereof, partly or wholly manufactured, as they have been assessed under paragraph 153 of the act of 1897, and not to be dutiable otherwise. Decision affirmed.

ALTMAN CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 18, 1900.)

No. 2,913.

CUSTOMS DUTIES—CORSETS.

Corsets of which cotton is the component material of chief value, trimmed at the top with lace, are not articles made in any part of lace, though they are so trimmed, and are dutiable under Act 1897, par. 314, as wearing apparel of "every description of which cotton is the component material of chief value."

Appeal by the Altman Company from decisions of the general appraisers which confirm the action of the collector in assessing duty on importations in question.

Curie & Smith, for importers.

D. Frank Lloyd, Asst. U. S. Atty.

WHEELER, District Judge. These are corsets, of which cotton is the component material of chief value, trimmed at the top with lace. Paragraph 339 of the act of 1897 provides for a duty on "handkerchiefs, napkins, wearing apparel, and other articles made wholly or in part of lace." They have been assessed as articles made in part of lace, against a claim that they are within "wearing apparel of every description of which cotton is the component material of chief value," provided for in paragraph 314. The lace is not brought into their structure, and they do not appear to be articles made in any part of lace, although they are to some extent trimmed with lace. Decision reversed.

**VOLKMAN v. UNITED STATES.**

(Circuit Court, S. D. New York. January 18, 1900.)

No. 2,916.

**CUSTOMS DUTIES—CHOCOLATE.**

The dutiable value of chocolate packed in tin boxes should be arrived at by adding the number of pounds of both the chocolate and the tin coverings, under Act 1897, par. 281, providing for a duty on the chocolate, and that "the weight and value of all coverings, other than plain wooden, shall be included in the dutiable weight and value" thereof.

Curie &amp; Smith, for importers.

Chas. D. Baker, Asst. U. S. Atty.

**WHEELER**, District Judge. Paragraph 281 of the act of 1897 provides for a duty on chocolate valued at not over 15 cents a pound of 2½ cents a pound; valued above 15 and not above 24 cents a pound, of 2½ cents a pound and 10 per cent. ad valorem; valued above 24 and not 35 cents a pound, 5 cents a pound and 10 per cent. ad valorem; and valued above 35 cents a pound, 50 per cent. ad valorem. And, further, that "the weight and value of all coverings, other than plain wooden, shall be included in the dutiable weight and value of the foregoing merchandise." The dutiable value per pound of this importation has been arrived at by adding the value of the tin boxes to that of the chocolate, and dividing the sum by the number of pounds of the chocolate alone, against a protest that the division should be by the number of pounds of both the chocolate and the tin coverings. The method adopted included the value and excluded the weight of the coverings from the computation. This brought the dutiable value above 24 cents per pound, and, with the weight of the coverings included, it would have been below, and the duty 2½ cents per pound less. The requirement is express that the weight, as well as the value, of the coverings "shall be included," and it was not. Decision reversed.

**HILLS BROS. CO. v. UNITED STATES.**

(Circuit Court of Appeals, Second Circuit. January 5, 1900.)

No. 80.

**CUSTOMS DUTIES—CLASSIFICATION—DRIED CURRANTS.**

"Dried currants," so called, from the Levantine, which are known to the trade by some 30 different names, indicating the islands or localities where grown, and which, although in fact raisins, made from a small grape, constitute the only currants known commercially or imported, are, except those grown on the island of Zante, entitled to free entry, under paragraph 489 of the free list of the tariff act of 1894, as "fruits, \* \* \* dried, not specially provided for," and are not dutiable under paragraph 217, which covers "plums, prunes, figs, raisins and other dried grapes, including Zante currants."

Appeal from the Circuit Court of the United States for the Southern District of New York.



This is an appeal from a decision of the circuit court, Southern district of New York, which affirmed a decision of the board of general appraisers, affirming a decision of the collector of the port of New York touching an importation of dried currants.

A. P. Ketchum, for appellant.

Henry C. Platt, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The importation was under the tariff act of 1894, the relevant paragraphs being:

"Par. 217. Plums, prunes, figs, raisins and other dried grapes, including Zante currants, one and one-half cents per pound."

"Par. 489 [of the free list]. Fruits, green, ripe or dried, not specially provided for in this act."

It has been stipulated, and apparently has never been disputed, that the currants in question were not the growth of the island of Zante. The question here presented first arose upon an importation of Austin, Nichols & Co. into the port of New York, and the board held that such currants were not within paragraph 217. In this decision the treasury department for some time acquiesced. Subsequently, a similar question arising in California, the board, upon the evidence in the Austin-Nichols Case and upon further proofs, reaffirmed its former decision. Appeal was taken to the circuit court, Northern district of California, additional testimony was taken in that court, and the decision of the board was reversed. In *re Wise* (C. C.) 73 Fed. 183. In the case at bar still further testimony was taken, but the board, referring to the *Wise* decision, held as follows: "In deference to a superior tribunal, we follow the said judicial ruling, and affirm the decision of the collector." This decision does not present a finding of fact by the board upon conflicting testimony of such a character that the reviewing court should hesitate to express a different conclusion, if, upon the whole record, such court were satisfied that the weight of testimony did not support such enforced finding. The circuit court, as a matter of comity, followed the decision in the Northern district of California, without discussing the merits of the case.

In the record now before this court we have—First, all the testimony which was before the California court, both that returned by the board and that taken in the court; and, second, some additional testimony which has been taken in the case at bar. The record is most voluminous, and a great deal of the testimony wholly immaterial and unnecessary to the decision. It will not be necessary to go at length into any discussion of the testimony. In the California case the inquiry seems to have been more particularly directed to the scientific and historical side of the case. Of the 23 witnesses examined in court (leaving out the importer and his two witnesses, Falkinham and Elliot), only four were sufficiently qualified to speak as experts touching the commercial meaning of the phrase "Zante currants"; the other dealers were shown to have no experience in trade and commerce at wholesale with imported dried currants. And of the four it appeared that the experience of nearly all was most limited.

The trade witnesses called here on behalf of the importers, however, had acquired their knowledge of trade terms by long years of dealing in this very commodity—dried currants—in large quantities in the markets of this country. If it were necessary to determine the commercial meaning of the words in controversy, the record before this court would seem to present an exposition of commercial dealings at and prior to the passage of the act of 1894 much more complete and satisfactory than that upon which the court in California undertook to pass. But it will not be necessary to inquire whether there is any commercial meaning of the term "Zante currants" which will include currants not in fact of Zante. The language which congress has employed, when read in the light of the facts in proof, is most clear and unambiguous.

Referring to the history and scientific classification of the dried imported currant of commerce, the court in California says it is "a kind of raisin made from a small, seedless grape, grown not only on the island of Zante, but also, and to a much greater extent, on the mainland of Greece and other neighboring localities. It derives the name of 'currants' from the fact that in times past it was shipped from the city of Corinth, Greece. In German it is called 'Korinthen'; in French, 'raisin de Corinthe'; in Spanish, 'pasas de Corinthe.' It is a raisin grape, as distinguished from a shrub currant, with which its name may be confounded, but from which it is entirely distinct,—the former belonging to the grapevine family, or *vitis vinifera*, of plants; the latter to the shrub, or *ribes*. \* \* \* On the vine it is a small-sized grape. When picked and dried, it is a dried grape, or kind of raisin." And the court quotes the testimony of Prof. Hilgard, of the state university (California), as follows: "[It is] a raisin made from a small grape which grows in the Ionian Isles, and also in the archipelago there; also on the mainland of Asia Minor. [And the witness subsequently added, "on the mainland of Greece."] They are dried and prepared in various ways, and shipped to the whole world. It is the only region that, so far, has produced this grape to perfection."

The conclusions of the California court, that these dried fruits "are a kind of raisins," and "are grapes dried," are abundantly supported by the record. Scientifically and botanically they are "raisins or other dried grapes," but popularly and commercially they are not known or classified as such. The testimony of the qualified experts,—not the botanists, but the trade experts,—who testified in California and before the board of appraisers, is overwhelming to the effect that in trade and commerce in this country, at and prior to 1894 (and, indeed, at all times), these dried currants have never been known or classed as raisins or as dried grapes, which are different and well-known articles of commerce. Now, it is manifest that congress fully understood this situation, and legislated upon the understanding that these so-called "currants" would not become dutiable as a part of the family of raisins or dried grapes unless they were specifically referred to, and therefore congress used the phrase, "raisins and other dried grapes, including Zante currants." If the contention of the government were sound, the words, "including Zante currants," would

be entirely superfluous. But we must assume that congress was satisfied to the contrary, and certainly the testimony now before the court shows quite clearly that the congressional understanding as to trade classification and nomenclature was correct.

It appears, moreover, that congress has known for a long time that there were to be expected among the importations, which its successive tariff acts would cover, not only "Zante currants," but also "other currants." Thus, the Revised Statutes imposed a duty of one cent a pound on "currants, Zante or other" (Schedule M); and the act of 1883 imposed a like duty, by paragraph 293, on "currants, Zante or other." The act of 1890 put all currants on the free list by the use of the same phrase in paragraph 578, "currants, Zante or other"; and the same words are found when all currants are, in the act of 1897, again made dutiable, the paragraph reading:

"Par. 264. Figs, plums, prunes and prunelles, two cents per pound; raisins and other dried grapes, two and one-half cents per pound; dates, one-half of one cent per pound; currants, Zante or other, two cents per pound."

Incidentally, it may be noted that this paragraph accentuates the fact that congress distinguishes between dried grapes and these so-called "currants" from the Levant, for it imposes different rates of duty upon them.

What, then, are currants "other than Zante"? The record shows that the only dried foreign currants known to trade and commerce (and paragraph 217 of the act of 1894 manifestly deals with dried fruits) are the fruits of the peculiar variety of the *vitis vinifera* already described, which reaches perfection only in the islands of the Grecian archipelago, and on the neighboring mainland of Greece and Asia Minor. The fruit of the shrub currant is not known in this form. Many names are given to these currants which we may comprehensively call "Levantine." Vostizza, Calamata, Patras, Amalia, Ithaca, Pyrgos, Provincial, Gulph, Cephalonia, are samples of the 30 or more names by which they are described in trade circulars, and under which wholesale dealers in the article are accustomed to order them. These different names, it is apparent, are mainly indicative of the place from which the fruit comes, and the evidence shows that the differences are more than nominal. It is testified that the fruit grown in different localities possesses different characteristics, and some of the witnesses before the board picked out samples which they identified as Vostizza, Zante, Provincial, etc., and pointed out the differences between the fruit. Inasmuch as congress has recognized the existence in trade and commerce of currants other than Zante, we must assume, in view of testimony that discloses the existence of these Vostizza, Calamata, Provincial, and other Levantine currants, and denies the existence of any other dried currants than the Levantine, that congress, when it used the phrase "currants, Zante or other," meant to differentiate the Zante currant from the Vostizza, the Calamata, the Provincial, and the other varieties of Levantine currants. That congress did make just this distinction in the Revised Statutes, and in 1883, 1890, and 1897, is proved by its continued use of the phrase, "currants, Zante or other." And there is no evidence at all which would indicate that, when that body passed the act of 1894, it had

any other or different understanding of the situation. In the acts of 1883 and 1890, the free list contained a comprehensive provision covering "fruits, green, ripe or dried, not specially provided for," which, of course, would include every kind of dried currants, unless it were elsewhere specified. In both of these acts congress withdrew from the operation of this free-list provision, not only Zante currants, but also all the other Levantine currants,—in 1883, by provisions in the duty schedules for "currants, Zante or other"; and in 1890, by a specific free-list provision for "currants, Zante or other." When the act of 1894 was framed, the same free-list provision remained, but congress withdrew from it, not "currants, Zante or other," but only "Zante currants"; the phraseology of paragraph 217 being "plums, \* \* \* raisins and other dried grapes, including Zante currants, one and one-half cents per pound." The conclusion seems irresistible that the "other currants," whose existence as something different from Zante currants congress had recognized for 20 years, remained within the provisions of the free list, since they were not withdrawn therefrom by the form of words congress had always used before when imposing duty upon them, and which form of words it used three years later, when it again laid duty on "currants, Zante or other." Act 1897, par. 264. When, therefore, we find that the only "other currants" known to commerce are these Levantine currants, not of Zante, it must be inferred that congress did not intend, nor did it use language appropriate, to sweep them out of the comprehensive provision of the free-list paragraph covering fruits, green, ripe, or dried. Since it is undisputed that the currants now under consideration are not the growth of the island of Zante, but are Amalias and Provincials, and within the class known to congress as "other currants," they were entitled to free entry, under the tariff act of 1894. The decision of the circuit court is reversed.

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UNITED STATES v. RICHARD et al.

(Circuit Court of Appeals, Second Circuit. January 5, 1900.)

No. 82.

CUSTOMS DUTIES—CLASSIFICATION—PAINTED TILES.

Articles composed of tiles, which are put together in rows before being fired, their faces forming a plane surface, on which a picture is painted with brown mineral paint, mixed with oil or water, the tiles being then separated and fired, by which process the color of the painting is changed from brown to blue, and the surface of the tile is glazed, after which the tiles are reassembled and framed, in which condition they are imported, being used in the frames for wall decoration, or removed and set in mantles or wainscoting, are dutiable, under paragraph 94 of the tariff act of 1890, as "tiles glazed, painted or vitrified," and not under paragraph 485, as "paintings in oil or water colors."

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the circuit court, Southern district of New York, reversing a decision of the

board of general appraisers which sustained a ruling of the collector of the port of New York touching certain pictures on china or porcelain.

Henry C. Platt, for the United States.

Albert Comstock, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The importation was made under the tariff act of 1890, and the relevant paragraphs are:

"Par. 94. Tiles and brick, other than fire brick, not glazed, ornamented, painted, enameled, vitrified or decorated, 25 per centum ad valorem; ornamented, glazed, painted, enameled, vitrified or decorated, and all encaustic, 45 per centum ad valorem."

"Par. 100. China, porcelain, parian, bisque, earthen, stone and crockery ware, including plaques, ornaments, toys, charms, vases and statuettes, painted, tinted, stained, enameled, printed, gilded, or otherwise decorated or ornamented in any manner, 60 per centum ad valorem; if plain white, and not ornamented or decorated in any manner, 55 per centum ad valorem."

"Par. 465. Paintings in oil or water colors and statuary, not otherwise provided for in this act, 15 per centum ad valorem."

The collector classified the importation in suit under paragraph 94. The importers contend that it should have been classified under paragraph 465.

Precisely what the articles in question are will be apparent from a description of the way in which they are produced. Earthenware tiles, "in the white" and unfired, are assembled together in a single row, or in two or more superimposed rows, so as to make a plane surface. Upon this surface, not by stenciling or other mechanical process, but by freehand painting, there is depicted some landscape or figure or other artistic decoration. The painting is done with what are known as "mineral colours" (vitrifiable colors), and when applied they produce a brown painting on the white surface. The composite surface formed by the several tiles is then broken up, and the tiles are "fired." By this process the color of the painting is changed from brown to blue, and the surface of the tile is glazed, the result being the well-known Holland delft. The several tiles are then re-assembled, so as to present the picture which was painted on them, and are framed so as to retain their relative positions to each other. They are imported framed. With the frames on them they are used for wall decoration, and they may be removed from the frames, and set into mantles, or door panels, or wainscoting.

From the above description, it is apparent that each earthenware tile may properly be said to be glazed, painted, and vitrified, and, indeed, may quite fairly be held to be ornamented or decorated; for inspection of the samples shows that the fraction of the entire painting which is found on each tile has made it more ornamental and decorative than it was before. Moreover, if it be assumed that the assembling of these painted and vitrified tiles, in such a way that the aggregation of two or more of them will make up a single picture, constitutes an advance beyond the group of articles known as tiles, nevertheless the importer cannot prevail if the result of such an advance has been merely the production of an earthenware ornament

painted or otherwise decorated. Such painted earthenware would be dutiable, under paragraph 100, at 60 per centum,—a higher rate than that assessed on painted tiles. Whether or not the importations in this case are within the provisions of paragraph 100 need not be decided; it will be sufficient to dispose of the contention presented in the importer's protest, viz. that they are paintings, within the meaning of paragraph 465.

The general subject of duties upon artistic productions was discussed in *U. S. v. Perry*, 146 U. S. 71, 13 Sup. Ct. 26, 36 L. Ed. 890, and it was there pointed out that the special favor extended by congress in the low rate upon paintings in oil or water colors is accorded only to such productions as are recognized to belong to the domain of high art, and does not cover minor objects of art, intended also for ornamental purposes, such as statuettes, vases, plaques, drawings, etc. Save for the fact that it takes two or more tiles to make up the complete picture, these importations are in no respect different artistically from the painted earthenware plaques which are specifically included in paragraph 100. The plaque is round, the tile straight-sided, but both are of the same material, are painted with the same colors, transformed in the same way by the application of heat, with the same freehand execution, and are used for the same purposes. The circuit court held, and the importer does not seem to dissent from such conclusion, that "upon the evidence [these importations] would not appear to have been known in commerce as oil paintings or water-color paintings." But we are unable to concur in the further conclusion of the circuit court that congress intended paragraph 465 to cover any paintings but such as were known in commerce as "oil paintings" or as "water-color paintings." Undue weight seems to have been given in the opinion below to the circumstance that, presumably for convenience of expression, the words of the statute are so transposed as to read "paintings, in oil or water colors," instead of "oil or water-color paintings." The meaning of both phrases, when read in connection with the rest of the statute, seems to us the same. The decision of the circuit court is reversed.

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#### ZIMMERLING v. HARDING.

(Circuit Court of Appeals, Third Circuit. January 2, 1900.)

No. 34.

#### INTERNAL REVENUE—TAX ON SUGAR REFINERS—ACT OF 1863.

A firm engaged in the business of boiling molasses to the point of crystallization, producing sugar with a residuum of molasses, were "sugar refiners," within the definition of the amended internal revenue act of March 3, 1863 (12 Stat. c. 74), and subject to the tax thereby imposed on their product.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Robert Ralston and David W. Sellers, for plaintiff in error.

James M. Beck, for defendant in error.

Before **ACHESON** and **GRAY**, Circuit Judges, and **KIRKPATRICK**, District Judge.

**ACHESON**, Circuit Judge. John Zimmerling, the plaintiff below and in error, as surviving partner of Feltus, Zimmerling & Co., brought this suit to recover the sum of \$21,565.74, with interest, paid as internal revenue taxes by said firm to the defendant's intestate, Jasper Harding, who was United States collector of internal revenue for the First collection district of Pennsylvania, upon tax assessments alleged to have been erroneously made against said firm, as sugar refiners, for the period between March 3, 1863, and March 2, 1867. During that period Feltus, Zimmerling & Co. were engaged in the business of extracting sugar from molasses by boiling it to the point of crystallization, and then passing it into an open vessel, in which it was stirred, and afterwards passing it into iron molds, from which the uncrystallized molasses was drained off; the final products being raw sugar and a residuum of low-grade molasses, of an aggregate value greater than the molasses from which they were produced, and which products the firm sold.

Act March 3, 1863 (12 Stat. 713, 716), amendatory of Act July 1, 1862, *inter alia*, enacted:

"That section seventy-five be \* \* \* amended \* \* \* by striking out the following words: 'On sugar refined, whether loaf, lump, granulated, or pulverized, two mills per pound; on sugar refined, or made from molasses, sirup of molasses, melado or concentrated melado, two mills per pound,' and inserting in lieu thereof as follows: 'Sugar refiners shall pay one and one-half of one per cent. on the gross amount of the sales of all the products of their manufactories: provided, that every person shall be regarded as a sugar refiner under this act, whose business it is to advance the quality and value of sugar by melting and recrystallization, or by liquoring, claying, or other washing process, or by any other chemical or mechanical means; or who shall advance the quality or value of molasses and concentrated molasses, melado or concentrated melado, by boiling or other process.'"

The case turns upon the construction of this provision of the act of 1863, which was substantially re-enacted by the internal revenue act of June 30, 1864 (13 Stat. 223, 265), and that of July 13, 1866 (14 Stat. 98, 129), and was in force during the period covered by the plaintiff's claim. The question to be determined is whether or not the extracting of sugar from molasses by boiling in the manner above set forth by Feltus, Zimmerling & Co., and the sale by them of the products of their manufactory, namely, the sugar so produced and the residuum of molasses, made them liable for the prescribed tax. Looking at the act of 1863 in its entirety, and having regard to its purpose, we think that one who boiled molasses, and thereby extracted sugar therefrom, leaving a residuum of molasses, which products were, in the aggregate, of an enhanced value over the unboiled molasses, was a "sugar refiner," within the meaning of the act, and liable to the tax thereby imposed. Undoubtedly one who produced sugar from molasses by boiling, as practiced by Feltus, Zimmerling & Co., was taxable for the sugar so made, under the said act of July 1, 1862 (12 Stat. 463). That act imposed a tax of two mills per pound "on sugar, refined, whether loaf, lump, granulated, or pulverized"; and the same tax was imposed "on sugar, re-

fined or made from molasses, sirup of molasses, melado or concentrated melado." All these sugars were rated alike for the purpose of taxation. Moreover, it will be perceived that in connection with the manufacture of sugar from molasses the act of 1862 used the word "refined" as synonymous with the word "made." The language there employed is, "refined or made from molasses." Now, manifestly, it was not intended by the act of 1863 to diminish the subjects of taxation. The purpose was just the reverse. The enacting clause reads, "Sugar refiners shall pay one and one-half of one per cent. on the gross amount of the sales of all the products of their manufactories." Then, to avoid a too limited construction of the phrase "sugar refiners," there was added the proviso giving the legislative definition of the term, and expressly bringing under the operation of the act every person "who shall advance the quality or value of molasses \* \* \* by boiling or other process." The declared purpose, *inter alia*, was to impose the prescribed tax on "the gross amount of the sales of all the products" of any manufacturer who should "advance the quality or value of molasses" by "boiling or other process." Now, by their practice of boiling molasses to the point of crystallization, and their subsequent manipulation of it, Feltus, Zimmerling & Co. produced sugar and a residuum of salable molasses, and these combined products were more valuable than the molasses before it had received such treatment. It seems to us, then, that Feltus, Zimmerling & Co. came within both the letter and the spirit of the law. Whether or not they were "sugar refiners," within the popular acceptance of the term, is immaterial. The legislative definition is conclusive here. In confirmation of our construction of the act of 1863, we may add that it is conclusively shown by the evidence that it is impossible to advance the quality or value of molasses by boiling unless sugar is thereby extracted from it. This fact presumably was known to the lawmakers. To give any effect whatever to this provision of the act, the process practiced by Feltus, Zimmerling & Co. must be held to be within the act. We think that the judgment of the circuit court was right, and accordingly it is affirmed.

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In re SCHEITLIN.

(Circuit Court, E. D. Missouri, E. D. January 9, 1900.)

No. 4,251.

INTERSTATE COMMERCE—STATE REGULATIONS—OLEOMARGARINE LAW OF MISSOURI.

The provision of the oleomargarine law of Missouri (Sess. Acts 1893, p. 26, § 2) prohibiting the manufacture or sale within the state of any substance "in imitation or semblance of natural butter," or with which any substance has been combined "for the purpose or with the effect of imparting thereto a yellow color, or any shade of yellow, so that such substitute shall resemble yellow or any shade of genuine yellow butter," is a proper regulation for the prevention of fraud and deception, which is within the police power of the state, and its enforcement as to oleomargarine brought from other states, and sold in the original packages, is



not a violation of any rights secured by the interstate commerce clause of the constitution of the United States.

This was an application by Charles Scheitlin for a writ of habeas corpus.

Thomas B. Harvey, for relator.

Taylor & Erd, for respondent.

ADAMS, District Judge. This case is submitted on the petition for the writ of habeas corpus and the return thereto. It appears that the Capital City Dairy Company, a corporation of Ohio, is engaged in the manufacture and sale of oleomargarine; that the relator is its agent engaged in selling in St. Louis, Mo., the product of his principal in original unbroken packages only; that on the 2d day of December, 1899, an information was duly filed in the St. Louis court of criminal correction charging the relator with unlawfully selling and offering for sale oleomargarine which then and there resembled yellow, or a shade of genuine yellow, butter, contrary to the form of statute in such case made and provided; that upon this information the relator was arrested, found guilty, and adjudged to pay a fine of \$50, and for the nonpayment of which he was, by an order of court, committed to the custody of the sheriff for imprisonment. The petition for the writ of habeas corpus charges that the law of Missouri under which the prosecution of relator was had, in so far as it attempts to prohibit the sale in this state of oleomargarine in original packages, when brought here from another state in which it is manufactured, is repugnant to section 8 of article 1 of the constitution of the United States, which confers upon congress power to regulate commerce among the several states. Section 2 of the act of Missouri approved April 19, 1895 (Sess. Acts 1895, p. 26), provides as follows:

"No person shall by himself, his agents or employees, produce or manufacture any substance in imitation or semblance of natural butter, nor sell nor keep for sale, nor offer for sale any imitation butter made or manufactured, compounded or produced in violation of this section, whether such imitation butter shall be made or produced in this state or elsewhere."

This section elsewhere provides:

"That no person shall combine any animal fat, or vegetable oil, or other substance with butter, or combine therewith or with animal fat or vegetable oil, or combination of the two, or with either one, any other substance or substances whatever, any annatto or compound of the same, or any other substance or substances, for the purpose or with the effect of imparting thereto a yellow color, or any shade of yellow so that such substitute shall resemble yellow or any shade of genuine yellow butter."

There is no claim that there is any want of evidence of illegality in the proceedings which resulted in the imprisonment of the relator, other than that the law itself under which the conviction was had is unconstitutional, being violative of the commerce clause of the constitution, in this: that it—the act of Missouri—prohibits the sale of imported oleomargarine in the original package if the same "resembles yellow or any shade of genuine yellow butter." This contention raises the question whether the act of Missouri in ques-

tion constitutes an unlawful interference with interstate commerce, or whether, on the other hand, it constitutes a fair and lawful exercise of the police power of the state. I am relieved from the necessity of giving this question an original, independent consideration for the reason that the same has been heretofore exhaustively considered by the supreme court of the United States in a variety of decisions, from which, it seems to me, a rule of conduct for trial judges is clearly laid down and established. In the case of *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154, 39 L. Ed. 223, the supreme court had occasion to consider a statute of the commonwealth of Massachusetts very similar to that of Missouri now under consideration. The Massachusetts act made it unlawful for any person to sell any article, product, or compound made wholly or partly out of any fat, oil, or oleaginous substance, or compound thereof, not produced from unadulterated milk or cream of the same, "which shall be in imitation of yellow butter produced from pure unadulterated milk or cream of the same." That act was assailed as unconstitutional for the same reasons as the Missouri act is now challenged. After a careful consideration of the prior adjudicated cases bearing upon the exercise of the police power of a state as affected by the commerce clause of the constitution, the supreme court in that case concluded its opinion as follows:

"It has, therefore, been adjudged that the states may legislate to prevent the spread of crime, and may exclude from their limits paupers, convicts, persons likely to become a public charge, and persons afflicted with contagious or infectious diseases. These and other like things having immediate connection with the health, morals, and safety of the people may be done by the states in the exercise of the right of self-defense. And yet it is supposed that the owners of a compound which has been put in a condition to cheat the public into believing that it is a particular article of food in daily use, and eagerly sought by the people in every condition of life, are protected by the constitution in making a sale of it against the will of the state in which it is offered for sale, because of the circumstances that it is an original package, and has become a subject of ordinary traffic. We are unwilling to accept this view. We are of opinion that it is within the power of a state to exclude from its markets any compound manufactured in another state which has been artificially colored, or adulterated so as to cause it to look like an article of food in general use, and the sale of which may, by reason of such coloration or adulteration, cheat the general public into purchasing that which they may not intend to buy. The constitution of the United States does not secure to any one the privilege of defrauding the public. The deception against which the statute of Massachusetts is aimed is an offense against society, and the states are as competent to protect their people against such offenses or wrongs as they are to protect them against crimes or wrongs of more serious character; and this protection may be given without violating any right secured by the national constitution, and without infringing the authority of the general government. A state enactment forbidding the sale of deceitful imitations of articles of food in general use among the people does not abridge any privilege secured to citizens of the United States, nor in any just sense interfere with the freedom of commerce among the several states. It is legislation which can be most advantageously exercised by the states themselves."

I need not further comment upon or quote from this decision of the supreme court. It is conceded by counsel to be controlling authority in the case now under consideration, unless the same has been overruled by a later decision of that court. It is contended

that the supreme court, in the case of *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. 757, 43 L. Ed. 49, has practically overruled the doctrine of the *Plumley Case*, and it is to this contention that I have given very careful consideration; especially so in the light of the fact that the circuit court for the district of Minnesota in the case *In re Brundage* (C. C.) 96 Fed. 963, has reached a different conclusion than that to which I am irresistibly brought. In approaching a consideration of the *Schollenberger Case*, it is well to distinctly understand the question there involved. The act of Pennsylvania under which a conviction was had in that case is as follows:

"No person, firm or corporate body shall manufacture out of any oleaginous substance, or any compound of the same other than that produced from unadulterated milk or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale or have in his, her or their possession with intent to sell the same as an article of food."

It is observed at the outset that the law of Pennsylvania absolutely prohibits the sale of oleomargarine within the confines of the state. The law of Massachusetts under which the *Plumley Case* arose does not prohibit the sale of oleomargarine, but only prohibits its sale when made in imitation of yellow butter; in other words, prohibits the coloring of oleomargarine so as to resemble yellow butter, practically the same as the statute of Missouri now under consideration. The supreme court, in its opinion in the *Schollenberger Case*, analyzes the *Plumley Case*, and distinguishes it from the *Schollenberger Case*; saying as follows:

"The statute in that case [*Plumley v. Massachusetts*] prevented the sale of this substance in imitation of yellow butter. \* \* \* This court held that a conviction under that statute for having sold an article known as 'oleomargarine,' not produced from unadulterated milk or cream, but manufactured in imitation of yellow butter produced from pure unadulterated milk or cream, was valid. Attention was called in the opinion to the fact that the statute did not prohibit the manufacture or sale of all oleomargarine, but only such as was colored in imitation of yellow butter produced from unadulterated milk, or cream of such milk. If free from coloration or ingredient that caused it to look like butter, the right to sell it in a separate and distinct form, and in such manner as would advise the consumer of the real character, was neither restricted nor prohibited. The court held that under the statute the party was only forbidden to practice, in such matters, a fraud upon the general public; that the statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food, and that it compels the sale of oleomargarine for what it really is by preventing its sale for what it is not; that the term 'commerce among the states' did not mean a recognition of a right to practice a fraud upon the public in the sale of an article even if it had become the subject of trade in different parts of the country. It was said that the constitution of the United States did not take from the states the power of preventing deception and fraud in the sale within their respective limits of articles, in whatever state manufactured, and that that instrument did not secure to any one the privilege of committing a wrong against society. It will thus be seen that the case was based entirely upon the theory of the right of a state to prevent deception and fraud in the sale of any article, and that it was the fraud and deception contained in selling the article for what it was not, and in selling it so that it should appear to be another and a different article, that this right of the state was upheld. The question of the right to totally prohibit the introduction from another state of the pure article did not arise, and, of course, was not passed upon."

In so distinguishing between the Plumley Case and the Schollenberger Case, the court concludes that the act of Pennsylvania is violative of the commerce clause of the constitution in that it entirely prohibited the sale of oleomargarine within the confines of the state, even when the same was manufactured in another state and shipped into the state in the original package, for sale within the state in such original package. It is true the supreme court in the Schollenberger Case declared that pure oleomargarine was an article of commerce within the meaning of the commerce clause of the constitution, but I cannot bring myself to the conclusion, as contended by the relator in this case, that the supreme court in that case decided that, because oleomargarine was the subject of commerce between the states, therefore no restrictions or limitations upon its sale within a state can be made by the legislature of that state, provided only the article be pure, wholesome, and unadulterated of its kind. I believe the doctrine of the Plumley Case is and ought to remain in force, and that, notwithstanding oleomargarine is a subject of commerce between the states, any state has the undoubted right to so legislate with respect to it, in the exercise of its police power, as to prevent imposition, fraud, and deception upon the public; and this is what the act of the state of Missouri, now under consideration, alone attempts to do. It simply singles out one color, and enacts that that color, because of the likelihood that its use would deceive the unwary into purchasing what they do not desire, shall be prohibited. It leaves the range of all the other colors open to the manufacturer and distributor, and can, therefore, not be said to be prohibitive in its character.

The foregoing are the conclusions which I have reached from a careful consideration of all the cases to which my attention has been called. They are nearly all of them referred to and considered in the Plumley and Schollenberger Cases, and I have, therefore, not deemed it profitable to take them up and give them a separate consideration. It results, from the foregoing views, that the relator's imprisonment is not unlawful, and that he must be remanded.

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CHURCH & DWIGHT CO. v. RUSS et al.

(Circuit Court, D. Indiana. January 23, 1900.)

No. 9,580.

TRADE-MARKS—INFRINGEMENT.

A trade-mark used by the owner on packages of baking soda and saleratus manufactured by it is infringed by the use thereof by another on packages of baking powder, the articles being of the same class.

Dickerson & Brown, for complainant.  
Andrew Anderson, for defendants.

BAKER, District Judge. This is a suit to enjoin the infringement of a trade-mark or trade-symbol, and to recover damages for its infringement. It is alleged that the complainant since July 1, 1896, has been engaged in the state of New York in preparing

and marketing baking soda and saleratus used for cooking purposes, and prior to that time its predecessor, under the name of Church & Co., had been engaged in the same business at the same place. On July 1, 1896, the complainant succeeded to the business of the firm of Church & Co., and to all its interest in said business, including any and all trade-marks and trade-names used by said firm in its business, and to the rights thereunder which had accrued to that firm. Since the year 1874 the complainant and its predecessor have prepared and put upon the market a new and original preparation of soda and saleratus to be used for cooking purposes, and, to indicate the origin and genuineness of the preparation, it and its predecessor have put upon the packages containing the preparation marketed by them, as a trade-mark and trade-symbol, a representation of a bared arm, the hand grasping the handle of a hammer; the arm being shown raised in the position which it would assume when about to strike with the hammer. At all times since 1874 the complainant and its predecessor have prepared soda and saleratus used for cooking purposes, and placed them on the market in packages having this trade-mark upon them. The complainant's predecessor devised and adopted the trade-mark, which was different from any which had been used to designate soda and saleratus. This trade-mark has been universally known and recognized as indicating that the articles or packages having such trade-mark were manufactured by the complainant or its predecessor, and said trade-mark became, and ever since has been, a valuable property right, and a protection to purchasers of soda or saleratus used for cooking purposes made and sold by complainant and its predecessor. The above-specified trade-mark is the exclusive property of the complainant, and it is entitled to its sole and exclusive benefit and use. The complainant and its predecessor have at all times insisted on its trade-mark, and have notified the public thereof. This trade-mark has become universally known as the property of the complainant and its predecessor, and has been uniformly respected as such until its infringement by respondents. For the purpose of further informing the public of the complainant's rights in and to said trade-mark, it caused it to be registered on January 26, 1897, according to the statutes of the United States. This trade-mark has been used by the complainant and its predecessor for more than 20 years continuously in connection with packages containing soda and saleratus, in commerce with Canada and other foreign countries, and has been very extensively used throughout the United States. The soda and saleratus prepared and sold by it and its predecessor have been of a superior quality, and have been prepared for the market with care, according to their peculiar methods; and the soda and saleratus have met with great favor since they were placed upon the market, and the demand for them has increased from year to year. The exclusive right to this trade-mark is of great value in its business, and the respondents' infringement of it has caused great and irreparable loss, to an amount exceeding \$5,000. The respondents are engaged in manufacturing and selling baking powder used for cooking pur-

poses, the active ingredient of which is soda, prepared and put up in packages having a representation exactly similar to the trade-mark of the complainant. It is further alleged that the respondents, knowing the high reputation and deserved celebrity of the baking soda and saleratus manufactured and sold by the complainant, have pirated its trade-mark, with the intent to enlarge their sales of baking powder, and to deceive the public into the belief that the baking powder put up in packages having said trade-mark is manufactured and sold by the complainant, or with its authority and consent. The complainant has notified the respondents of its right to the exclusive use of said trade-mark, and has requested them to desist from its use, which they have refused to do, and they insist on their right to use such trade-mark upon the packages of baking powder sold by them. The respondents admit all the material facts above stated, except that they deny they infringe the complainant's trade-mark by using the same on their packages of baking powder, because, as they allege, baking powder does not belong to the same class of goods as baking soda and saleratus. They also deny that they intend to, or do, deceive the public by using the complainant's trade-mark on their baking powder, or that the complainant is damaged by such use. They also allege that on March 18, 1896, they registered said trade-mark, in accordance with the statute of the state of Indiana, to be used upon packages of baking powder manufactured and sold by them.

The evidence is conflicting on the question whether the public are, or are likely to be, deceived by the respondents' use of the complainant's trade-mark. The averments of the complaint and the admissions of the respondents make it manifest that the complainant is, and long has been, the exclusive owner of the trade-mark alleged to be infringed. The respondents admit that they have appropriated the complainant's trade-mark for use upon packages of baking powder, and assert their right to continue its use on the ground that the complainant has always used its trade-mark on packages of baking soda and saleratus, and never upon baking powder, and that the latter is a different class of goods from the former, and that therefore the respondents do not infringe the rights of the complainant by the use of its trade-mark on their packages of baking powder. It is also insisted that the public is not deceived, or likely to be deceived, nor is the complainant injured, by such use.

The tendency of the courts at the present time seems to be to restrict the scope of the law applicable to technical trade-marks, and to extend its scope in cases of unfair competition. *Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144; *Laughman's Appeal*, 128 Pa. St. 1, 18 Atl. 415, 5 L. R. A. 599; *Koehler v. Sanders*, 122 N. Y. 65, 25 N. E. 235, 9 L. R. A. 576; *Castle v. Siegfried*, 103 Cal. 71, 37 Pac. 210; *Fleischmann v. Starkey* (C. C.) 25 Fed. 127. As this case falls more appropriately under the head of an infringement of a technical trade-mark, rather than under the head of unfair competition, it becomes desirable to ascertain as nearly as may be the distinctions, as well as the points of resemblance, between them. The underlying principle of each is the same, namely, the preven-

tion of that which in its operation and results, and usually in intention, is a fraud upon the public, and an injury to the rival trader. That this is the underlying principle is clearly shown in the leading case on technical trade-mark law (*Canal Co. v. Clark*, 13 Wall. 311, 322, 20 L. Ed. 581, 583), where the supreme court says:

"This will be manifest when it is considered that, in all cases where rights to the exclusive use of the trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the cases."

But, while the idea of fraud or imposition lies at the foundation of the law of technical trade-marks as well as the law of unfair competition, it must be borne in mind that fraud may rest in actual intent shown by the evidence, or may be inferred from the circumstances, or may be conclusively presumed from the act itself. In the case of unfair competition the fraudulent intent must be shown by the evidence, or be inferable from the circumstances, while, in the case of the use by one trader of the trade-mark or trade-symbol of a rival trader, fraud will be presumed from its wrongful use. It is commonly said that there is a right of property in a technical trade-mark, and an infringement of it is spoken of as a violation of a property right. Whether this view be correct or not is quite immaterial, because it is universally agreed that some of the rights which are incident to property do inhere in a technical trade-mark. The cases all agree that no one has a right to use another's trade-mark in connection with similar goods; and if he does so use it, and persists therein after being requested to desist, the fraud and imposition which constitute the essence of the injury will be presumed to exist, and relief will be granted without further proof. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 548, 549, 11 Sup. Ct. 396, 34 L. Ed. 997. In strict trade-mark cases, such as the present case is, a fraudulent intent to injure the complainant, or an actual misleading of the public, need not be proved, as it will be presumed. In *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, *supra*, the supreme court says:

"The jurisdiction to restrain the use of a trade-mark rests upon the ground of the plaintiff's property in it, and of the defendant's unlawful use thereof. *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69. If the absolute right belonged to the plaintiff, then, if an infringement were clearly shown, the fraudulent intent would be inferred; and, if allowed to be rebutted in exemption of damages, the further violation of the right of property would nevertheless be restrained. *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828; *Mendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526."

The complainant having acquired the exclusive right to the use of the trade-mark upon baking soda and saleratus, the remaining question is this: Does the baking powder of the respondents belong to the same class of goods as the baking soda and saleratus of the complainant? The respondents admit that their baking powder consists of 25 per cent. of soda, mixed with 75 per cent. of corn-meal starch and tartaric acid. The greater part of the baking powder consists of the starch, used simply as a drier to absorb the moisture

to which the baking powder may be exposed, and thus to prevent the formation of carbonic acid gas by the chemical combination of the soda and acid. Consequently, every time the respondents sell a package of their baking powder, having the complainant's trade-mark upon it, they are actually selling a package a material part of which consists of baking soda. Soda and baking powder are used for the purpose of leavening or lightening dough in the manufacture of bread and cakes, as well as for other domestic uses. They are generally handled by the same class of dealers, and are purchased by the same class of customers. Either is indifferently used, as may be most convenient, to accomplish the same object. To the extent that baking powder is used, to that extent it will necessarily displace the use of soda for baking purposes. They belong to the same class of goods, coming in direct competition with each other in sale and use for the same purpose. The public would readily suppose that the baking powder bearing the complainant's trade-mark was either manufactured by it, or by some one having its authority and consent, and that it vouched for the superiority and high character of the goods bearing such trade-mark. Goods are in the same class whenever the use of a given trade mark or symbol on both would enable an unscrupulous dealer readily to palm off on the unsuspecting purchaser the goods of the infringer as the goods made by the owner of the trade-mark, or with his authority and consent. The fact that the complainant has not used its trade-mark upon packages of baking powder constitutes no ground of defense. It has the right to manufacture or sell baking powder, and to use its trade-mark in connection with such manufacture or sale. The right to use its own trade-mark upon baking powder manufactured or sold by it would be valueless if all others were at liberty to use the same trade-mark on baking powder manufactured or sold by them. *Collins Co. v. Oliver Ames & Sons Corp.* (C. C.) 18 Fed. 561. A decree may be prepared in accordance with the foregoing views.

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**BRESNAHAN et al. v. TRIPP GIANT LEVELLER CO.**

(Circuit Court of Appeals, First Circuit. January 10, 1900.)

No. 293.

**1. PATENTS—SUIT FOR INFRINGEMENT—ESTOPPEL—EFFECT OF PRIOR DECISIONS.**

The fact that defendants in a suit for infringement of a patent, who have been granted a rehearing on the ground of newly-discovered evidence affecting the validity of the patent, were also parties or privies to other litigation in the same jurisdiction involving the same patent, which pending such suit passed to final decree sustaining the validity of the patent, does not estop them from contesting any of the issues opened by the rehearing, although the questions involved are subject to such fair and reasonable influence as may legally result, on grounds other than strict estoppel, from the prior adjudication; and, to warrant the overturning of such decision, the newly-discovered evidence presented must fully, clearly, and unmistakably establish, in connection with the other evidence in the case, that the prior decision was wrong.



**2. SAME—ANTICIPATION—MACHINE FOR BEATING OUT SHOE SOLES.**

The Cutcheon patent, No. 384,893, for improvements in machines for beating out the soles of boots and shoes, was not anticipated by either the Collyer patent, No. 178,598, nor by the De Forest patent, No. 270,936, for an improvement in presses for pressing material of a spongy nature, such as cotton or tobacco.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Frederick P. Fish and William Quinby, for appellants.

Causten Browne and Alexander Browne, for appellee.

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

ALDRICH, District Judge. The litigation involving the validity and scope of the Cutcheon patent has been protracted over a period of eight years. Questions in respect to its validity and scope, in different aspects, have been several times before the circuit court, and twice before the circuit court of appeals for the First circuit, wherein its patentability and its utility have been repeatedly sustained and explained. It is now strenuously urged by counsel for the Cutcheon interests that from the beginning the relations of the present appellants to the litigation involving the Cutcheon invention have been such, as parties or privies, as to estop them from further litigation in respect to all questions heretofore settled in this circuit in the various cases involving the Cutcheon device. The evidence before us tends strongly to show that the appellants were privy in fact to the various proceedings involved in this litigation; but if we were to assume that the present appellants were parties in a part of the prior litigation, and that they conducted, controlled, and paid the expenses of that in which they were not parties of record, we could not, in the present aspect of this case, accept such conditions as operating as a strict estoppel, for the reason that the final decree in the earlier litigation was entered after this proceeding was instituted, and is not so pleaded as to strictly and legally present the question of estoppel. Moreover, the petition of Hayes and Bresnahan, filed in this cause January 2, 1897, for leave to file a supplemental bill, concludes with the prayer that, upon the coming in of the proofs under the supplemental bill, they may be awarded a hearing of the original cause. On January 22d of the same year the circuit court, exercising the discretion which resides alone with such court, granted leave in general terms, and without limitation. Such order unquestionably entitles the appellants to a consideration de novo of all the questions at issue in this cause. Such questions, however, are subject to such fair and reasonable influence as may legally result, on grounds other than strict estoppel, from the prior determinations and adjudications upon similar facts in respect to the Cutcheon patent.

The petition for a rehearing on supplemental bill was grounded upon newly-discovered evidence involved in a prior patent issued to one Collyer, and another to one De Forest, which it is claimed are anticipations of the Cutcheon patent, or, if not to be accepted as such, at least serve to limit the first claim thereof. The petition was

filed, as has been said, on January 2, 1897, and, of course, subsequent to the adjudications in *Cutcheon v. Herrick* (C. C.; decided in 1892) 52 Fed. 147, approved by the court of appeals in *Herrick v. Leveller Co.*, 8 C. C. A. 475, 60 Fed. 80; subsequent to the adjudications in *Leveller Co. v. Rogers*, heard with other cases, to one of which the present appellants were parties (C. C.; 61 Fed. 289); and subsequent to the adjudications in *Leveller Co. v. Bresnahan* (decided by the circuit court in 1895) 70 Fed. 982, as approved and explained by the court of appeals upon *Bresnahan's* appeal, reported in 19 C. C. A. 237, 72 Fed. 920. While the prior litigation and these adjudications, for the reasons already stated, do not operate strictly as an estoppel, they do serve to forcibly confront us with considerations of stare decisis, considerations of public policy, considerations of laches, and considerations of the rule that the newly-discovered evidence, to entitle a party to a rehearing and a reversal of prior adjudications, must disclose clear and unmistakable anticipations of a patent which has been sustained on final hearing on the ground that it involved invention.

The rule of stare decisis is a salutary one, at least to the extent that a court should with reasonable stability adhere to its solemnly declared and authoritatively published decisions in respect to similar situations, and upon questions depending upon similar facts which relate to general interests, as well as to private and particular interests, and in respect to which the public, in a measure, is supposed to adjust itself and its business affairs; and even upon the view which we take, that the prior litigation is not, strictly speaking, an estoppel upon the defendant in respect to the questions now presented, the public view is one which we are bound to consider upon the question whether all that has been decided by the various courts, and all the business interests and conditions which have been established throughout the country in reliance thereon, should be unsettled and overthrown upon the ground of newly-discovered evidence, of a recorded and public character, like that of a patent, introduced into this proceeding nearly six years after the validity of the *Cutcheon* patent was put in issue in the *Herrick* Case, in which there was a final hearing in the circuit court, and an opinion reported in 52 Fed. 147; a hearing on appeal, reported in 8 C. C. A. 475, 60 Fed. 80; a hearing on a motion for a rehearing, which was denied, in the same case, November 16, 1893,—and nearly five years after the validity and scope of the patent were put in issue in a proceeding to which the present appellants were parties of record, and in relation to which there had been numerous hearings, including a hearing upon motion for preliminary injunction; another upon motion for contempt; a final hearing resulting in an opinion of the circuit court, reported in 61 Fed. 289; a hearing upon motion for preliminary injunction, resulting in the opinion of the circuit court published in 70 Fed. 982; and a hearing on appeal, wherein the decree of the circuit court was affirmed. 19 C. C. A. 237, 72 Fed. 920. Public policy requires that decisions which involve general law, and the determination of facts such as those involved in a patent which may concern the general public, should be adhered to, unless it shall subsequently be made

clearly to appear that the decision and the findings were erroneous, when, it goes without saying, the decision should be corrected. The reasons which are so often given for holding that the judgment estops, not only as to every ground of recovery or defense actually presented, but also as to every ground which might have been presented (*Southern Pac. R. Co. v. U. S.*, 168 U. S. 1, 50, 18 Sup. Ct. 18, 42 L. Ed. 355; *Columb v. Manufacturing Co.*, 50 U. S. App. 264, 267, 28 C. C. A. 225, 84 Fed. 592), are cogent reasons to be considered upon the question of reversing a long line of judicial decision upon a rehearing grounded upon newly-discovered evidence. To allow a party to come into court again and again after decision, with newly-discovered evidence, which, as said in *Southern Pac. R. Co. v. U. S.*, 168 U. S., at page 65, 18 Sup. Ct. 18, 2 L. Ed. 355, is simply cumulative, except in cases where the newly-discovered evidence is clear and vital, and the party is absolutely free from laches, would offend the doctrine so forcibly stated by Mr. Justice Field in *Stark v. Starr*, 94 U. S. 477, 485, 24 L. Ed. 276, 278, where it is said:

"It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit if the first fail. There would be no end to litigation if such a practice were permissible."

Under the constitution and the laws, every party is entitled to a full and fair trial, and this means that every party holds his property and his interests subject to the results fairly and reasonably reached by the constituted authorities under the limitations upon humanity. The theory of the judicial system is to give a party a reasonable day in court, and a trial as full, fair, and impartial as the lot of humanity will permit; but this theory does not contemplate that litigation shall be so interminable that private rights shall be practically incapable of vindication.

While the views which we have expressed in respect to stare decisis, public policy, and laches do not operate strictly as an estoppel under the circumstances of this case, such considerations have operated to create and sustain the rule which requires that the newly-discovered evidence, in order to be controlling, shall fully, clearly, and unmistakably establish, in connection with the other evidence in the case, that the former decisions between the same parties were wrong. In the present case, at an earlier stage (19 C. C. A. 237, 72 Fed. 920), on appeal from an earlier decree than the one based upon the newly-discovered evidence which we are now considering, the appellants then maintained that they furnished proofs in addition (not the present newly-discovered evidence) to the proofs adduced in the original case; and the full force of the rule as to the effect of prior determinations and adjudications in patent cases was there recognized by the court of appeals, which, in referring to the rule that subsequent discoveries should not narrow the claim as interpreted in *Herrick v. Leveller Co.*, supra, unless the newly-discovered evidence made a new case, said at page 924, 72 Fed., and at page 242, 19 C. C. A., "We would annul

the effect of our own determinations, and encourage interminable litigation, \* \* \* unless we apply this rule strictly." This is not a question as to the effect of prior decisions upon the same patent in another jurisdiction, but a question whether the newly-discovered evidence introduced under the supplemental bill on the rehearing is sufficient to warrant overturning prior decisions and determinations in our own circuit in respect to the same device; and this question, presented as a mixed question of law and fact, must be determined upon the evidence,—the old and the new,—and upon the circumstances of this particular case. The decisions (and there are many) all go at least to the extent of saying that the new evidence, to warrant it, must be so cogent and persuasive as to impress the court with the conviction that, if it had been presented and considered on the original hearing, it would have clearly produced a contrary conclusion from the one there reached. There are some cases where it is held that, if the claim is made that newly-discovered evidence or patents anticipate the patent previously sustained upon bona fide and strenuous contest, the anticipation must be described in full, clear, and exact terms. We do not consider it necessary to resort to this extreme rule, but are disposed to consider whether the situation now presented, which involves the prior determinations and adjudications, together with the old and the new evidence, presents a case which fairly calls for a result different from that heretofore reached in the circuit court and in the circuit court of appeals. The question of fact in patent causes is, in the first instance, of course, presented to the circuit court for its determination. The validity and scope of the Cutcheon patent had been frequently passed upon by the circuit court prior to January 22, 1897, when, through the medium of the supplemental bill, the De Forest and Collyer patents were introduced. We have no occasion to deal here with the question as to what would have been the probable effect of the newly-discovered evidence upon the hearing in the circuit court, which was necessarily involved in the consideration of the motion for a rehearing in that court; and, moreover, the question of the probable effect of the newly-discovered evidence upon the tribunal charged in the first instance with the determination of the facts is not now problematical, for the reason that after the motion for rehearing was granted, and the case reheard in the light of the newly-discovered evidence, and after patient consideration, the earlier decree in that court was affirmed, with an exhaustive opinion, which deals fully with the force of the evidence involved in the De Forest and Collyer patents. It would not be useful, and we do not feel called upon, to review or explain what has been said in the published opinions of the circuit court and the circuit court of appeals in the various stages of the prior litigation with respect to the validity and scope of the Cutcheon patent, or the breadth and scope of claim 1 of that patent. The present situation only requires that we should consider the newly-discovered evidence on which the appellants rely in connection with the other evidence in the case, and determine whether there is anything in the case as presented now which calls for a modification or reversal of the adjudications involved in the decree of the circuit court which was opened by

the order permitting the supplemental bill and the new evidence to be filed, and which was afterwards, upon rehearing and consideration, affirmed by that court.

As has been already said, the newly-discovered evidence on which the appellants relied was the Collyer patent, No. 178,598, dated June 13, 1876, for improvements in machines for the manufacture of boots and shoes, and the De Forest patent, No. 270,936, dated January 23, 1883, for improvements in presses, both of which were granted prior to the date of the Cutcheon invention. The opinion of Judge Colt on rehearing in this case (92 Fed. 391) presents an exceedingly careful analysis of the mechanism involved in the newly-discovered evidence, and its application, so far as it may be applied, to the mechanism involved in the Cutcheon invention. We might fairly and reasonably enough leave the weight and effect of the newly-discovered evidence involved in both patents upon the analysis accorded to it in the circuit court; for it seems to us that, in view of the whole situation, which includes, of course, the prior determinations and adjudications in respect to the Cutcheon patent, the circuit court was clearly right in treating the newly-discovered evidence as quite insufficient to change the results theretofore reached. Judge Colt, in his opinion on rehearing, significantly points out that the De Forest patent was borrowed from a different art; but let us, for a moment, look at this patent, not in the light of extremely refined and scientific conception and reasoning, but rather upon the practical view which, in a sense, at least, should govern a practical question relating to a practical machine to be used by practical men in the practical affairs of life. This patent, in general terms, presents a description of a device for improvements in presses; and, in the description, it is clearly and distinctly stated that "the invention relates to that class of presses which are designed and used for pressing materials of a spongy nature, such as cotton, tobacco, etc., but more especially for pressing and molding plug tobacco." Following this is a particular description as to how the plugs shall be formed and molded under pressure, and it will thus be seen that its chief and leading idea is its intended application to the tobacco industry, wherein it is intended to press the light and leafy tobacco substance into solid plugs of marketable shapes and forms. From beginning to end, the word "shoe" (in the sense of a leather shoe) or "leather" or "sole" does not appear in the description or the claims of the patent; and no line or word suggests in the remotest way the idea that the inventor intended it should be used, or that the inventor thought it capable of being used, in the shoe industry, or to fit leather to the form and shape of the human foot. If the fact (which is disputed) were conceded that ingenious and skillful experts may discover in its mechanism a latent and undisclosed capacity, rendering it susceptible of being transformed into a machine capable of beating out leather and shaping it to the foot, and thereby doing something that the inventor never dreamed it could do, it would not present an anticipation so clear and unequivocal as to warrant the court in disturbing its prior adjudications, made upon full and fair hearing, and upon consideration of prior submitted evidence and arguments. Such a disturbance of judicial decision

can only be justified by clear, unmistakable, and substantial proofs, where the party asking relief on the ground that the proofs are newly discovered is free from color of laches, and where it is clear that substantial rights have been violated. But, aside from this general view of the evidence which separates the two patents by a broad valley, the circuit court forcibly and particularly differentiates the two in respect to mode of operation and mechanical construction. We are quite content to leave the technical description of the merits of the De Forest patent, as applicable to the patent in suit, where the circuit court leaves it. Contrary to the view of the circuit court, we think the Collyer patent somewhat nearer to the one in suit than the De Forest patent, for it does relate to the same general art; but, as has been said with respect to the De Forest patent, it is impossible to find in the claims or the description a machine or device, described in clear and unmistakable terms, for doing the particular work of the Cutcheon machine in its particular way, or that it possessed mechanism for automatically moving one jack in one direction while the other is being moved in the opposite direction, in such order that the shoe on the one to which pressure has been applied may be removed while the other is being placed in position to move into pressure. We do not view this case as one involving a question whether the evidence was sufficient to have produced a different result if introduced on the original hearing; neither are we in a position to adopt the well-established rule that rehearings will not be granted upon the ground of newly-discovered evidence where the newly-discovered evidence is cumulative in its nature. Such questions are involved on consideration of a motion for rehearing. But in this case, the motion for rehearing having been granted, the question now is whether it is clear, in view of the new evidence and the old, and in view of the fair and reasonable presumptions arising from prior determinations and adjudications, that a different result should now be reached. On the whole, we do not feel warranted in holding that the newly-discovered evidence introduced upon rehearing under the supplemental bill, considered with the other evidence in the case, is sufficient, in respect to being clear and unmistakable anticipations of the Cutcheon invention, as to change the result of the litigation previously announced. The decree of the circuit court of February 23, 1899, confirming its earlier decree of March 19, 1894, is affirmed, with costs.

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LANE et al. v. WELDS et al.

(Circuit Court of Appeals, Sixth Circuit. December 4, 1899.)

No. 739.

1. JUDGMENT—RES JUDICATA—PERSONS CONCLUDED.

In order that one not a party of record, nor in privity with a party, shall be concluded by a judgment, on the ground that he assumed the burden of the defense in the suit, his action in that regard must have been open, and known to the opposite party.

2. PATENTS—INVENTION—WIRE FENCES.

The Hewitt patent, No. 316,458, for improvements in wire fences, the fence described being formed by a combination of crimped metal pickets,

and a series of cables formed of two wires twisted together, between which the pickets are held, is void for lack of patentable invention, as both elements were old, and the crimped pickets merely the equivalents of the notched or grooved wooden pickets known in the prior art.

**3. SAME.**

The Lane and Lane patent, No. 518,506, for an improvement in wire fences, which consists in incorporating in a wire picket fence crimped or corrugated wire pickets, with the reverse twisting of the strands of the longitudinal wires between the pickets, which was the usual mode of twisting such wires previously, when the fence was made in the field, whether the pickets were of metal or wood, is void for lack of invention.

**4. SAME.**

The incorporation upon an old art of a function of the mechanism commonly used to produce the fabric of the old art does not constitute invention which will sustain a patent.

**5. SAME—COMMERCIAL SUCCESS.**

The commercial success of a patented article is only one element to be considered, where patentability is otherwise in doubt.

**Appeal from the Circuit Court of the United States for the Eastern District of Michigan.**

This is a bill brought to restrain infringement of letters patent No. 316,458, issued March 31, 1885, to one W. Hewitt, which has been assigned to the complainants, and letters patent No. 518,506, issued April 17, 1894, to J. and C. Lane, the complainants below and appellants here. Both patents are for improvements in wire fences. The bill avers that the validity of the patents and the fact of infringement is res adjudicata by reason of a decree in a former suit upon the same patents, between complainants and one William Price, the defense having been made for Price by the present defendants in their own interest. The answer denies infringement; denies that defendants were parties or privies to the former suit, or in any way estopped thereby; and denies the validity of the patents involved. The decree was for the appellees, the lower court finding that defendants were not estopped by the decree in the former suit with Price, and that the patents involved were void.

R. A. Parker, for appellants.

James Whittemore, for appellees.

Before TAFT, LURTON, and DAY, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

1. The decree against Price, establishing the validity of the two patents upon which this suit is brought, does not estop the present defendants from challenging the validity of those patents. Defendants were not parties or privies to that suit, and had no direct interest therein. B. A. Weld, one of the defendants, was the patentee of a fence-making machine, which was capable of making many different kinds of wire and wire and slat fences. The patentee, or the firm of which he was a member, it does not clearly appear which, sold to one Price one of the Weld fence machines. They also sold him some crimped or corrugated wire pickets, which were capable of being used in the construction of many kinds of wire fences, including those covered by the Hewitt and Lane patents. Price was sued for making the Hewitt and Lane fence with the Weld machine. Neither the Weld fence machine nor the crimped pickets infringed either patent, as neither patent included any mechanism for the construction of the fence or the crimped or corrugated picket, except so far as such

pickets were one element in the fences covered by the claims of those patents. In fact, crimped or corrugated wire pickets were old, and could not have been the subject of any patent as an article of manufacture. Weld, therefore, had no interest in the suit of Lane and Lane against Price, except in so far as it limited the use of the Weld machine to fences not covered by the two patents owned by Lane and Lane, or to those having licenses under those patents. The claim that B. A. Weld, either for himself or the firm of which he was a member, assumed to defend that suit, and thereby estopped himself, is not satisfactorily made out. The most that can be said is that he at one time promised to defend same, and did pay five dollars to the solicitor employed by Price to obtain copies of the patents claimed by Lane and Lane. He, however, declined to carry out this promise, and refused to pay the retainer fee of counsel or the expense incident to making the necessary patent-office investigations. When Price found that Weld would not defend the suit, he abandoned the case, and suffered a decree to be taken upon an agreement by which the complainants in that suit waived an assessment of damages and paid the costs.

Aside from the unsatisfactory character of the evidence relied upon as establishing the fact that the defendants, or any one of them, did defend said suit, even so far as any defense was made, there is no evidence whatever going to show that the complainants in that suit knew anything whatever as to the interference of the present defendants with the defense of that suit. Indeed, it does not appear that the complainants in the Price suit even knew of the relation of Price to either B. A. Weld, or Weld & Co., or of the license which Price held under them to use and sell their machine. An estoppel must be mutual. If the defendants did not openly and avowedly, to the knowledge of the complainants, undertake the defense of that suit, the complainants would not have been estopped by the decree, if adverse to them, in a subsequent suit against the defendants. The principle is correctly stated thus in *Herm. Estop.* p. 157:

"If one not a party of record, nor in privity with a party of record, to a judgment, desires to avail himself of the judgment as an estoppel, on the ground that he in fact defended the action resulting in the judgment, he must not only have defended that action, but must have done so openly, to the knowledge of the opposite party, and for the defense of his own interests. That he employed an attorney who appeared for the defendant of record, and appeared as a witness for the defendant, is not sufficient."

In *Andrews v. Pipe Works*, 19 C. C. A. 548, 76 Fed. 166-173, 36 L. R. A. 139, a case decided by the court of appeals for the Seventh circuit, in reference to an estoppel originating in the defense of a suit to which the party against whom the estoppel was pleaded was not a party of record, the court, speaking by Woods, C. J., said:

"Estoppels in such cases, as in others, must be mutual, and it is not to be considered that *Andrews* and *Whitcomb* became bound by the decree, by reason of their participation in the defense, unless their conduct in that regard was open and avowed, or otherwise known to the opposite party, so that it, too, was concluded, or would have been by an adverse judgment. *Herm. Estop.* p. 157; 2 *Van Fleet*, Former Adj. § 523; 2 *Black*, Judgm. § 540; *Freem. Judgm.* § 189; *Lacroix v. Lyons* (C. C.) 33 Fed. 437; *Schroeder v. Lahrman*, 26 Minn. 87, 1 N. W. 801; *Association v. Rogers*, 42 Minn. 123, 43 N. W. 792; *Brady*



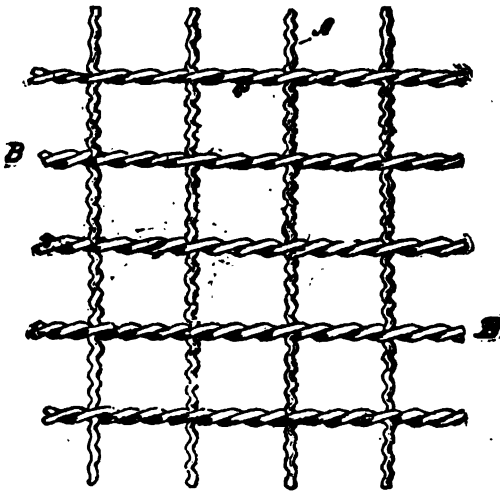
v. Brady, 71 Ga. 71; Majors v. Cowell, 51 Cal. 478; Allin's Heirs v. Hall's Heirs, 1 A. K. Marsh. 525."

In *Oramer v. Manufacturing Co.*, 35 C. C. A. 508, 93 Fed. 636, 637, where a like plea had been sustained by the court below, that court, speaking by Gilbert, C. J., said:

"In so holding, the circuit court applied the well-settled rule that one who, for his own interests, assumes the defense of an action, is bound by the judgment as if he had been a party thereto or in privity with the defendant. But it must not be overlooked that the rule is subject to the limitation that, in order that one not a party who has assumed the burden of the defense of an action shall be bound by the judgment therein rendered, his connection with the defense must be open and known to the opposite party."

2. The circuit court did not err in holding void both the Hewitt patent, No. 316,458, and the Lane and Lane patent, No. 518,506. The only claim of the Hewitt patent was for a new article of manufacture, "a metallic fabric composed of a series of corrugated, kinked, or crimped strips, rods, or pieces of metal, and of a series of wire cables, the strands of which, respectively, embrace and bind in each strip independently of every other strip, substantially as shown and described." The fence of the Hewitt patent in suit is shown by Fig. 2 of the patent, and the crimped picket by Fig. 4, both of which are shown below:

*Fig 2.*



*Fig 4*



The specifications recite that "the office of the corrugation, kinks, or bends in the strips is to form seats for and retain against displacement the strands or wires composing the cables, which latter, in being twisted about the strips, lodge, so to speak, or seat themselves, with

respect to given corrugations of said strip, and so remain in position." Fences wholly of wires were old. Examples are shown in patent No. 70,946 and No. 101,816 to W. R. Boerner. Fences of wire, with pickets of wood, were also old. Such fences are shown as common in the fence-machine patents to Fultz, No. 298,368, and in that to Mid-daugh & Wilcox, No. 309,724, as well as in patents for particular forms of such fences, examples of which are to be seen in patent to Thomas, No. 267,948, and to Lyne, No. 300,093. It is obvious that the substitution of metal for wooden pickets did not involve invention, inasmuch as both materials had long been used in the construction of pickets for wire fences, each material being a well-known substitute for the other.

If there is any patentable invention in Hewitt's wire fabric, it is in the combination of corrugated or crimped pickets and a series of cables formed of two wires twisted together, the pickets being held against displacement by the mode in which the strands of the cable seat themselves on opposite sides of each picket in the act of twisting. The corrugated or crimped picket used by Hewitt was old. It is found in the fence of Boerner's second patent, though not held in place as in Hewitt's fence. The patent of Seitzinger of 1871 is for a machine for crimping "square or round iron or wire on the edge before it is woven for fences, railing, coal screens," etc. The only office of the crimp or kink in the picket was to provide seats for the transverse wires to lodge themselves in the act of twisting, and thereby prevent slipping or other displacement. The same office was discharged by the angles or curves in the wire pickets of Boerner's first patent, though Boerner there limited himself to angles in opposite directions, the pickets being so placed in the construction of his fabric that two pickets would pass through the same twist in the crossing cable. But the function of the angle or bend was to prevent the embracing wires from slipping by furnishing them seats in which they might lodge themselves. Some method of locking wires crossing to prevent displacement of the perpendicular wire has always been necessary, and the evidence shows that, where two pairs of wires cross at right angles in wire fabric intended for screens, railings, or fences, it was old to provide the perpendicular wire with a crimp, bend, angle, or corrugation of some kind at the point of intersection, whereby the horizontal strands might find seats or places in which they might tightly lodge themselves, and bind the pickets against displacement. In an earlier patent granted to Hewitt, applied for at same time with that in suit, he provided against this displacement by making his pickets in the form of a spiral. The same necessity existed in fences when the pickets were of wood. Displacement was guarded against in some cases by notches, or grooves in the slat at points of intersection. This plan Hewitt says in his specifications was old. In others, the twisting of the strands of transverse wire against the sharp corners of flat or square wooden pickets effected a certain lodgment in the soft wood, and thus held the pickets firmly until decay of the wood should loosen them. To guard against the effect of water settling in the notches or grooves cut in the wood of the pickets, and

thus inducing decay and consequent looseness, Thomas, in his patent, No. 267,948, for a wire fence with wood pickets, provided pickets channeled around their entire surface, which answered the double purpose of carrying water, and at the same time furnishing a plurality of sharp ridges into which the binding wires would bury themselves and hold against displacement. Examples of methods adopted for providing the binding or twisted wires with seats in the wood palings of old forms of wire fence are seen in the patents for machines for constructing wire fences in the field granted to Fultz by patent No. 298,368, and to Middaugh and Wilcox, No. 309,724. All that Hewitt did was to take the well-known form of a crimped or kinked picket, and twist his transverse wires around it, just as had been common in fences of wire with wooden slats or pickets. This was not such a step as to constitute invention.

3. The Lane and Lane patent is equally void of invention. The only difference pointed out between the two earlier Hewitt patents and that patent lies in the fact that its claims describe the strands as being "alternately twisted upon the pickets from right to left and left to right." This limitation was inserted after the application had been rejected upon a reference to the Hewitt patents. After being thus amended, it was again rejected upon a reference to a patent to Moore, No. 17,692, and one to Matlock, No. 385,467. In the latter the reverse twisting between pickets is expressly described as one element in the claim. This reverse twisting between or on the pickets was confessedly old, and this admission was made by the patentees in a paper filed to obtain a reconsideration of the application, and the same admission is made now by counsel. Indeed, it is shown that neither the "spiral picket" fence of the first Hewitt patent, nor the "corrugated or crimped" picket fence of the second Hewitt patent, could be made in the field by any of the numerous fence machines which antedated Lane and Lane, without reversing the twisting between the pickets. Unless this was done, the strands in advance of the machine would become so twisted as that the machine could not move along the wires. This blocking of the machine might have been prevented by using a swivel at the point of finishing, but this would necessitate a new operation. The fact remains that the usual mode of constructing a wire fence, or a wood and wire fence, in the field, was to reverse the twisting between each picket. To allow a patent upon the result of this operation would be to find novelty in the usual mode of construction, and in a result which was commonly indispensable to the use of the usual mechanisms by which such fences were built. But it was insisted in the patent office that this usual mode of reversing the twist between pickets "gave no hint whatever of the fine results which are secured by incorporating with such reverse twisting the convoluted picket," and that, though "the invention is extremely narrow, yet, as it does not seem to be exactly met and the exact results obtained," the claim, as limited, should be allowed. Upon this argument the patent seems to have been issued. To this conclusion we cannot agree. The three forms of pickets preferred by Lane and Lane, and the results obtained by this operation of reverse twisting, are shown by Figs. 2, 3, and 4 of the patent, as follows:

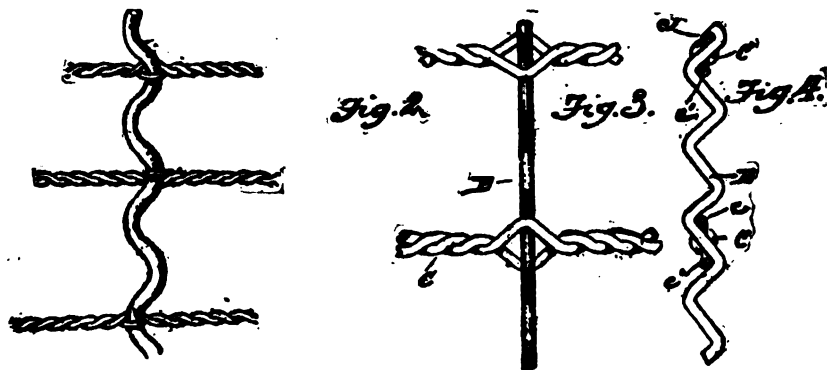


Fig. 2 shows what the patentees describe as a "wire spiral." Fig. 3 shows a "corrugated" picket, and Fig. 4 the "convaluted" picket. The specifications state: "The action of twisting thereby compels the pickets to assume the positions shown in Figs. 2 and 4, depending on whether the spirally twisted pickets or the convaluted pickets are used; the principle, however, being the same in either case." The so-called "convaluted" picket is substantially the "crimped or kinked" picket of the second Hewitt patent. Whether simply "corrugated," "convaluted," "crimped," "kinked," "spiral," or bent into "angles," the office is the same, namely, to furnish seats or lodging places for the binding wires, and thus prevent slipping. They were all old forms and equivalents for the notches or grooves or horizontal channels cut in wood pickets or pailings for the same purpose. No new result was reached, and no new method of producing the result is shown. If it was old to reversely twist the wires upon each picket, it must be evident that the same "fine result" asserted for the claims of the Lane and Lane patent must have resulted whenever any "crimped," "kinked," or "corrugated" picket fence was constructed in the field by any of the old fence machines, which could not be operated without reversing the crank so as to reversely twist between each picket. That which was commonplace, whether as a result directly sought or incident to a usual mode of construction, cannot be novel. It is, in effect, an effort to incorporate upon the old art a function of the mechanism used in producing the fabric of the old art. That this fabric has gone into extensive use is an unsafe criterion by which to judge its novelty. Other causes have doubtless co-operated in creating a large sale. The commercial success of a patented article is only one element to be considered where patentability is otherwise in doubt. *Manufacturing Co. v. Robbins*, 43 U. S. App. 391, 21 C. C. A. 198, 75 Fed. 17; *McClain v. Ortmayer*, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800. The decree holding both patents void and dismissing the bill must be affirmed.

## PERFECT CIGAR SHAPER CO. v. DOYLE et al.

(Circuit Court, E. D. Pennsylvania. January 18, 1900.)

No. 45.

## PATENTS—INFRINGEMENT—CIGAR SHAPERS.

The Ogden patent, No. 530,794, for a cigar mold, consisting of a body and a cap, so formed as to engage with each other, and to be retained in connection by the friction of the parts, *held* valid and infringed.

## In Equity.

This was a suit in equity for an infringement of a patent. On final hearing.

Charles N. Butler and Frank P. Prichard, for complainant.  
George C. Hazleton, Jr., for respondents.

McPHERSON, District Judge. This bill is filed to restrain the alleged infringement of letters patent No. 530,794 and No. 587,600, both of which are owned by the plaintiff. The first-named patent has the following claims:

"(1) A cigar bunch mold consisting of a tapering tubular body and a reversely tapering tubular cap, both of nonabsorbent material, one of said parts having at its large end a projecting flange serving to guide the other part into place, and to retain the same by friction thereupon, substantially as specified.

"(2) A cigar bunch mold consisting of a tapering tubular body and a reversely tapering tubular cap, one of said parts having at its large end a projecting flange serving to guide the other part into place, and to retain the same by friction thereupon, substantially as specified."

The third claim of the other patent is as follows:

"(3) A cigar shaper consisting of a tubular body and a tubular cap, said body and cap each having a beveled rim, one rim being adapted to engage with the other, the inner contour of the body and of the cap being continuities of each other."

I do not think it necessary to determine the validity of the third claim of No. 587,600, nor to decide whether or not the cigar shaper manufactured by the defendants infringes that claim. I am of opinion, however, that these shapers are a clear infringement of the two claims of No. 530,794, and nothing further need now be decided. Before the plaintiff's first patent was granted, no satisfactory cigar shaper had been invented. The makers of cigars recognized that such a shaper was much to be desired, and it was evident that a large supply could readily find a market. Other devices had previously been put into more or less extensive operation, but none of them had been successful at all points. None of them disclosed a mold or shaper such as No. 530,794 discloses, namely, a body and a cap so formed as to engage with each other, and to be retained in connection by the friction of the parts. This is the essence of the plaintiff's invention, and it was not anticipated by any patent that has been brought to our notice. It is therefore a valid invention, and, if it has been infringed by the defendant, the conclusion must follow that the plaintiff is entitled upon this patent to the decree sought.

In support of the denial of infringement, the defendants set up a patent granted to them, No. 585,348, under which they claim to be

manufacturing the shapers complained of. It is not necessary to decide whether shapers manufactured under this patent would infringe the plaintiff's patent No. 530,794; for an inspection of the shapers manufactured and sold by the defendants makes it plain that they are not made under their own patent. The essential feature of their shaper is that the mouths, both of the body and of the cap, shall be flared; while the mouths of the shapers that they have been making and selling are not flared at all, but, on the contrary, are either straight or slightly inclined inwards. There is some confusion in the testimony, caused by the failure of some witnesses to use words in their precise meaning. It will be found that some of the witnesses speak of a "flared" end or edge, when they really mean an end or edge that has been "reamed" or "beveled." If this is borne in mind, the apparent conflict in part of the testimony will be at once removed; or, if the testimony is read with the exhibits in hand, the meaning of the particular word used will be at once perceived.

A decree may be drawn in accordance with this opinion, providing for an injunction and the usual accounting.

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#### BANNERMAN v. SANFORD.

(Circuit Court of Appeals, Second Circuit. January 5, 1900.)

##### 1. PATENTS—VALIDITY—PRIOR USE.

Where A. and B. jointly invented and constructed an operative machine, containing a certain useful combination, A. is precluded, by the prior knowledge and use of such combination by B., from covering it by a patent procured in his own name for a different machine subsequently invented by himself; and it is immaterial by which of the two the combination was actually invented.

##### 2. SAME—MAGAZINE FIREARMS.

The Roper patent, No. 316,401, for a magazine firearm having an actuating hand-piece beneath the barrel, and connected with a piston-breech, for removing exploded shells and inserting cartridges without taking the gun from the shoulder, *held* invalid because of prior use.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a decree of the circuit court, Southern district of New York, dismissing bill of complaint (85 Fed. 448) in a suit for infringement of United States letters patent No. 316,401, granted April 21, 1885, to Sylvester H. Roper, for a magazine firearm. The facts sufficiently appear in the opinion.

Chas. G. Coe, for appellant.

Geo. D. Seymour and Chas. R. Ingersoll, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The specification opens with the statement that the—

"Invention consists mainly in the combination, in a magazine firearm, of a piston-breech with an actuating-slide, provided with a hand-piece, arranged

beneath the barrel, and acting as a support therefor, and adapted to be grasped by one hand and reciprocated, in a line parallel with the axial line of the barrel, while the other hand is employed in holding the stock of the gun against the shoulder of the person using it."

In describing the drawings the specification further states that:

"The piston-breech, E, is connected with and operated by the reciprocating slide-bar, F, provided with the handle, F'. This handle, F', not only affords means of reciprocating the slide-bar, F, but also constitutes a means whereby the barrel may be supported. The handle therefore constitutes a support for the barrel."

The brief of counsel for appellant contains an epitome of the testimony of complainant's expert, which sets forth the invention described in the patent with sufficient accuracy, as follows:

"The essence of the Roper invention is a magazine firearm so organized and constructed that the supporting, actuating handle, by reason of its location in front of the receiver, and of its combination and connection with the piston-breech, performs the function of actuator operating the piston-breech to work the action mechanism of the gun, and also, by being at the proper time in exactly the right place to be grasped by the forwardly extended hand of the user, the function of supporting the gun at the moment of firing, thus insuring accuracy of aim and steadiness of fire."

It will not be necessary to give further quotations showing what particular functions the piston-breech discharges, and precisely how, in the device shown in the patent, it brings about, when moved by the connection with the actuating hand, the ejection of the discharged shell, the removal of the new shell from the magazine, transference thereof to the barrel of the gun, and the closing of the parts in readiness for discharge, because, out of the 11 claims of the patent, only 6 are here in controversy, and in those 6 such details are not made elements of the claim. This is apparent from the text of the claims, which read as follows:

"(1) In a magazine firearm, a piston-breech suitably connected to, and in combination with, an actuating sliding handle situated forward of the receiver, and serving as a means for supporting the barrel, and provided with a path of reciprocation in a line parallel with the axial line of the barrel. (2) In a magazine firearm, the combination of a piston-breech, a supporting-handle forward of the receiver, and movable in the direction of the length of the barrel, means connecting the handle and piston-breech, and means whereby the piston-breech will be held in position during firing, substantially as specified. (3) In a magazine firearm, the combination of a piston-breech, a supporting-handle forward of the receiver, and means connecting the piston breech and supporting handle, so that when the supporting-handle is used the piston-breech will be moved in the same direction, substantially as specified. (4) In a magazine firearm, the combination of a piston-breech, a supporting-handle forward of the receiver, movable in the direction of the length of the barrel, and means whereby, when the said supporting-handle is moved back and forth, motion will be transmitted to the piston-breech so as to cause the latter to move back and forth, substantially as specified. (5) In a magazine firearm, the combination, with a barrel and a tubular magazine, of a piston-breech, a device whereby the passage of a cartridge from a point opposite the magazine to a point opposite the barrel will be effected, and a supporting-handle forward of the receiver, adapted to move in the direction of the length of the barrel, to operate the piston-breech, and to operate the device whereby the passage of a cartridge from the magazine to a point opposite the barrel is effected, substantially as specified. \* \* \* (8) In a magazine firearm, the combination, with a barrel and magazine of a piston-breech, a supporting-handle situated forward of the receiver, for reciprocating the piston-breech in the direction of the length of the barrel, and a device operated by the piston-breech, and serving to cause

the passage of a cartridge from a point opposite the magazine to a point opposite the barrel, substantially as specified."

A movable breechblock, which could be opened and closed in order to remove old shells, place new cartridges in position, and close the breech against explosion, was, of course, old in the art; and long before the patent in suit there were in use two well-known varieties of breechblock,—the "piston-breech," the principal mode of motion of which was forward and backward, or in a line parallel with the longitudinal axis of the barrel, and the "swinging-breech," the principal movements of which are sliding or rocking movements in planes which are transverse to the longitudinal axis of the barrel. We concur with the circuit judge that, both forms of breechblock being old, there would be no invention in the mere actuation of a piston-breech by axial movement of the supporting handle, if the art already knew of the actuation of a swinging-breech by axial movement of such handle, although there might be field for improvement in the mechanism by which connection was made between the handle and breech, and in the mechanism by which the breech, when actuated, completed its necessary movements. But in the claims in suit the mechanism by which the breechblock operates is not made an element, and the mechanism for connecting handle with breechblock is referred to only by such phrases as "suitably connected," or "means connecting," "means whereby motion will be transmitted," "handle adapted to move the piston-breech," "handle for reciprocating the piston-breech."

Among the patents set forth in the answer was one to E. M. Spencer and Sylvester H. Roper (the patentee of the patent in suit) for magazine firearms (No. 255,894, dated April 4, 1882). The description of this firearm is clearly set forth in the specifications, as follows:

"It is the object of our invention to provide for the recharging of a magazine-shotgun without requiring the gun to be taken down from the position in which it has been fired. We accomplish this result by means of a forked slide provided with a handle, which is arranged beneath the barrel, in convenient position to be grasped and reciprocated by one hand while the gun is held against the shoulder by the other hand, which grasps the stock. One arm of the forked slide carries at its end a laterally projecting pin, upon which is a friction roller which traverses a cam-groove provided with a spring-tongue or switch-cam in the side of an oscillating breechblock."

Here follows a detailed description of the mechanism by which the handle is connected with the breech, and of the mechanism by which the breechblock performs its functions in removing old shells, supplying new ones, etc. The specification proceeds:

"It will be understood that, while the devices which we employ may be variously modified, the leading feature of our invention—the prime mover of the mechanism by which the desired results are accomplished—is the forked slide provided with a handle forward of the breech, in a convenient position to be grasped by the hand and reciprocated in a path substantially parallel with the barrel, while the other hand grasps the stock and holds the gun against the shoulder in firing position."

The similarity between this statement of invention and that set forth in the patent in suit is most striking. The evidence, however, shows that the firearm of the patent in suit was actually made (Feb-



ruary, 1882) prior to the application for the Spencer and Roper patent, last quoted from. No. 255,894 therefore cannot be availed of in defense, under the third subdivision of section 4920, Rev. St. U. S., as evidence that the alleged invention of the patent "had been patented or described in some printed publication prior to the patentee's supposed invention or discovery thereof." It appears, however, that in the spring of 1881, a model gun of wood was made by Spencer and Roper in the latter's shop in Boston, and in the summer of 1881 a model gun of metal was made by Spencer at his house in Hartford,—a perfectly successful and operative firearm. In both of these models the invention described in the Spencer and Roper patent is embodied. These guns were put in evidence. As was to be expected from the language of the patents, it is apparent that the invention of the claims above quoted from the patent in suit, namely, the longitudinally moving supporting-arm connected with the breech-block so as to actuate it when the supporting-arm is moved, is fully disclosed in these exhibits, except that in the models the breech-block is a swinging-breech, and in the patent in suit a piston-breech. In the models the magazine lies below the barrel. In the patent in suit it is placed on top,—a wholly immaterial change, which we do not understand that complainant contends to exhibit patentable novelty. Section 4886 provides that any person who has invented any new and useful machine, or any new and useful improvement thereof, not known or used by others in this country, may obtain a patent therefor. Complainant contends that in February, 1882, he invented the useful combination which we find in the Roper gun; but it further appears that the very same combination embodied in the Spencer and Roper gun was known, not only to Roper, but to Spencer, early in the year 1881. Upon the testimony, there can be no suggestion that the combination of the earlier gun was embryonic or inchoate, or rested merely in speculation, or was a mere abandoned experiment. The conception was clothed in a substantial form, demonstrating at once its practical efficacy and utility, and the inventors promptly secured a patent for it. "Prior knowledge and use by a single person is sufficient." *Coffin v. Ogden*, 18 Wall. 124, 21 L. Ed. 821. With such clear proof of Spencer's prior knowledge and use of the invention which Roper claims under his patent, it would seem that novelty is abundantly negated. The complainant insists that this was not knowledge and use by another than Roper, because the gun of 1881 was the joint invention of Spencer and Roper; that such knowledge and use by Spencer was not separate and apart from the knowledge and use of Roper; that in the eye of the law, as regards the Spencer and Roper invention, Spencer is Roper, and no other person; and that, therefore, "so far as its availability as a defense to defeat the Roper patent in suit is concerned, the Spencer and Roper invention is no more regarded than if it had been the sole invention of Roper, without co-operation on the part of Spencer." We find such argument hypercritical and unpersuasive. Roper, having, with Spencer, invented and constructed a machine which contains a certain useful combination, thereafter takes out a patent in his own name covering this very combination.

If the prior machine produced by both men, and known to both, does not disentitle Roper to cover such combination in his patent, it would not disentitle Spencer to cover the same combination in a patent to himself; and we would have two joint inventors, each rightfully holding a separate patent for the same invention, which is absurd. The fact of knowledge by Spencer of the concrete embodiment of the combination in the guns of 1881 is in no way dependent upon the other fact that it was his invention, or Roper's, or their joint product, or that of some stranger. Once the combination was successfully embodied in a concrete shape, it declared its own existence to any one skilled in the art who looked at it; and we see no sound reason why Spencer alone should be precluded from acquiring the knowledge which such inspection would convey, merely because he had been jointly instrumental with Roper in producing it. We therefore concur in the conclusion expressed in the circuit court. Decree is affirmed, with costs.

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**MENCKE v. A CARGO OF SUGAR EX BRITISH SHIP BENLARIG et al.**

(District Court, E. D. New York. January 16, 1900.)

**1. SHIPPING—DISCHARGE OF CARGO—NECESSITY OF LIGHTERAGE.**

A ship cannot be required to submit to being dismantled or mutilated in order to discharge her cargo under a charter, but, where she cannot approach the place of discharge designated by the charterer without such mutilation, the cargo should be lightered; the liability for the expense of lighterage to be determined by the custom of the port or the terms of the charter.

**2. SAME—CONSTRUCTION OF CHARTER—EXPENSE OF LIGHTERAGE.**

A British ship was chartered to carry a cargo of sugar from Java. The charterers, as permitted by the charter, designated New York as the port of discharge; and the ship proceeded to that port, approaching it by the customary route from Java. The charter provided that the ship should deliver the cargo "so near the port of discharge as she may safely get, and deliver the same, always afloat, in a customary place and manner, in such dock as directed by the charterers." It further provided that the goods were to be taken from alongside the ship at the charterers' risk and expense, and that lighterage, if any, to reach the port of destination, or to deliver the cargo at such port, should be paid by the receivers, notwithstanding any contrary custom of the port. The dock designated as the place of discharge was above the Brooklyn Bridge, under which the ship was unable to pass without cutting off the tops of her masts, which were unusually high and immovable. *Held*, that under the charter she could not be required to go to such dock, and that it required the expense of lightering her cargo to be paid by the receivers.

This was a suit in admiralty by the master of the British ship Benlarig to recover a balance of freight under a charter.

Convers & Kirlin (Mr. Kirlin, of counsel), for libellant.

Butler, Notman, Joline & Mynderse (Mr. Brown, of counsel), for claimants.

THOMAS, District Judge. The Benlarig was chartered in London, July 1, 1898, by her owners, to Erdmann & Sielcken, of Batavia, to

carry a cargo of sugar from Java. The charter party, among other things, states that the vessel—

"Being so loaded (and dispatched), shall (unless ordered to a direct port of discharge, on signing last bills of lading) therewith proceed to Barbadoes, thence Queenstown or Falmouth (as directed by charterers or their agents), for orders, to discharge, always afloat, either at a safe port in the United Kingdom, or on the continent of Europe between Havre and Hamburg (both included), Rouen excluded, or, at option of charterers, to order vessel from Barbadoes, to proceed to Delaware Breakwater for orders, to discharge at New York or Boston or Philadelphia or Baltimore, or so near the port of discharge as she may safely get, and deliver the same, always afloat, in a customary place and manner, in such dock as directed by charterers, agreeably to bills of lading, on being paid freight in full of all port charges, pilotage, and primage as customary at port of discharge," etc.

#### Section 4 of the charter party provides:

"All goods to be brought to and taken from alongside of the ship, always afloat, at the said charterers' risk and expense, who may direct the same to the most convenient anchorage; lighterage, if any, to reach the port of destination, or deliver the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding."

From Batavia the ship went to Barbadoes for orders, pursuant to which she came to New York. Bills of lading had been issued for the cargo, making it deliverable at the port of discharge, as per charter party, to Messrs. Winter & Smillie, as agents, or to their assigns; he or they paying freight for the said sugar, as per charter party. The ship's documents were delivered to Czarnikow, MacDougall & Co., of New York, who transferred the same to the claimants. After due notice of the ship's arrival, the claimants gave orders in writing for the discharge, above the Brooklyn Bridge, at their refinery at the foot of Pearl street, Brooklyn. As the master considered that two of the ship's masts would not go under the bridge, arrangements were made between the parties for delivering the cargo by lighters, and payment of the expense thereof was deferred for subsequent determination. The question here is whether such expense should fall upon the libellant or claimants.

The Benlarig was a square-rigged iron ship. Her three masts were built up solid from the bottom to the top, and were composed of cylindrical plating riveted together, and internal, transverse, angle-iron braces. The mainmast was 139 feet 10 inches above the deck, and the deck was 5 feet 2½ inches above the deep-water load line at the mainmast, making the total height of that mast 145 feet and ½ inch. The foremast was 136 feet 8 inches above the deck, but the height of the deck above the water line at that part of the ship is about 7 feet, so that the height of this mast was 143 feet 8 inches. The mizzenmast was 129 feet above the deck, which was 7 feet above the water line, so that the height of the mizzenmast from the water was 135 feet. The clear height of the Brooklyn Bridge above mean high water is 135 feet, and the mean rise and fall of the tide is 4½/10 feet. At dead low water the ship could not pass under the bridge without cutting off about 5 feet from the mainmast and foremast, while safety required greater removal from such masts, to avoid the effect of any disturbance of the water. After the ship should have been discharged, it would be necessary to cut off an additional portion

of such masts, and also some part of the mizzenmast, to allow her to repass under the bridge, unless a return cargo could have been taken above the bridge, or the ship could have gone out by the East river and Long Island Sound. There were but two means of escaping this mutilation of the masts, for the purpose of discharging the cargo. One was by approaching New York from the east, through Hell Gate. All shipping experts called by the claimants testified that they never had heard of a ship from Java pursuing that course. It may therefore be concluded that such alternative was contrary to the expectation and understanding of all parties to this contract, or of any other contract for the carriage of sugar from Java. The remaining alternative was to lighten the sugar, and the question is upon which party the expense of such lighterage should fall. It is quite exceptional for a ship to have immovable masts so high that she cannot pass under the bridge, and there is no custom or practice known among shipping merchants respecting such a case. This is the concurring testimony of all the witnesses called by the claimants. Before considering the charter party, it should be stated that the ship had been before at the port of New York, and the owners well knew that she could not pass under the bridge without disturbing her masts. It is not understood that the charterers had this knowledge. On the other hand, there is no notice to the ship that it would be necessary to discharge the cargo above the bridge, although in fact about 75 per cent. of the sugar now received at this port is so discharged. If this knowledge of the owners be urged against them, it may be answered that for this very reason they may have considered themselves protected by the terms of the charter party, and in fact all previous notice or understanding by either party must be regarded as merged in the charter party, and to the interpreting of that instrument resort must be had to ascertain the relative rights.

The charter is stated by a witness connected with claimants' factory to be the same charter usually employed in the Java sugar trade, although the words "always afloat" seem to have been interlined in the fourth subdivision. The essential question is whether the provisions of the charter already quoted relieve the ship from delivering cargo above the bridge. For whatever purposes such stipulations were originally embodied in charter parties, they have been retained and adopted for use in view of existing structures, and it is considered that the provisions are sufficiently broad to relieve the ship. This conclusion is reached through no ingenuity of construction, but by giving to the language the meaning which might be gathered ordinarily from the words used. The initial agreement in the charter is to deliver the cargo at one of several ports, "so near the port of discharge as she may safely get, and deliver the same, always afloat, in a customary place and manner, in such dock as directed by charterers." This provision seems to be a direct stipulation to deliver the goods at any place where the ship might float, in such dock as directed by the charterers, in a customary place and manner, when such dock shall have been reached. The evident intention is that the ship shall go to the designated port, if she can get there in safety; and the continuing thought seems to be that she shall deliver the goods in a dock

designated by the charterers, in a customary place and in a customary manner. Any intelligent construction would seem to demand that the ship could not be ordered to a dock where it would be unsafe for her to go, whether the danger arose from the depth of water or any other cause. For instance, the ship could not be ordered to a slip which was too narrow to receive her, or where there was some overhanging shed or house that would prevent. So, if the entrance to the dock was obstructed, or there was other interference with the discharge at the place designated. But section 4 is explicit, and states that the goods are to be taken from alongside the ship at the charterers' risk and expense, although they are permitted to direct her to the most convenient anchorage, and that any lighterage, either to reach the port of destination or to deliver the cargo at such port, shall be paid by the receivers, notwithstanding any contrary custom of the port. Now, lighterage was necessary for the purpose of delivering this cargo after the ship reached the port of destination, for the reason that the ship could not make the delivery without such lighterage, unless she was mutilated by the cutting off of her masts. The proposition then is: If the charterers stipulate to pay the lighterage necessary for the purpose of delivering the cargo, may they be excused from observing this agreement upon the plea that no lighterage would be necessary if the masts of the ship were cut down to a certain length? It is thought that it is the privilege of the ship to be preserved from self-mutilation, and that she need not be crippled, deformed, or dismantled for the purpose of delivering her cargo. Apparently that should never be required. It should not be expected. Rather than that, it is expectable that the cargo should be lightered by the shipowners, and that they would pay for the same. But the expectation as to the person upon whom the payment of the lighterage should fall changes when it appears that there is a stipulation that the receivers shall themselves pay the lighterage. It is useless to conjecture respecting these stipulations, where they are, as in the present case, unambiguous. It is better to take words at their apparent and ordinary meaning, and hold parties to their agreement according to the plain sense of the language used. Adopting such rule, the libellant should recover.

Since the trial of this case the attention of the court has been called to *In re Arbitration between Goodbody & Co. and Balfour, Williams & Co.*, 8 Asp. 303, pt. 7 (Nov., 1899). In that case a cargo had been sold to arrive by the steamer *Vanduaara*, on condition that the bills of lading should provide for its delivery "at any safe port in United Kingdom of Great Britain, \* \* \* vessel to discharge afloat." The bills of lading provided that the cargo should be delivered "at any safe port in the United Kingdom, Manchester excepted"; and the vendee refused to accept the documents, upon the ground that they did not comply with the contract for delivery at any safe port in the United Kingdom. It was found that the *Vanduaara*, when loaded with the said cargo, would have been unable to go up the Manchester Ship Canal to the Manchester Docks without dismantling the ship, because the heads of her main and mizzen masts would be higher than the limit fixed by the canal company's regulations for passing under

the Runcorn Bridge. Runcorn Bridge is about 24 miles from Manchester, and about 12 miles from the entrance of the canal. In the opinion this language was used:

"It was contended on behalf of the sellers that Manchester was not a safe port for the Vanduara, because the height of her masts prevented her getting to Manchester, and that therefore the words in the charter party and the bill of lading, 'Manchester excepted,' did not amount to a variance from the terms of the contract, because, as Manchester was not a safe port for the ship, she could not in any case have been ordered there."

In the opinions it is stated:

"She could not have been ordered to Manchester in any case, because she could not have got under Runcorn Bridge, and the presentation of documents containing the words 'Manchester excepted' imposed no restriction upon the purchaser inconsistent with the terms of the contract of purchase. \* \* \* I may observe that the contract was for a cargo per Vanduara, a named ship; and if, in point of fact, Manchester was not a safe port for her, it does not seem to me that the defendants were in any way prejudiced by a phrase being introduced into the document which abridged none of their rights, and imposed no restriction which was not imposed by the terms of the contract itself." Again: "It is clear that Manchester, in the limited sense, cannot be a safe port for a vessel which, in order to reach it, must be wholly dismantled."

In the above case it appears that the port was sufficiently safe, but that the canal was crossed by a bridge which prevented the ship from reaching the port in safety unless she were dismantled. In the present case the facts are equal, and, in addition, the parties have stipulated that the receivers should bear the expense of the lighterage,—an element which was lacking in the instance to which attention has just been called. The skillful argument of the claimants gives a totally different meaning to the charter party. If what appears to the court to be a plain statement of duties in this instance favorable to the libellant has quite other significance, yet it would be considered that the claimants should not succeed. The ship stipulated to deliver the cargo at one of many ports; and while it was undoubtedly her duty, after arriving at a designated port, to go to such point therein as she could safely, it is thought that she would not be obliged to go to such point in the harbor at the peril of injury, or at the sacrifice caused by mutilation of her masts. It seems that, in selecting a convenient dock for discharging in a harbor, the receivers of the cargo must select one which the ship can physically approach; and, if there be a permanent structure in the way, the conception that the ship should not encounter this would seem to enter into the spirit and understanding of their agreement. The libellant should have a decree for the balance of the unpaid freight, with costs.

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THE S. A. McCAULLEY.<sup>1</sup>

(District Court, E. D. Pennsylvania. December 13, 1890.)

No. 40.

**1. LIMITATION OF LIABILITY—LACHES OF PETITIONER—TERMS IMPOSED.**

Although the owner of a vessel allows a court of common law to retain jurisdiction of a suit against him for a maritime tort for several years, during which time he takes all the chances of success before that tribunal, he is still in time, and has the right, by petition to a court of admiralty,

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<sup>1</sup> Reported by Arthur G. Dickson, Esq., of the Philadelphia bar. by Google

to limit his liability, and remove the case to that court; but the court, in granting such petition, can require him to pay all the costs that had accrued in the common-law proceeding.

**2. SAME—CONCURRENT JURISDICTION OF COMMON-LAW COURTS—ASSERTION OF RIGHTS IN ADMIRALTY.**

Although the supreme court of a state has decided that the statute giving the right to a limited liability of shipowners can be enforced in the courts of the state, this does not deprive the courts of admiralty of this jurisdiction, and the right may be asserted there, and the case removed.

**3. SAME—ASSERTION OF RIGHT BY LESS THAN ALL THE PART OWNERS.**

The right of a limitation of liability is an absolute one, and is not dependent upon the joinder of all the part owners in the application for it; it may be availed of by any one or more of them.

**In Admiralty.**

This was a petition to limit the liability of certain owners of the steam tug S. A. McCauley. Exceptions to the petition were filed, alleging (1) that there was but one suit pending against the petitioners, and, as the supreme court of Pennsylvania had decided that the common pleas court could apply the law limiting the liability of the shipowners, the district court had no jurisdiction to entertain the petition; (2) that the petitioners were barred by laches in failing to file their petition until after two years from the date of the accident by which John Loughin lost his life; (3) that the petition could not be entertained, because it was filed on behalf of a portion only of the whole number of part owners of the vessel. The decree of the court was conditioned upon the payment by the petitioners, within 20 days, of all the costs that had accrued in the common-law court, in which event the exceptions were to be overruled; otherwise, the petition should be dismissed. Further facts appear in the opinion of the district judge.

Horace L. Cheyney and John F. Lewis, for petitioners.  
Wendell P. Bowman, for respondents.

McPHERSON, District Judge. This is an application to limit the liability of certain owners of the tugboat S. A. McCauley, and I grant the petition because I feel obliged to do so. I am unable to regard with favor the course pursued by the petitioners. Being sued in the common pleas of Philadelphia county for a maritime tort alleged to have been committed by the vessel, they refrained for more than two years from asking this court to take jurisdiction of the controversy. The acts of congress allowing vessel owners to limit their liability cover the injury sued for, and a proper petition would, of necessity, have transferred the whole dispute to this court. Not only was there two years' delay, however, but during that period there had been a trial in the common pleas, in which the present petitioners had set up their right to a limitation of liability under the federal statutes, and a verdict had been rendered against them on the merits. The trial court having refused to entertain the partial defense of limited liability, the petitioners appealed to the supreme court of Pennsylvania, and obtained a reversal, on the ground that, in a case such as this, where it is conceded that only one claimant exists, a state court was competent to apply the right given by the acts of congress. *Loughin v. McCauley*, 186 Pa. St. 517, 40 Atl. 1020. While the writ of error was pending before the Pennsylvania supreme court, a petition was presented to this court asking for a limitation of liability, and this petition, in amended form, is now presented for consideration.

By following the course described, the petitioners have been enabled to take their chances of success before a tribunal where they might hope to defeat the claim entirely by proving the contributory negligence of the decedent; and now, having discovered that this effort is likely to be unsuccessful, they have determined to try their fortunes in a different jurisdiction, and by a different method of trial. The merits have been once determined against them by a jury; and, although the judgment has been reversed, it was reversed merely for the reason that the right to limit the defendant's liability had not been applied by the court below. The result is to give the petitioners an undue advantage. But, as I look at the statutes and the decisions upon this subject, it is impossible to deny them the right to come into the federal tribunal, even after they have taken their chance of a favorable verdict in the common pleas. I cannot avoid the conclusion that the circuit court of appeals for the First circuit was right in deciding (*Quinlan v. Pew*, 5 C. C. A. 438, 56 Fed. 111) that a state court does not possess the machinery fully to administer the act of congress, even in cases where there is only one claimant. It may be (although I do not decide the point) that a state court is a "court of competent jurisdiction," within the meaning of section 4285 of the Revised Statutes, and may therefore have power to appoint a trustee under that section. But, even if this be true, a state court has no power to appraise the vessel under rule 54 in admiralty, or to carry out the other provisions there to be found, and these provisions are now as much a part of the right as is the statutory direction concerning the appointment of a trustee. If the state court has no power to appoint a trustee, this furnishes a second reason for upholding the owner's right to apply to a court of admiralty.

If the owner's laches could bar him from a successful application to such court, I should have no hesitation in refusing the present petition; but the statute fixes no limit of time within which the court must be asked to act, and the supreme court of the United States in *The Benefactor*, 103 U. S., on page 245, 26 L. Ed. 351, has intimated that the right may exist as long as any damage or loss remains unpaid. The court says: "Precisely when the owners of a ship in fault ought to be regarded as precluded from instituting proceedings for a limitation of liability might be difficult to state in a categorical manner. Perhaps they can never be precluded, so long as any damage or loss remains unpaid." Since so much doubt exists upon the subject, I prefer to sustain the right; but I shall follow the advice of the court in the same case, by imposing terms upon the petitioners. The opinion goes on to say: "But, in a particular case, relief should not be granted except upon condition of compensating the other party for any costs and expenses he may have incurred by reason of the delay in claiming the benefit of the law."

It is therefore ordered that if the petitioners, within 20 days from this date, pay the costs that have accrued upon the suit in the common pleas, including the costs in the supreme court and the expense of printing the plaintiff's paper book upon appeal, and pay also the costs that have accrued in this court, the exceptions to the petition will be overruled; otherwise, the exceptions will be sustained, and the petition dismissed.



## COLSTON et al. v. SOUTHERN HOME BUILDING &amp; LOAN ASS'N.

(Circuit Court, N. D. Georgia. December 15, 1899.)

No. 1,089.

## 1. JURISDICTION OF FEDERAL COURTS—AMOUNT IN DISPUTE—SUIT FOR DISSOLUTION OF CORPORATION.

Quære, whether, when the question is raised at the threshold of a suit, by demurrer, the amount in dispute, for the purpose of determining the jurisdiction of a federal court to entertain a bill by stockholders for the appointment of a receiver for a corporation on the ground of its insolvency, is the value of the property to be administered by the court if the prayer of the bill is granted, or the amount of the complainant's interest therein.

## 2. FEDERAL AND STATE COURTS—COURT FIRST ACQUIRING JURISDICTION—SUITS IN REM.

A federal court will not entertain a suit by stockholders for the appointment of a receiver for a corporation, and the liquidation of its affairs as an insolvent, while a prior suit brought in a state court for the same purpose is still pending and undetermined, although the state court on a preliminary application has refused to appoint a receiver. In such case the second suit will either be abated or stayed until the final determination of the first.<sup>1</sup>

In Equity. On demurrer to bill and plea in abatement.

John L. Hopkins & Sons, for plaintiffs.

Hoke Smith, H. C. Peeples, and W. D. Ellis, for defendant.

NEWMAN, District Judge. In this case a bill was filed by two members of a building and loan association. The total amount which they have paid into the association, and consequently their claim against it, aggregates something like \$1,300,—considerably less, at least, than \$2,000. The purpose of the bill is to have the property and assets of every kind of the association placed in the hands of a receiver, to be administered for the benefit of all concerned. It is alleged that the association is insolvent, and that its affairs are being badly mismanaged. The amount of the assets of the association to be administered, if the case proceeds, is much greater than the jurisdictional amount in this court. The defendant demurred to the bill on the ground that on its face it showed the court to be without jurisdiction to entertain it, by reason of the amount involved. The question now presented is this: Whether the amount of the complainants' claims, or the value of the assets to be administered should the case proceed, determines the court's jurisdiction.

The language of the statute (Act Cong. Aug. 13, 1888 [1 Supp. Rev. St., 2d Ed., p. 611]), omitting language not material here, is as follows:

"The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, \* \* \* in which there shall be a controversy between citizens of different states \* \* \* in which the matter in dispute exceeds exclusive of interest and costs, the sum or value aforesaid [two thousand dollars]."

<sup>1</sup> For conflict of jurisdiction between federal and state courts, see *Louisville Trust Co. v. City of Cincinnati*, 22 O. C. A. 356.

It will be perceived that the statute contemplates that in some instances "the sum" will be the matter in dispute, and in others "the value." In the one case the amount in controversy will control, and in the other the value of the property involved.

In this case there is no prayer whatever for a money judgment or decree against the association. The prayer is that its assets be placed in the hands of a receiver, and that the debts be collected, and, when all of the assets shall be reduced to cash, that they be divided pro rata among those entitled thereto. It is urged that this is one of the cases in which the jurisdiction of the court must be determined by the value of the property to be administered, as the purpose of the bill, and its only purpose, is the administration of the association's assets. Undoubtedly, the matter in dispute being the solvency or insolvency of the association, and the proper or improper management of its affairs, the action of the court in determining these matters must affect one way or the other the entire assets of the association, as the court either takes control of the same, and causes it to be administered as prayed, or declines to do so. It is urged that the complainants come into court, not as outsiders seeking relief against the association, but rather from the inside, as members of the association, —as a part of the association itself,—and ask, by reason of its insolvency, mismanagement, etc., that it be wound up, because its condition is such that it cannot accomplish the purpose for which it was organized. In the case of *Towle v. Society* (C. C.) 60 Fed. 131, which was a building and loan association case, Judge Grosscup held that "the entire assets of the society are brought into court to be administered, and are therefore the matter in dispute or controversy," the question of jurisdictional amount having been raised. In the case of *Putnam v. Carpet Co.*, 79 Fed. 454, Judge Clark, of the circuit court for the Eastern district of Tennessee, held that where a bill was brought to administer a trust fund, in behalf of all the creditors, the fund to be administered determines the question of jurisdiction. In the recent case of *Cowell v. Supply Co.*, 96 Fed. 769, Judge Woolson, of the United States circuit court for the Southern district of Iowa, decided, as summed up in the third headnote, as follows:

"In a suit to set aside a conveyance of property, and mortgages given thereon, the value of the property and rights which will be affected if the relief prayed for is granted, and not the value of complainant's interest in the property, constitutes the amount in dispute, for the purpose of determining the jurisdiction of a federal court."

It is contended by defendant's counsel in this case that the case of *Towle v. Society*, supra, and the case of *Putnam v. Carpet Co.*, supra, should not be regarded as authority here, because in the first case the court, at the time the question of jurisdiction was raised, had taken possession of the property, and had it in its custody, and that it should not control in a case like this, where the question is presented at the threshold, and before the court enters into possession of the res; and in the latter case, because the question here made was really not involved, as one of the complainants' claims exceeded the jurisdictional limit, and it was really unnecessary to determine it. Counsel for defendant also claim that the cases here cited do not state the correct

rule on the subject. They claim that, as to the complainants' interest in the controversy, although their several claims may perhaps be joined for the purpose of determining the jurisdictional amount, yet their claims together must exceed \$2,000, etc., to give the court jurisdiction. They say that it is not the value of the property sought to be subjected, but the complainants' interest in the controversy; that the test of the amount in controversy is that which is involved in the controversy between the particular complainants and the defendant. They rely especially upon the case of *Gibson v. Shufeldt*, 122 U. S. 27, 7 Sup. Ct. 1066, 30 L. Ed. 1083, in which many former decisions of the supreme court are cited and considered, and also on the cases of *Brown v. Trousdale*, 138 U. S. 389, 11 Sup. Ct. 308, 35 L. Ed. 987; *Walter v. Railroad Co.*, 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206; *Colvin v. City of Jacksonville*, 158 U. S. 456, 15 Sup. Ct. 866, 39 L. Ed. 1053; and, particularly, on the following decisions of the circuit court: *Massa v. Cutting*, 30 Fed. 1; *Putney v. Whitmire*, 66 Fed. 385; *Smithson v. Hubbell*, 81 Fed. 593. These decisions do make the jurisdiction, as to the jurisdictional amount involved, doubtful,—perhaps too doubtful to justify the court in proceeding in the case under the recognized rule that the jurisdiction should be clear; but it is unnecessary at this stage of the case, in view of what will be hereafter said, to determine that question, and the same may be left for future consideration, should the necessity for a decision arise.

Pending the determination of the matter above discussed, and after it had been submitted to the court, a question arising on a plea in abatement was argued, and also submitted. The plea in abatement sets up the pendency of a suit in the superior court of the state, over the same subject-matter, seeking the same result, and by what the defendant claims are substantially, for present purposes, the same parties against the same defendant. By consent of counsel, the original record in the state court is used, and is considered as accompanying the plea in abatement. The object of the bill in the state court was to have all the assets of the Southern Home Building & Loan Association placed in the hands of a receiver. The allegations in that bill were substantially the same as those of the bill filed in this court. It charged, in effect, the same mismanagement, the same danger to members, supported by the same facts generally that are set out here. The complainants were different persons from those who filed the bill in this court, but the bill was sworn to by the same person, as agent for the complainants, who made the affidavit to the bill filed in this court. The bill was filed in the state court one day before the bill was filed in this court. On the day the bill was filed, the judge of the superior court passed the following order:

"Read and considered. Let petition be filed and served. Let defendant show cause before me on October 28, 1899, at 9 o'clock a. m., or as soon thereafter as a hearing can be had, at the court house in said county, why injunction and receiver should not be granted as prayed for. In the meantime, and until the hearing or further order of court, the defendant, its officers and agents, are restrained from selling, transferring, encumbering, or removing from the jurisdiction of its assets, except that the regular course of business may proceed, and the officers of the company now in charge may continue the

usual conduct of business; keeping account thereof, subject to be rendered if hereafter required. Should further order be found necessary before the time set for the hearing, or should a speedier hearing or an advancement of the day set therefor be desired, either side may apply therefor on notice to the other."

When the bill was filed in this court, the next day after this order of the judge of the superior court, a somewhat similar order was made; and the case has been pending here since, without any action except the argument of the questions now under consideration. In the meantime, and before the questions now discussed came up for argument here, there was a hearing on the application for receiver in the state court, on the bill, answer, and affidavits; and the application for a receiver and injunction was denied, and the temporary restraining order copied above was dissolved. The case is still pending in the state court, and, so far as appears from the record, it will come on regularly for trial according to the practice in that court; and the question is whether that is a sufficient cause for abatement of the suit in this court, or, if it does not have that effect, if the case here should not be stayed until after the determination of the case in that court, as the court having first obtained jurisdiction of the subject-matter of the controversy. It may be stated in the beginning, as a general proposition, that the pendency of a suit in the state court is no bar to a suit in this court between the same parties, and for the same cause of action. In *Stanton v. Embrey*, 93 U. S. 548, 23 L. Ed. 983, it is held that "the pendency of a prior suit in a state court is not a bar to a suit in the circuit court of the United States, or in the supreme court of the District of Columbia, by the same plaintiff against the same defendant, for the same cause of action." In *Gordon v. Gilfoil*, 99 U. S. 168, 25 L. Ed. 383, it is said in the opinion of the court that "it has been frequently held that the pendency of a suit in a state court is no ground even for a plea in abatement to a suit upon the same matter in a federal court." It is equally well settled, however, that, where either the state or federal court has obtained jurisdiction of a suit in which the actual seizure and disposition of property may become necessary, the court first acquiring jurisdiction of the subject-matter will retain it, and the other court will not proceed with the suit involving the same controversy during the pendency of the prior suit. In the case of *Zimmerman v. So Relle*, 25 C. C. A. 518, 80 Fed. 417, this question is fully discussed in the decision by the circuit court of appeals for the Eighth circuit (opinion delivered by Thayer, Circuit Judge). The character of the controversy in the state court and in the circuit court of the United States, as well as the conclusion reached in that case, will appear from the following extract from the opinion of the court:

"The plea which was filed by the defendant below, who is the appellee here, shows, we think, with sufficient certainty, that the suit at bar, and the suit previously brought in the district court of Pitkin county, Colo., by So Relle against Zimmerman, are substantially of the same character, the parties thereto being simply reversed. In the case pending in the state court, So Relle is attempting to quiet his title against Zimmerman, who is claiming title to and possession of the premises in controversy by virtue of a trustee's deed executed under a power of sale contained in a mortgage that was made by So Relle; while in the suit at bar Zimmerman seeks to quiet his title and gain possession

of the property by enjoining So Relle from asserting that the sale by the trustee was insufficient to pass the legal title. Both suits concern the same property, and necessarily involve a consideration of the same evidence and a decision of the same questions. Such being the state of facts disclosed by the defendant's plea, we think that the case pending in the state court was of such a nature that the trial court was not at liberty to proceed with the hearing of the case at bar, within the doctrine which was recently applied by this court in the case of *Merritt v. Steel-Barge Co.*, 24 C. C. A. 530, 79 Fed. 228. We held in that case that when a suit is brought to enforce a lien against specific property, or to marshal assets, or to administer a trust, or liquidate an insolvent estate, and in all other cases of a similar kind, where in the progress of the case the court may find it necessary or convenient to assume control of the property in controversy, the court which first acquires jurisdiction of such a case by the issuance and service of process is entitled to retain it to the end, without interference on the part of any other court of co-ordinate jurisdiction. We held further that a rigid adherence to this rule, both by the federal and state courts, is necessary in order to prevent unseemly conflicts which might otherwise arise. The doctrine in question has been so recently and fully considered, both in the case last referred to, and in *Gates v. Bucki*, 12 U. S. App. 69, 4 C. C. A. 116, 53 Fed. 961, that a further discussion of the subject seems to be unnecessary. It is manifest, we think, that the suit brought in the state court by So Relle against Zimmerman is of such a nature that that court may see fit at any time to issue an injunction against Zimmerman, restraining him from prosecuting a suit to recover the possession of the property in controversy in any other forum, and we cannot doubt its right to make such an order; whereas in the case at bar, if the trial court had permitted it to proceed, it may be that at some stage of the proceedings it would have been found necessary to appoint a receiver of the property, to collect the rents thereof, and otherwise care for it, pending the litigation as to the title. Possibly the state court may deem it proper to make a similar order. The controversy, then, is of such a nature that the pendency of the two suits at the same time in different jurisdictions is liable at any moment to create a conflict of authority, and give rise to conflicting titles. No court ought to proceed with the hearing of a case under such circumstances, so long as the prior suit remains pending and undetermined."

In the case of *Hughes v. Green*, 28 C. C. A. 537, 84 Fed. 833,—this being also a case from the circuit court of appeals for the Eighth circuit,—it is said in the opinion of the court:

"The rule is perfectly well settled that where two suits are pending between the same parties,—the one in the state court, and the other in the federal court,—the object of both suits being to secure the same relief, where the relief sought is the enforcement of a lien against specific property, to administer trusts, or liquidate insolvent estates, and in all other suits of a similar nature, where in the progress of the litigation the court may be compelled to assume the possession and control of specific personal or real property, the court which first acquired jurisdiction of the issue and service of process must be allowed to proceed with the hearing of the case to final judgment or decree, without interference on the part of the other court wherein the suit is pending."

It will be perceived that the test is not which court has taken, by its officer, actual possession of the property, or even which court has by an order taken jurisdiction of the property, and so, constructive possession; but, in the language of the above extract from *Hughes v. Green*, the test is, "where in the progress of the litigation the court may be compelled to assume possession and control," etc. Almost the same language is used in *Zimmerman v. So Relle*, supra. In such cases "the court which first acquires jurisdiction of such a case by issuance and service of process is entitled to retain it to the end, without interference on the part of any other court of co-ordinate jurisdiction."

In *Rodgers v. Pitt*, 96 Fed. 668, Judge Hawley, of the circuit court for the district of Nevada, discusses at some length this question, in various aspects. While the court in that case reached the conclusion that it was its duty to retain the case, the law on the subject is laid down substantially as in the cases just referred to. The following quotation will show the opinion entertained in that court of the law on the subject:

"The general rule is well settled that, where different courts have concurrent jurisdiction, the court which first acquires jurisdiction of the parties, the subject-matter, the specific thing, or the property in controversy, is entitled to retain the jurisdiction to the end of the litigation, without interference by any other court. This rule is important to the exercise of jurisdiction by the courts whose powers are liable to be exerted within the same spheres, and over the same subjects and parties. There is but one safe road for all the courts to follow. By adhering to this rule the comity of the courts, national and state, is maintained, the rights of the respective parties preserved, and the ends of justice secured, and all unnecessary conflicts avoided. Any other rule would be liable at any time to lead to confusion, if not open collision between the courts, which might bring about injurious and calamitous results. This rule is elementary law, and a citation of all the authorities in its support would be endless and useless."

A number of cases are then cited as bearing upon the question.

In *Harkrader v. Wadley*, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399, in the opinion of the court, by Mr. Justice Shiras, this expression is used:

"When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases,"—citing *Freeman v. Howe*, 24 How. 450, 18 L. Ed. 749; *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257; *Taylor v. Taintor*, 16 Wall. 366, 21 L. Ed. 287; *Ex parte Crouch*, 112 U. S. 178, 5 Sup. Ct. 96, 28 L. Ed. 690.

It would be useless to enter into a discussion of all the decisions of the supreme court on this subject. They are numerous, but are probably all referred to and commented on in the cases already cited.

It becomes necessary, from what has been stated, to find the distinction between the class of cases in which the pendency of a suit in one court, either state or federal, is no sufficient objection to the same case proceeding in the other court, and the class of cases in which the pendency of the former suit may be pleaded as ground for abatement of the second suit, or at least for a stay of proceedings therein. The distinction, according to the authorities, is between cases in personam, strictly, on the one hand, and cases in rem, or quasi in rem, on the other. In *Zimmerman v. So Relle*, supra, in the opinion from which an extract has already been given, it is said:

"We concede, as a matter of course, that two suits involving the same question, and between the same parties, may be pending at the same time, the one in a state and the other in a federal court, and that in such event a plea of lis pendens may not be available as a defense to the suit which was last brought. This is always the case where the two suits are strictly in personam,"—citing *Stanton v. Embrey*, supra.

The same distinction is recognized in *Rodgers v. Pitt*, supra.

The case at bar must be considered an action in rem, as distinguished from what would be strictly speaking an action in personam.

Its sole object is the disposition of the assets of the association. Counsel for complainants expressly disclaim any purpose to obtain a money judgment against the defendant association. The only ground upon which the jurisdiction of the court can be sustained, as to jurisdictional amount involved, is that the suit is one solely for the purpose of bringing the property into court, and administering it for the benefit of the members of the association. It must be classed, for present purposes, in determining the question now discussed, as an action in rem. *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. Ed. 372; *Zimmerman v. So Relle*, *supra*; *Rodgers v. Pitt*, *supra*.

Counsel for complainants rely with much confidence on the case of *Shields v. Coleman*, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660, as favoring their contention that the pendency of the suit in the state court is no obstacle to the present case proceeding in this court. The case has weight, it must be admitted, in favor of complainants' view of this question; and yet it may be reconciled with the views hereinbefore expressed, upon careful examination. A bill for receiver had been filed in the circuit court of the United States for the Eastern district of Tennessee, and a receiver appointed, who took possession of the railroad, the property involved. Afterwards, on petition of the railroad company, it was allowed to give bond, and the receiver was discharged, and the property returned to the railroad company. Subsequently a bill was filed in the chancery court of the state, and a receiver appointed, who took possession of the property. After this, on motion of the complainants, the circuit court of the United States reappointed a receiver, and ordered him to take possession of the railroad, which he seems to have done; and thereupon the receiver of the state court applied to the circuit court for restoration of the property, which was denied, and this made the question for determination by the supreme court in that case. In its opinion the supreme court seemed to recognize that the suit in the circuit court, by the giving of the bond, ceased to be one against the property involved. This is said on the subject:

"Accepting a bond, and directing the receiver to return the property to the owner, was not simply the transfer of the possession from one officer of the court to another. The bond which was given was not a bond to return the property if the judgment to be rendered against the contractors was not paid, but a bond to pay whatever judgment should be rendered. It was therefore in no sense of the term a forthcoming bond. The property ceased to be in custodia legis. It was subject to any rightful disposition by the owner, or to seizure under process of any court of competent jurisdiction."

In other words, the property had been taken entirely from without the jurisdiction of the court, and a bond with personal securities had been substituted therefor; and the complainants were simply proceeding to ascertain the amount of their debts, and for a decree against the defendant and the sureties on its bond. In this view of the facts, there is no conflict whatever between this case and the rule which seems to be laid down in the other authorities on the subject. The supreme court in this case seemed to recognize the rule that the court first acquiring jurisdiction in the suit for the appointment of a

receiver will retain it to the end. The following is the language used:

"For the purposes of this case, it is unnecessary to decide whether, as between courts of concurrent jurisdiction, when proceedings are commenced in the one court with the view of the appointment of a receiver, they may be continued to the completion of actual possession, and whether, while those proceedings are pending in a due and orderly way, the other court can, in a suit subsequently commenced, by reason of its speedier modes of procedure, seize the property, and thus prevent the court in which the proceedings were first commenced from asserting its right to the possession. *Gaylord v. Railroad Co.*, 6 Biss. 286-291, Fed. Cas. No. 5,284, cited in *Moran v. Sturges*, 154 U. S. 256-270, 14 Sup. Ct. 1019, 38 L. Ed. 981; High, Rec. (3d Ed.) § 50. Of course, the question can fairly arise only in a case in which process has been served, and in which the express object of the bill, or at least one express object, is the appointment of a receiver, and where possession by such officer is necessary for the full accomplishment of the other purposes named therein. The mere fact that in the progress of an attachment, or other like action, an exigency may arise which calls for the appointment of a receiver, does not make the jurisdiction of the court in that respect relate back to the commencement of the action."

As to the time that jurisdiction attaches, the court says this:

"In *Heidritter v. Oilcloth Co.*, 112 U. S. 294-301, 5 Sup. Ct. 135, 28 L. Ed. 729, a question was presented as to the time that jurisdiction attaches. Mr. Justice Matthews, after quoting from *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931, and *Boswell's Lessee v. Otis*, 9 How. 336, 13 L. Ed. 164, observed: 'But the land might be bound, without actual service of process upon the owner, in cases where the only object of the proceedings was to enforce a claim against it specifically, of a nature to bind the title. In such cases the land itself must be drawn within the jurisdiction of the court by some assertion of its control and power over it. This, as we have seen, is ordinarily done by actual seizure but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit.'"

In the case in the state court, while the injunction and receiver has been denied, the application for the same may at any time be renewed, and the court is fully authorized to grant the same, should a proper case be made. *Glass v. Clark*, 41 Ga. 544; *Blizzard v. Nosworthy*, 50 Ga. 514. The case there, as has been stated, seeks the administration of the same assets as does the bill in this court, and the possession and administration of those assets is the only purpose of the bill, and it is still pending. While the court there has refused to order possession of the property by interlocutory order pending the litigation, it may at any time hereafter, by order pendente lite, or by a decree on the final hearing, take actual possession of the property involved, through its officers. The case comes fully up to the rule laid down in the authorities which have been cited and discussed. Without further discussion of the subject, the conclusion is that the case now under consideration is one of that class in which the court first acquiring jurisdiction should retain it, and as to which the court in which the suit is last brought will either dismiss the suit because of the pendency of the former proceeding, or will at least enter an order staying the case until the prior suit is ended. Under the circumstances of the case, as disclosed, perhaps the safest course, and that con-



sistent with the authorities on the subject, would be to enter an order staying the present case until the case is ended in the state court, and it will be given this direction.

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AMERICAN LOAN & TRUST CO. v. ATLANTA ELECTRIC RY. CO. et al.

(Circuit Court, N. D. Georgia. June 20, 1899.)

No. 1,044.

**1. MORTGAGES—FORECLOSURE SALE—RIGHTS OF JUNIOR MORTGAGEE.**

Under Civ. Code Ga. § 2747, which does not require or permit a junior mortgagee to become a party to a statutory proceeding to foreclose the senior mortgage, where the property has been sold in such foreclosure proceedings the remedy of the junior mortgagee is by a bill to redeem.

**2. SAME—SUIT TO REDEEM—TENDER OF PAYMENT.**

A bill by a junior mortgagee to redeem from a sale under the senior mortgage must contain an offer to pay the entire first mortgage debt, where it is greater than the price for which the property was sold.

On Rehearing.

**MORTGAGES—STATUTORY FORECLOSURE IN GEORGIA—RIGHT OF JUNIOR MORTGAGEE TO REDEEM.**

A proceeding by a senior mortgagee to foreclose his mortgage according to the statutory form and proceedings used in Georgia, and a sale thereunder, do not deprive a junior mortgagee—who cannot, under the statute, be made or become a party to such proceedings—of the right to redeem by paying the senior mortgage and the costs of foreclosure.

This is a suit in equity to foreclose a mortgage. Heard on bill and answers.

H. M. Patty and King & Spalding, for plaintiff.

Burton Smith, King & Anderson, and C. P. Goree, for defendants.

NEWMAN, District Judge. The allegations of the bill are substantially as follows: That on the 2d of March, 1896, the Atlanta Electric Railway Company made and executed 42 bonds, each of that date, and each for the sum of \$500, making a total of \$21,000, payable to bearer at 6 per cent. per annum from date, payable semiannually; that, to secure the said issue of bonds, the railway company, on the said 2d day of March, 1896, executed and delivered to complainant a certain deed of trust whereby it conveyed its line of street railway within and adjacent to the city of Atlanta, in Fulton county, Ga., together with all its rights, franchises, etc.; that the railway company agreed that in default of payment of interest as per contract, and when such default shall have continued for three months after payment had been duly demanded, etc., the bonds shall become payable, and the right given to the trustee, upon the request of the holders of one-half of the bonds outstanding, to sell the property covered by the trust deed, or to institute proper legal proceedings for the foreclosure of the mortgage; that the default in the payment of interest had existed for three months, so as to authorize foreclosure proceedings; that on the 17th day of August, 1895, the Atlanta Electric Railway Company had executed and delivered to D. H. Livermore a mortgage to secure \$24,500 of existing indebt

edness, and \$5,500 which Livermore agreed thereafter to advance; that subsequently, and at a date unknown to it, Livermore gave his own note to J. F. Leary, ostensibly for the sum of \$10,000, and undertook to deliver to Leary, as collateral, the notes secured by the mortgage upon the railway company, and also the mortgage; that the railway company had delivered the bonds secured by complainant's trust deed to Livermore, and had thereby extinguished the debt due Livermore, and secured by his mortgage; that on the 30th day of November, 1897, in the superior court of Fulton county, Leary caused a proceeding in the name of Livermore, suing for his use, to be instituted, for the purpose of foreclosing the mortgage held by him as collateral; that the proceeding was in the statutory form for foreclosure of a mortgage on real estate in Georgia, and a rule nisi was issued requiring the defendant to pay the sum of \$24,500 principal, and interest and costs, on or before the first day of the next term of the superior court, which term was to convene on the 7th day of March, 1898, or, in default thereof, that the court would proceed as to justice might appertain; that the railway company, by its president, acknowledged service, and consented that a judgment of foreclosure might be entered for the full amount sued for; that thereupon a rule absolute was granted by the superior court for the sum of \$24,500 principal, and something over \$5,000 interest, with all costs of suit, and the equity of redemption in said railway company was adjudged to be forever barred and foreclosed, and that said sum should be made and recovered out of the mortgaged premises; that execution was issued upon the said railroad, and the property advertised and sold on the first Tuesday in April, 1898; that on the sale the property was knocked down to J. F. Leary, as the best and highest bidder, for the sum of \$500; that complainant had no notice of the foreclosure proceeding until the day before the sale; that it gave to the sheriff, and caused to be read at the sale, a notice setting up its rights; that Leary heard and read the notice, and was fully apprised of its contents, and of the claim of complainant, before the property was bid off by him; that complainant was not a party to the foreclosure proceeding, and, by express provision of the law of Georgia, was not entitled to become a party to said proceeding. There are other parts of the bill, immaterial here. The only prayer in this bill, insisted on now, is to have a decree of foreclosure and a sale of the property.

The Atlanta Electric Railway Company and Leary have both answered the bill, and in both answers it is claimed that the transactions between the railway company and Livermore, and between Livermore and Leary, were both made in the utmost good faith, and that the consideration named in both transactions actually passed. The railway company says that it received from Livermore the amount for which the notes and mortgage were given, and both the company and Leary say that the \$10,000 was actually loaned by Leary to Livermore at the time of the transaction between them.

Counsel for complainant conceded on the argument that such was the fact; that the transaction between Livermore and Leary was a bona fide transaction. So the case stands in this way: On the

17th of August, 1895, the railway company gave to Livermore notes, and a mortgage to secure the same, for the principal sum of \$24,500; that in September and October, 1895, Leary loaned to Livermore \$10,000, and took from him a transfer of the notes and the mortgage named as collateral security; that subsequently to this, on the 2d of March, 1896, after the transaction between Livermore and Leary was complete, the trust deed was executed to complainant to secure an issue of \$21,000 of bonds; that, in 1897, Leary foreclosed his mortgage under the statutes of Georgia, and according to its forms, and caused the property to be sold, bidding the same in for \$500, and causing the deed to be made to his daughter. Leary claims that he had the deed so made, solely for the purpose of enabling him to sign any bond that might be required, that it was done upon the advice of his attorney, and that he assumed all responsibility for the bid.

Conceding, as counsel have in the argument of this case, that Leary actually loaned the money, and that the transaction was bona fide in every way, we come to consider the rights of complainant. The complainant must stand in this case, of course, as a junior mortgagee, and with such rights as that relation to the transaction will give it. The contention is that it has the right, notwithstanding the purchase by Leary under the foreclosure sale, to have the property resold, inasmuch as it was not a party to the foreclosure proceeding. The Civil Code of Georgia (section 2746) provides for any defense by the mortgagor or his special agent against a foreclosure proceeding which might be made in an ordinary suit instituted on the debt, and section 2747 provides as follows: "If the mortgagor or his special agent or attorney fail to set up the defense provided for in the preceding section, it is not competent for any third person to interpose; neither will the court itself, of its own motion, do so." It seems, therefore, that complainant, as a junior mortgagee, having been precluded from asserting its rights in the statutory foreclosure proceeding, may now do so, in a proper way. Its right is to have its debt paid after the amount due on the older mortgage shall have been paid off. To accomplish this object, its remedy would seem to be by a bill to redeem.

The purpose of the bill here seems originally to have been to attack the debt from the railway company to Livermore, and from the company to Leary, and, while complainant's right to redeem is mentioned in the bill, it can hardly be said to be a bill strictly for that purpose. Even treating it as a bill to redeem, it lacks a very necessary ingredient, and that is an offer to pay off the prior incumbrance. As the case now stands, by the answers and by concession of counsel, any right which complainant in this case may have is subordinate to Leary's right to have his debt paid, and, before this junior mortgagee can have any standing in court, it must offer to do equity, which is to pay Leary's mortgage. "Payment of the amount due on the mortgage is a necessary condition precedent to redemption." Jones, *Mortg.* (5th Ed.) § 1070. This property having been sold for a less amount than the older mortgage debt, it is not sufficient to tender the purchase money, but there must

be a tender of the amount due on the senior mortgage. "To redeem property which has been sold under a mortgage (as is alleged irregularly), it is not sufficient to tender the amount of the sale. The whole mortgage money must be tendered, or, if suit be brought, be paid into court." *Collins v. Riggs*, 14 Wall. 491, 20 L. Ed. 723.

It is unnecessary to pass any further upon the rights acquired by the purchaser at this sale than to say, at present, that the most complainant can claim in this case is the right to redeem the property by paying off Leary's debt, with interest and costs (not passing for the present upon the question of attorney's fees, as that was merely alluded to, but not argued), and to institute proper proceedings for that purpose. Unless, by the present bill, such a tender is made, the bill must be dismissed.

### On Rehearing.

(November 14, 1899.)

Subsequently to the filing of the former opinion in this case, filed June 20, 1899, complainant, the American Loan & Trust Company, amended its bill, and tendered to Leary the amount due him by Livermore, with interest and costs, in the event that the lien of Livermore's mortgage, transferred to Leary, should be held superior to complainant's lien. After this amendment was allowed, a decree was entered in which it was adjudged (1) that the mortgage to Livermore was a good and valid security for Leary's debt of \$10,000, and that Leary was entitled to enforce the same for the purpose of collecting the debt due by Livermore; (2) that the Livermore mortgage, in Leary's hands, was a superior lien to the deed of trust given by the Atlanta Electric Railway Company to the American Loan & Trust Company; (3) that the foreclosure proceedings of Livermore for the use of Leary against the Atlanta Electric Railway Company, in the state court, to foreclose the mortgage given by the railway company to Livermore, and the proceedings had thereunder, were not binding upon the American Loan & Trust Company, and did not foreclose its equity of redemption to the mortgaged premises, and that said American Loan & Trust Company was entitled, upon payment to Leary of his principal, interest, and costs, to redeem the property so mortgaged from the lien of the mortgage. It was then further decreed that the American Loan & Trust Company should have until July 17, 1899, to pay to said Leary the sums aforesaid, and in default thereof the right of said American Loan & Trust Company to redeem said premises should be forever extinguished and barred, and its bill dismissed, and Leary's title to said premises should stand freed from all right or equity of redemption of said American Loan & Trust Company thereto or therein. The decree further fixed the amount of the debt of the American Loan & Trust Company, and its right to foreclose was adjudged, subject to its making default in redeeming the first mortgage, as before provided. The further provisions of the decree determined the rights of the complainant in the event it should redeem. This decree was entered on the 30th day of June, 1899. Subsequently,

on the 17th day of July, 1899, the Atlanta Consolidated Street-Railway Company, alleging that it had leased the mortgaged premises from Leary, moved for a rehearing, and to set aside so much of the decree rendered as held that the title acquired by Leary at the sheriff's sale was subject to the right of the American Loan & Trust Company, as junior mortgagee, to redeem, on payment to Leary of his debt, with interest and costs. By consent of all the parties at interest, the motion was allowed to stand over for a hearing at a time to suit the convenience of the court and counsel, and the motion has been recently elaborately argued, and full briefs submitted.

The precise question to be determined on this application for a rehearing is, does a proceeding to foreclose a mortgage by a senior mortgagee, according to the statutory form and proceedings used in Georgia, and a sale thereunder, deprive a junior mortgagee of the right to redeem by paying off the senior mortgage and all the costs of the foreclosure proceedings? The statutory method of foreclosing a mortgage on real estate in Georgia is by what is commonly known as a "rule nisi" and a "rule absolute." A rule nisi calls on the mortgagor to pay into court, on or before the first day of the next term succeeding the one at which the rule is granted, the amount of the mortgage debt, with interest and costs. When the rule nisi has been issued and published or served as required, the mortgagor, or his special agent or attorney, may appear at the term of the court at which the money is directed to be paid, and file his objections to the foreclosure of the mortgage, and may set up and avail himself of any defense which he might lawfully set up in an ordinary suit instituted on the debt or demand secured by such mortgage, and which goes to show that the applicant is not entitled to the foreclosure sought, or that the amount claimed is not due; provided, such defense is verified by the affidavit of the mortgagor, or his special agent or attorney, at the time of filing the same. The statutes further provide (Civ. Code, § 2747) that if the mortgagor, or his special agent or attorney, fail to set up the defense provided for, it is not competent for any third person to interpose; neither will the court, of its own motion, do so. If the mortgagor fails to pay the principal, interest, and costs as required, and fails to set up and sustain his defense, the court shall give judgment for the amount due on the mortgage, and shall order the mortgaged property to be sold in the manner and under the same regulations which govern sheriff's sales under execution. The junior mortgagee cannot be made a party to this statutory foreclosure proceeding. Such being the case, is the equity of redemption of a junior mortgagee barred by such foreclosure proceeding, where he could not be made a party and has no opportunity to be heard?

There is a provision in the statutes of the state (Civ. Code, § 2770) by which "the holder of any mortgage to real or personal property, or both, whether as original mortgagee or as executor, administrator or assignee of the original mortgagee, shall be at liberty to foreclose such mortgage in equity according to the practice of courts in equitable proceedings, as well as by the methods prescribed in the Code." Before discussing the decisions of the supreme court of

the state, so far as they may be pertinent to a determination of the questions here involved, it may be well to observe that at common law, and under general law, independently of any statutory provision, the right of a junior mortgagee, who has not been made a party to the foreclosure proceeding by which a senior mortgage is foreclosed, to redeem, even after sale of the mortgaged premises, is undeniable. 2 Jones, Mortg. § 1064 et seq.; Terrell v. Allison, 21 Wall. 289, 22 L. Ed. 634; Howard v. Railway Co., 101 U. S. 837, 25 L. Ed. 1081 (on this point, pages 848, 849, 101 U. S., and page 1084, 25 L. Ed.); McCormick v. Knox, 105 U. S. 122, 26 L. Ed. 940. The junior mortgagee has, by virtue of his mortgage, such an interest in the mortgaged property as gives him the equitable right of redemption in respect to the prior mortgage. 11 Am. & Eng. Enc. Law (2d Ed.) p. 219, and cases cited in notes. If a person entitled to redeem was not made a party to the foreclosure proceedings, it is for that reason a nullity as to him, and therefore does not affect his right of redemption. 11 Am. & Eng. Enc. Law (2d Ed.) p. 245, and cases cited in notes. The equitable right of redemption of property is an estate in the mortgaged premises. "It is descendible, devisable, and alienable, like other interests in real property." Clark v. Reyburn, 8 Wall. 318, 19 L. Ed. 354. A junior mortgagee receives, by his mortgage, such an interest in the mortgaged property, and such a transfer of the mortgagor's equity of redemption, as gives him an independent right to redeem. 11 Am. & Eng. Enc. Law (2d Ed.) p. 219. The contention made by counsel moving for the rehearing in this case, that a different rule prevails in other states, whereas in Georgia a mortgage is only a security for a debt, and passes no title, is not sustained by an examination of the authorities. The reverse is true in a number of those states, at least, in which the decisions have been examined. See Whitney v. Higgins, 70 Am. Dec. 748; Carpenter v. Brenham, 40 Cal. 221; Bunce v. West, 62 Iowa, 80, 17 N. W. 179; Poole v. Johnson, 62 Iowa, 611, 17 N. W. 900; Spurgin v. Adamson, 62 Iowa, 661, 18 N. W. 293; Avery v. Ryerson, 34 Mich. 362; Renard v. Brown, 7 Neb. 449; Wilson v. Tarter, 22 Or. 504, 30 Pac. 499; Pratt v. Frear, 13 Wis. 462.

Assuming, therefore, that it is settled, under the general law, that a junior mortgagee, not made a party to foreclosure proceedings, may redeem from the purchaser at foreclosure sale in a reasonable time, by paying the amount of the senior mortgage debt, with interest and costs, it is proper to consider whether there is anything in the decisions of the supreme court of this state construing the statutes on the subject, and the effect of the foreclosure sale by statutory method, which establishes a different rule.

The first case on the subject which may be noticed, inasmuch as it appears to refer to and discuss the former decisions, is the case of Williams v. Terrell, 54 Ga. 462. Judge McCay, in delivering the opinion of the court, says:

"This case turns upon the sole question as to whether the judgment of foreclosure against the mortgagee concludes the claimant. Under our Code, a mortgage may be foreclosed either by personal service on the mortgagor or by publication. It is expressly provided (section 3905, now section 2747) that, if neither the mortgagor nor his special agent or attorney sets up any defense,

it shall not be competent for any third person to do so. It follows, therefore, that this claimant not only was not a party to the proceedings to foreclose, but that it was not competent for him, on his own motion, to have appeared and defended. Can it be possible that it was the intent of the law that one not a party should be absolutely bound by a judgment against a third person, declaring this land to be subject to the mortgage, fixing the amount of it, declaring it still to be subsisting, etc., and that, too, when at the date of the proceedings the mortgagor had parted with all interest?"

He then proceeds to discuss certain prior decisions of the supreme court of the state, and concludes as follows:

"In *Watson v. Spence*, 20 Wend. 260, it is held that a decree in chancery against the mortgagor, foreclosing the equity of redemption, does not bind a purchaser from the mortgagor before the filing of the bill. The court says that, to bind one by a judgment, he ought to be a party or a privy to it. A vendee is never bound, except by acts done by his vendor before his purchase. He buys subject to all his vendor has done. But, after the title has passed out, it would seem contrary, not only to all rule, but to the principles of justice, to make it competent for the vendor, by any act of his, to conclude the purchaser. This, it will be remembered, is not a judgment against the mortgagor. It is a quasi judgment in rem,—a judgment, as against the mortgagor, that the land is subject to the mortgage, and that it (the mortgage) is a present subsisting charge on it. What security has the claimant that the judgment is right? The mortgagor did not have any possible interest in preventing the judgment. He had parted with all interest in the land, and the judgment did not bind him personally. On the whole, we feel bound to decide that the judgment does not conclude the purchaser who has bought before the commencement of proceedings to foreclose. If the mortgagee wishes to bind him, he must make him a party. Perhaps to do this he may have to file a bill. But, unless this be done, the purchaser may resist the judgment by any defense the mortgagee would have had."

It is true that in this case the party whose rights it was held were not affected by the foreclosure proceedings was a purchaser, but in the authorities no distinction is drawn between a purchaser before commencement of the foreclosure proceedings and a junior mortgagee, who takes his mortgage before the foreclosure proceedings are instituted. The junior mortgagee takes, so far as his right to redeem is concerned, the same interest by his mortgage as a purchaser would take by his purchase. It will be observed that the court treats this statutory foreclosure proceeding as "a quasi judgment in rem,—a judgment, as against the mortgagor, that the land is subject to the mortgage, and that it (the mortgage) is a present subsisting charge on it"; and, further, that, "if the mortgagee wishes to bind him, he must make him a party; perhaps to do this he may have to file a bill." If a junior mortgagee stands in the same relation to the mortgage transaction and the foreclosure sale as a subsequent purchaser, the language of this decision would seem to be conclusive that the same rule prevails in Georgia as prevails elsewhere, according to the authorities hereinbefore quoted.

In *Lilienthal v. Champion*, 58 Ga. 158, this is said, in the opinion:

"This fact makes this legal question: Can the purchaser of the whole estate, paying full value therefor, plead usury, which the mortgagor neglected to plead when the mortgage was foreclosed? First, is he bound by the judgment of foreclosure? This court has held that the judgment of foreclosure does not conclude the purchaser. In *Williams v. Terrell*, 54 Ga. 463, the cases are all reviewed, and the judgment is distinctly pronounced that the purchaser is not concluded. Certainly, upon principle, it would seem that he ought not to be,

unless he was made a party, or bought after the foreclosure, or, at least, had some notice of the proceedings to foreclose. Nothing of the kind is pretended in this case. See, also, *Fry v. Shehee*, 55 Ga. 208, and Civ. Code, § 3065 (now section 2747), which is conclusive."

The case of *Frost v. Borders*, 59 Ga. 817, was a case in which the question was as to whether or not the rights of the beneficiaries of a homestead were cut off by proceedings of foreclosure of a mortgage against the mortgagor, who was the head of the family. In the opinion by Judge Bleckley it was said:

"Purchasers from a mortgagor may go behind the judgment of foreclosure, where their protection requires it. *Williams v. Terrell*, 54 Ga. 462; *Lillenthal v. Champlin*, 58 Ga. 158. The wife and minor children are not strictly purchasers of property set apart as exempt, but they are persons for whom the law feels a special solicitude. In that solicitude the policy of exemption has its source and origin. A judgment which would not conclude ordinary purchasers may well be held not to conclude them."

The question in *Merritt v. Merritt*, 66 Ga. 324, was similar to that in the immediately preceding case, and it was held, following *Frost v. Borders*, that the beneficiaries of the homestead estate were not bound by a judgment of foreclosure of a mortgage.

The case of *Mixon v. Stanley*, 100 Ga. 372, 28 S. E. 440, is relied upon by the movants here. It was decided in that case that, as a mortgage does not in this state pass title to the mortgagee, the latter is not an owner of the mortgaged property, and therefore is not entitled, under section 909 of the Political Code, to redeem land upon which he held a mortgage, where the same was sold under tax execution against the mortgagor. There is nothing in this affecting the question now before the court. It simply construes the meaning of the word "owner" in the statute authorizing redemption from tax sales. The court merely holds that a mortgagee is not an owner, and that it will not extend the statute beyond those bounds.

Instead, therefore, of contravening the general rule on the subject under discussion, these decisions by the supreme court of the state seem to be in entire accord with it. The conclusion, therefore, must result that in a case like this, in Georgia, the right to redeem exists.

This is peculiarly a strong case in favor of the right of the junior mortgagee to come in and pay off the prior mortgage, even after foreclosure. Leary foreclosed for the whole amount of the judgment to Livermore. Leary's debt was \$10,000, with interest, and the Livermore mortgage, which had been transferred to him as collateral, was for \$24,500. While this court has held that the transaction between Livermore and Leary was a bona fide transaction, so as to authorize Leary to recover and to have a lien for the amount of his debt against Livermore, it has also held that that was all to which Leary was entitled. As to the additional amount due on the Livermore mortgage, it is clear that Livermore would have no right to claim priority over the mortgage to the American Loan & Trust Company. He executed the trust deed, as secretary of the railway company, to the American Loan & Trust Company, as trustee, and stipulated that it was a first lien on the property for the



benefit of the bonds secured thereby. Clearly, Livermore could not, as against this instrument and the holders under it, claim any prior right. So that to clear up this transaction, and ascertain the exact amount which it would be necessary to pay Leary, the American Loan & Trust Company would seem to have a stronger right to come into a court of equity and be heard than would an ordinary junior mortgagee against a purchaser at a foreclosure sale under a senior mortgage, where there was no question as to the amount due on the senior mortgage. The decree heretofore rendered in this case, allowing the American Loan & Trust Company to redeem on payment to Leary of the amount of his mortgage, with interest and costs, was right, and the rehearing will be denied.

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DE HIERAPOLIS v. LAWRENCE et al.

(Circuit Court, S. D. New York. December 21, 1899.)

**1. CREDITORS' SUIT—ALIEN PLAINTIFF—PROCEEDINGS IN REM—VENUE.**

Under Act 1875, § 8 (18 Stat. 470), providing that in suits to enforce liens on a claim to property, within the district where the suit is brought, absent or nonresident defendants may be brought in, and the judgment be made binding, in so far as it relates to the property in controversy; and Act 1888, § 5 (25 Stat. 433), continuing the preceding section in force,—a suit by an alien judgment creditor to establish the judgment as a lien against property of the judgment debtor may be brought in the district in which the property is situated, regardless of the fact that defendants are inhabitants of another district.

**2. SAME—PROPERTY WHICH MAY BE REACHED.**

A reservation of an annuity from an assignment in trust for the benefit of creditors is an estate which may be reached in equity to pay the assignor's debts.

**3. SAME—PROCEDURE—SUIT TO ESTABLISH LIEN.**

A reservation of an annuity from an assignment in trust for the benefit of creditors may be reached by a judgment creditor of the assignor by a suit in equity to establish the judgment as a lien on the same.

In Equity.

Theodore B. Chancellor, for plaintiff.

Norman G. Johnson, for defendants.

**WHEELER**, District Judge. The bill sets up the plaintiff as an alien, and the defendants as citizens of Maine, and alleges that the defendant Isaac Lawrence, on July 28, 1893, to defraud his creditors, including the plaintiff, conveyed all of his property, consisting of some personal property, and real estate of large value, in the city of New York, to two of the other defendants, in trust to take possession of the real estate, collect all the personal estate, and receive all the proceeds of the real estate, in trust to pay all his debts and liabilities then existing, and, among other things, to pay annually to him, out of the income, \$3,000; that on November 3, 1898, the plaintiff recovered judgment against him in this court for \$2,702.80, on which execution has been returned unsatisfied; and prays, among other things, that the judgment be decreed a lien upon, and that the trustees be decreed to pay it out of the proceeds of, the property,

or of that part reserved to the judgment debtor. The bill has been demurred to, and the cause has been heard upon the demurrer.

One of the principal grounds of demurrer is the bringing of the suit here, out of the district whereof the defendants are inhabitants. But the parties are such that jurisdiction of suits between them is given to the federal courts. The suit is brought to enforce a lien upon the property here, and the situs of the property is as well left by the statutes to draw the suit into this district as inhabitancy of the defendants is, without that, left to draw it elsewhere. Acts 1888, § 5 (25 Stat. 433); Acts 1875, § 8 (18 Stat. 470).

The other principal ground is want of equity. The provision in the conveyance for the then existing debts of the judgment debtor would seem to negative any idea that he intended to defraud then existing creditors, but he might intend to defraud new creditors by the change in his former ownership. And the interest of \$3,000 a year, reserved to himself in his own property, would seem to be such an estate or right as can be reached in equity for the payment of his debts. That interest remains in him of his property as it was before, and continues liable when it can be reached. This is a proper mode to reach it. Demurrer overruled; defendants to answer over by February rule day.

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#### HAWKINS v. CLEVELAND, C., C. & ST. L. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. January 17, 1900.)

No. 456.

##### 1. APPEAL—PROCEDURE AFTER REVERSAL—MOTION TO MODIFY MANDATE.

Where a mandate sent down by a circuit court of appeals on reversal of a decree is in customary form, commanding "that such further proceedings be had in said cause as are not inconsistent with the opinion of this court," a motion to modify the mandate is, in effect, one to modify the opinion, which cannot be entertained after the time allowed for a petition for rehearing, or, at furthest, after the term, when such time expires before the close of the term. In case of dispute over the interpretation or application of the opinion, the remedy is by mandamus or by a second appeal.

##### 2. SAME—EFFECT OF REVERSAL—PROCEDURE IN COURT BELOW.

When a decree is reversed, and the mandate does not direct the entry of any particular decree, but only that further proceedings be had, not inconsistent with the opinion of the appellate court, the effect is to put the case in the same position in the court below as if no decree had ever been entered; and the court has the same authority to permit amendments of the pleadings to enlarge the issues, and admit further proofs, as it had before the entry of the decree.

On Motion to Modify Mandate.

Lenord J. Hackney, for the motion.

John W. Kern, opposed.

Before WOODS and JENKINS, Circuit Judges.

WOODS, Circuit Judge. The opinion of this court reversing the decree of the circuit court in this case was handed down at the October session, 1898. *Hawkins v. Railway Co.*, 60 U. S. App. 561, 32

C. C. A. 198, 89 Fed. 266. The appellee now presents a "motion to modify the mandate," but, instead of a direct and specific statement of the modification desired, begins by saying, "The appellee, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, respectfully moves the modification of the mandate in the above entitled cause, and in support thereof, gives the court to know," etc. This is followed by a lengthy statement, from which we are able to deduce an intention to move that the mandate be "so modified as to direct the lower court to permit further pleading" as proposed in that court. There is also a suggestion that the opinion of this court be made more specific upon the question whether the claim of the appellee as a general creditor is to be limited to the sum of \$9,000, or whether further proof on that subject may be heard. It is stated in the motion that, after the decision of this court had been certified down, the appellant moved for a provision in the decree, to be entered in obedience to the mandate, to the effect that the appellee should share in the assets to be distributed only as a general creditor with a claim for \$9,000, and no more; that pending that motion the appellee gave notice of its motion for leave to amend its supplemental petition or bill by adding thereto certain averments of facts stated; and that thereupon the presiding judge, expressing his belief that amendments to the petition and a further hearing without the direction of this court would not be in accordance with the mandate as sent down, deferred action upon either of the motions so presented, in order to enable the appellee to seek from this court a modification of the mandate. The mandate was in the customary form, commanding "that such further proceedings be had in said cause as are not inconsistent with the opinion of this court, as, according to right and justice and the laws of the United States, ought to be had."

No proposition to modify an opinion of this court can be entertained after the time allowed for a petition for a rehearing, or, at furthest, after the term at which it was handed down, if the time allowed for a petition for a rehearing had passed at the expiration of the term. If there arises dispute over the proper interpretation or application of an opinion, the remedy of the complaining party must be by mandamus or by a second appeal. *Metcalf v. City of Watertown*, 34 U. S. App. 107, 16 C. C. A. 37, 68 Fed. 859.

In respect to the motion of the appellee for leave to amend its petition by adding the further averments proposed, the application to this court was unnecessary. The rule is well established, as declared in *Durant v. Essex Co.*, 101 U. S. 555, 25 L. Ed. 961:

"On a mandate from this court, affirming a decree, the circuit court can only record our order, and proceed with the execution of its own decree as affirmed. It has no power to rescind or modify what we have established." *Southard v. Russell*, 16 How. 547, 14 L. Ed. 1052; *Kingsbury v. Buckner*, 134 U. S. 650, 671, 10 Sup. Ct. 638, 33 L. Ed. 1047; *Bank v. Taylor*, 9 U. S. App. 406, 447, 4 C. C. A. 55, 53 Fed. 854; *In re Gamewell Fire-Alarm Tel. Co.*, 33 U. S. App. 452, 20 C. C. A. 111, 73 Fed. 908.

The rule, it will be found, has been applied only when the decree in the circuit court had been affirmed, or, if reversed, another decree or judgment had been ordered by the appellate court, and a review thereof was sought after the affirmance or the entry of the decree so

ordered. In *Southard v. Russell* the supreme court had reversed a decree on the pleadings and proofs, dismissing the bill, and had ordered a decree in favor of the complainant; and, after decree in the circuit court in obedience to the mandate, that court, without leave obtained of the supreme court, had entertained a bill of review, and after a hearing upon the pleadings and proof, partly new, again had dismissed the bill. In the present case the decree below was reversed, but, instead of a direction for the entry of any particular decree, the mandate was, as stated, that further proceedings should be had, not inconsistent with the opinion of this court. The effect was to put the case in the same posture as if no decree had ever been entered, and in that situation the court had the same authority to permit an amendment of the petition or bill of the appellee for the purpose of enlarging the issue and of admitting further proofs as it had before the entry of the reversed decree. The case of *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414, affords an apt precedent.

Counsel for the appellant have urged that in this instance it would be inequitable to permit a change in the issues, but in the first instance, at least, that is a question for the circuit court. The motion is denied, at the cost of the appellee.

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**EDGELL et al. v. FELDER.**

(Circuit Court of Appeals, Fifth Circuit. January 23, 1900.)

No. 866.

**1. APPEAL—FINAL DECREE.**

A decree in favor of persons not technically parties to the suit, but whose appointment and employment therein had been authorized by the court, to render designated services, and whose claims for compensation, on proper petition of the special master and on due hearing, were fully adjudicated, and ordered to be paid out of the fund in the registry of the court, as a part of the costs of administration of the same, which decree provides for its immediate execution, by ordering that the clerk draw checks, for the signature of the judge, on the fund in the registry of the court; for the allowances made to the claimants, is a final decree, for the purposes of appeal.<sup>1</sup>

**2. SAME—PARTIES—RECEIVER.**

The fund affected by a decree for payment of persons employed by authority of the court, in a suit in which a receiver was appointed, being in the registry of the court, and the payment being ordered by a check drawn by the clerk of the court, and signed by the judge, the receiver is not affected by the decree, and hence is not a necessary party to an appeal therefrom.

**3. SPECIAL MASTER—COMPENSATION—ESTOPPEL.**

Parties at whose instance and for whose convenience a decree was passed, in a suit in which a receiver had been appointed, appointing a special master to take testimony at a certain place, with authority to employ stenographers, and who participated in the proceedings for taking the testimony, without any motion to amend the decree, or suggestion as to

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<sup>1</sup> See note to *Brush Electric Co. v. Electric Imp. Co. of San José*, 2 C. C. A. 379; *Trust Co. v. Madden*, 17 C. C. A. 238; and *Prescott & A. C. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 28 C. C. A. 482.

distribution of the costs of the proceedings, cannot afterwards be heard to say that they will be injured by having the compensation of said master and stenographers paid out of the fund in the registry of the court.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

James E. Webb, for appellants.

Marion Erwin, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The decree from which this appeal is taken was passed in a suit which involved the rights of the respective parties in and to a large amount of real and personal property which the court, on adequate showing, had ordered to be taken possession of by its receiver. Some time after his appointment, this receiver represented to the court that, in order to discharge the duties devolved upon him, it was necessary for him to have possession of the books, correspondence, and other papers had and kept by and between the parties in reference to the property, and asked that the parties in possession of the same should be required to deliver them to him, to aid him in the discharge of his duties. The complainant also moved the court to make the order. It was shown that the books, correspondence, and other papers needed were in the possession of the defendants. The order prayed for was duly made. Thereafter the defendants appeared, and showed that it was impracticable and inequitable to obey the order as it was passed, because the books and other documents referred to were being used by them in the conduct of their current business. Thereupon, or immediately thereafter, apparently at the instance of all the parties,—certainly with the consent of the appellants, Edgell, Corbin, and Hehre, appearing before the court by the solicitor who now appears for them before this court,—that court passed the following decree:

"It is ordered by the court that Clem P. Steed, Esq., of Macon, Georgia, be, and he is hereby, appointed special master to take and report testimony in the above-stated cause, with powers of an examiner to take said testimony orally and stenographically in Georgia and New York, as provided by the sixty-seventh equity rule; and said special master is authorized to employ such stenographer or stenographers as he may deem necessary to assist him, who shall be by said master sworn to a faithful performance of his or their duty as such stenographer or stenographers. Said special master shall proceed to the city of New York, and take such testimony as is offered there by any party to this cause, upon reasonable notice to the parties or their counsel. Said special master shall, upon the request of either or any party, have power to require the production of books, documents, and papers before him for the purpose of making or causing to be made copies thereof or extracts therefrom for use in evidence or for the receiver, and to verify the same; but where books, papers, and documents are claimed by any of the parties to be in use in their business, and such parties express a willingness to submit the same at their place of business, or other suitable place, to the inspection of the other parties to the suit, their solicitors and agents, at all reasonable hours, then said special master shall take the testimony at such place, without requiring said books and documents and papers to be carried elsewhere; and the parties shall allow such inspection to be made, and copies and extracts to be made, at such place, by the special master, or the party desiring the same, or their solicitors or agents, at all reasonable hours. In the meantime the defendants to this suit, and each of them, are restrained from instituting or carrying on,

otherwise than in this court, or without the permission of this court, any legal proceedings of any kind or character whatsoever against the said complainant. T. J. Felder, embraced in the controversy in this cause, the accounting, and other subject-matter thereof. In the meantime, and until the further order of the court, the court reserves its decision on the motions before it, upon which evidence has this day been offered and argument had, until either party shall, on notice to the other, ask for a decision of the court thereon.

"Aug. 7th, 1897.

Emory Speer, U. S. Judge.

"The above order is agreed to.

"Marion Erwin,

"Solicitor for T. J. Felder.

"James E. Webb,

"Solicitor for Defts. Edgell, Corbin & Hehre."

It appears from the record that subsequent to the passing of this decree the defendants were permitted, by leave of court duly granted, on the giving of proper bonds, to withdraw from the custody of the receiver all of the assets which had been placed in his hands, except a certain amount of cash then held by him. Thereafter the special master appointed by the decree above recited, after due notice to the parties, proceeded to execute the same so far as it contemplated execution in the city of New York, where and when the parties, without having made any motion to amend the decree, or any suggestion to the court or the special master in reference to the distribution of the costs of the proceeding they were about to take, and the payment therefor, participated fully in the proceedings for the period of about one month, until the same were duly closed at that point. Of this proceeding the special master made his report, and moved the court to settle his compensation, and allow the claims of those employed by him under the order. This application coming on to be heard, the solicitors, who now represent the parties to this appeal, appeared before the court; and, the matter having been contradictorily tried, the court passed the decree from which this appeal is taken, in the following terms:

"The above-stated cause came on to be heard upon the petition of Clem P. Steed, special master appointed by the court by order of 7th day of August, 1897, to take testimony in Georgia and in New York in said cause, asking for the payment of his personal expenses on trip to New York in pursuance of said order, and for the payment of the stenographer's bill for services rendered at said hearing before said master in New York, and praying for an allowance on account of his personal compensation for services rendered as master in New York, and upon motion of complainant to have taxed as part of said cost the bill of said stenographer for services of two typewriters employed in making the copies of papers and documents from books and documents in the hands of the Corbin Banking Company for use as evidence before the master under the terms of said order; and evidence having been heard by the court, and arguments of counsel, it is adjudged, ordered, and decreed that the said Clem P. Steed, special master, be, and he is hereby, allowed out of the fund in the registry of the court in said cause the sum of \$153.50 for his personal expenses of his trip to New York as aforesaid, and \$500 on account for services rendered as said special master in said cause on said trip to New York; also, that the bills of Whitfield Sammis and Charles F. Tinkham for \$462.25 for services for taking and reporting the oral testimony in said cause before said master, and also their bill for \$113 for services of Miss Shepardson and Miss Moore, typewriters, for making copies of papers and documents for use before said master, be also approved, and directed to be paid out of the fund in the registry of the court, as part of the cost of the administration of the fund brought into court for distribution in said cause. It is further ordered that the

clerk draw checks, for the signature of the judge, on the fund in the registry of the court in said cause, for the above-stated allowances, as follows: In favor of Clem P. Steed, for \$868.50; in favor of Whitfield Sammis and Charles F. Tinkham, for \$575.25.

"In open court, December 22, 1898.

Emory Speer, U. S. Judge."

George S. Edgell and Austin Corbin, Jr., the appellants, having severed from their co-defendants, in due time procured the allowance of their appeal to this court, and duly filed the transcript of the record. They assign (1) "that the court erred in assuming jurisdiction in the matter of said petition to render said judgment set out on page 21 of the record." In support of this assignment, and as a part of it, they submit argumentatively several grounds, in substance: (1) That they, the real defendants to the bill, contend that the complainant has no interest in the fund in the custody of the court; (2) that the expenses provided for in the decree are not for the care and administration of the fund, but for the benefit of the complainant in the preparation and prosecution of the suit; (3) that the court could only fix the equitable and just proportion of these expenses to be borne by the parties, respectively, to be paid out of their own moneys and estates; (4) because the appellants, in open court, offered to pay whatever amount the court might ascertain and assess as their share of such costs and expenses, and it was error in the court to order and decree that the entire expense of taking such testimony should be paid out of the fund in the registry of the court. The appellee, Thomas J. Felder, moves to dismiss this appeal on grounds which may be stated thus: (1) Clem P. Steed, Whitfield Sammis, and Charles F. Tinkham, the persons most interested in maintaining the decree, and Earnest P. Willingham, the receiver, are necessary parties to the appeal, but have not been made parties thereto by citation or bond or otherwise; and (2) that the decree appealed from is not a final order from which an appeal lies.

On the hearing in this court the appeal on the merits and the motion to dismiss were considered together, and argued by counsel. The decree appealed from is not one adjudging costs in favor of certain parties to a suit against other parties. Such an order in reference to costs would, in the very nature of the case, be interlocutory, and could not support an appeal. This decree, however, is in favor of certain persons who were not technically parties to the suit, but whose appointment and employment therein had been authorized by the court to render designated service, and whose claims for compensation, on proper petition of the special master and on due hearing, were fully adjudicated, and ordered to be paid out of the fund in the registry of the court, as a part of the costs of administration of the same. The decree provides for its immediate execution, by ordering that the clerk draw checks, for the signature of the judge, on the fund in the registry of the court, for the allowances made to the claimants. There being no immediate allowance of the appeal, with supersedeas, the decree was doubtless promptly executed, the payments made, and the fund in court thereby diminished to the extent of the sum of these payments. On the authority of *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157, and *Railway Co. v. Bisbee*,

13 U. S. App. 377, 6 C. C. A. 249, 57 Fed. 66, and the precedents on which these rest, we are constrained to hold that the decree appealed from is a final decree, within the meaning of the statute and decisions allowing appeals. It appearing from the decree that the fund affected is in the registry of the court, and that the payment was to be made by a proper check drawn by the clerk of the court and signed by the judge, we do not perceive that the receiver, Earnest P. Willingham, is affected thereby, and hence must hold that he is not a necessary party to the appeal. As to the other persons claimed by the motion to be necessary parties to the appeal, the appellants, while contending that these persons are not such necessary parties, submit to the court that the appellants be allowed now to make new bond, and to give the necessary notice, if the court should be of opinion that these persons should be brought before it. This we could do. *Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127; *Evans v. Bank*, 134 U. S. 330, 10 Sup. Ct. 493, 33 L. Ed. 917; *Richardson v. Green*, 130 U. S. 104, 9 Sup. Ct. 443, 33 L. Ed. 516; *Peugh v. Davis*, 110 U. S. 227, 4 Sup. Ct. 17, 28 L. Ed. 127; *Railroad Co. v. Blair*, 100 U. S. 661, 25 L. Ed. 587; *Dayton v. Lash*, 94 U. S. 112, 24 L. Ed. 33. The view we have taken of the merits, however, renders it unnecessary that we should now allow a new bond and further notice to be given. It sufficiently appears on the face of the decree passed on August 7, 1897, above set out, that it was obtained at the instance and for the convenience of these appellants, represented then by the same counsel that represent them now, who also represented them before the special master when the work was done for which the decree appealed from provides compensation. Under the circumstances and conditions which the record shows to have existed at the time of the passing of the decree of August 7, 1897, and the doing of the work, we are of opinion that the appellants should not now be heard to say that they will be injured by having the compensation for this service paid out of the fund in the registry of the court. Their contention that the circuit court could and should only have adjudged between the parties the respective proportionate shares of these expenses does not commend itself to us. Because, in our view, the action of the circuit court was right, the decree appealed from is affirmed.

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**McNULTA v. WEST CHICAGO PARK COM'RS.**

(Circuit Court of Appeals, Seventh Circuit. January 23, 1900.)

No. 580.

**APPEAL—NECESSITY OF CITATION—ALLOWANCE IN OPEN COURT—SEVERANCE.**

When an appeal is allowed in open court at the term when the decree was rendered, no citation is necessary, and an appeal so taken brings into the appellate court all of the parties whose presence is necessary to a determination of the rights of the appellant.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

On motion to dismiss the appeal.



Thomas A. Moran and John P. Wilson, for appellant.

Francis A. Riddle, Edward O. Brown, and John S. Miller, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge. This suit was brought by the West Chicago Park Commissioners against the National Bank of Illinois at Chicago and John McNulta, as receiver of that bank, to recover a sum of money for which the bank was alleged to be accountable. By the decree rendered it was adjudged that the complainant recover of the bank a sum stated, and that the receiver pay to the complainant such ratable and proportionate share of that sum as necessary to put the complainant on an equality with other creditors of the bank. The decree was entered on January 10, 1899, and on the next day, at the same term of the court, the receiver filed in the clerk's office his petition for an appeal and an assignment of errors, and on the same day an order of court was entered that the appeal be allowed without bond. The appeal was perfected by the filing of a transcript of the record with the clerk of this court on the 15th of March ensuing. It is well settled that a citation is not necessary when an appeal is allowed in open court at the same term when the decree was rendered, and is afterwards duly perfected. *Brockett v. Brockett*, 2 How. 238, 11 L. Ed. 251; *Milner v. Meek*, 95 U. S. 252, 24 L. Ed. 444; *Dodge v. Knowles*, 114 U. S. 430, 5 Sup. Ct. 1108, 1197, 29 L. Ed. 144; *Hewitt v. Filbert*, 116 U. S. 142, 6 Sup. Ct. 319, 29 L. Ed. 581; *Brown v. McConnell*, 124 U. S. 489, 8 Sup. Ct. 559, 31 L. Ed. 495; *Jacobs v. George*, 150 U. S. 415, 14 Sup. Ct. 159, 37 L. Ed. 1127; *Central Trust Co. v. Continental Trust Co. of City of New York*, 58 U. S. App. 604, 30 C. C. A. 235, 86 Fed. 517. The underlying principle is, as stated in *Brown v. McConnell*, that the parties are constructively in court during the term, and charged with notice of all that is done in the case affecting their interests. In *Milner v. Meek* an appeal was taken in open court by one of a number of parties similarly affected by the decree, and, in disposing of a motion to dismiss, the court said, "Milner alone has appealed, but his appeal brings up so much of the case and such of the parties as are necessary to a determination of his rights." By the same rule the bank in this case, if its presence is essential to a determination of the receiver's rights, is a party to the appeal, and is entitled to be heard in vindication of its interests, whether identical with or hostile to those of the receiver. Whether the bank is a necessary party to the appeal we do not consider. If so, then it is a party, unless its silence when the appeal was granted amounted to a refusal to join in the appeal, and was equivalent to a formal severance. The more reasonable view, perhaps, is that, being constructively present, and not objecting, the bank should be deemed to have assented to the appeal of the receiver. It is enough, now, however, to say that on either view the jurisdiction of this court is complete, and the motion to dismiss must be overruled.

## SUPREME LODGE, ORDER OF GOLDEN CHAIN, v. TERRELL et al.

(Circuit Court, N. D. Georgia. June 22, 1899.)

## 1. LIFE INSURANCE—BENEFIT CERTIFICATE—CHANGE OF BENEFICIARY.

Under the provision in the by-laws of a benefit association that a member desiring to change his beneficiary may surrender his certificate, and a new certificate shall be issued, payable to such beneficiaries dependent on him as he may direct, on payment of one dollar; such surrender and designation being in writing, signed by him, and forwarded, under the seal of the subordinate lodge, with the benefit certificate, to the supreme secretary; he having by his will directed his executor to pay the benefit to his sisters, and by writing on the certificate, signed by him, directed the supreme secretary to issue to him a new certificate, payable to T., as his executor, and having sent it, with the fee, to the local officers of his lodge; and they having sent it to the officers of the supreme lodge; and he having died before any action by them,—it will be held that there is a sufficient designation of a new beneficiary, and as a new certificate would have issued, as matter of course, if he had not died before there was time therefor, it should be considered as issued payable to T. as executor, and in legal effect to his sisters.

## 2. SAME—OBJECTION TO BENEFICIARIES.

The constitution and by-laws of a benefit association providing that a person becoming a member shall enter on his application for a benefit certificate the "name or names of those dependent on him to whom he desires his benefit paid," and also providing for such "future disposal among his dependents as the member may thereafter direct," the designation by him of sisters as substituted beneficiaries, being satisfactory to the association, it cannot be objected by the persons who, in the absence of such designation, would receive the benefit,—the original beneficiary having died,—that they were not dependent on him.

In Equity. Exceptions to report of special master.

E. W. Martin, for complainant.

Maddox & Terrell, for defendant Terrell.

NEWMAN, District Judge. Ledrew R. Hooper had a benefit certificate, which had been issued to him in 1896, in the Order of the Golden Chain. The certificate provided for payment at his death to his mother, Mrs. Sophia A. Hooper, of the sum of \$3,000. On the 24th day of July Mrs. Hooper, the mother, died. The insured, Ledrew R. Hooper, was himself quite sick at the time of his mother's death. Immediately after his mother's death he sent for lawyers, and made his will. In the will he directed that the \$3,000 in question should be paid by the executor named in the will (John Terrell) to his two sisters, Mrs. Louisa West and Mrs. Martha M. Standridge. On the back of the benefit certificate held by Hooper is a blank to be used for naming a new beneficiary. Hooper caused this blank to be filled up, and in it directed the supreme secretary of the order to issue to him a new certificate payable to John Terrell as his executor which he signed. He sent the benefit certificate, with this indorsement on it, together with the \$1 fee required in such cases, to the local officers of his lodge in Atlanta. Within a very few days thereafter, Hooper died. The benefit certificate, with the indorsement on it changing the beneficiary, and the \$1, were received by the officers of the lodge, who subsequently sent it to the officers of the supreme lodge in Baltimore. In addi-

tion to the two sisters named in the will, to whom the executor was directed to pay this \$3,000, Hooper had five other brothers and sisters. After Hooper's death the order made no question as to its duty to pay the \$3,000 called for by the certificate, but as the same was claimed both by the executor, as to the entire amount, and by the five other brothers and sisters as to their five-sevenths of the amount, the order filed its bill of interpleader, and, by an order of the court, paid the money into its registry.

The question in the case is as to whether or not, by the provision of the will, and the designation on the back of the benefit certificate, Hooper made a proper and legal change in the beneficiary, so that the amount should go to the executor for the benefit of his two sisters, or whether it should go to all the brothers and sisters, share and share alike. Hooper's father had died before his mother, and, as he was an unmarried man, his brothers and sisters were his nearest relatives.

The by-laws of this order (section 172) provide:

"A member shall enter upon his application the name or names of those dependent upon him to whom he desires his benefits paid, subject to such future disposal among his dependents as the member may thereafter direct; and the name shall be entered in the benefit certificate according to said direction, which, however, must be explicit."

Section 173 provides:

"A member desiring to change his beneficiary may, at any time when in good standing, surrender his benefit certificate, and a new certificate shall be issued, payable to such beneficiary or beneficiaries dependent upon him as such member may direct, upon the payment of a fee of one dollar. Said surrender and direction must be made in writing, signed by the member, and forwarded, under the seal of the subordinate lodge, with the benefit certificate, to the supreme secretary."

Section 176 provides:

"In the event of the death of all the beneficiaries selected by the member, before the decease of such member, if he shall make no other or further disposition thereof, the benefit shall be paid to his widow; if none, then to his children, pro rata; \* \* \* if no widow, child, children, or grandchildren living, then to the mother of the deceased, if living; if none of the foregoing, then to his father, if living; in failure of all of the above named, to brothers and sisters, share and share alike," etc.

The constitution of the order provides for what is called a "widows' and orphans' benefit fund," payable to the member's family, "or those dependent upon him, as he may direct."

The contention here is, on behalf of all these brothers and sisters, that the designation by Hooper in his will was—First, not such a new designation of beneficiaries as is required by the by-laws of the order; and, second, that even if it be a sufficient designation, the two sisters named were not dependent upon him, and that therefore the designation was invalid, and by virtue of the terms of the by-laws all the brothers and sisters, being the next of kin, are entitled to the amount.

As to the first point, the will of Hooper and the designation on the back of the benefit certificate must be considered together. He directed the order to issue a new certificate to John Terrell,

as his executor. In his will he directs that John Terrell, as his executor, shall collect the money, and hold the same as trustee for the benefit of the two sisters named. By the terms of the by-laws the new certificate would be "payable to such beneficiary or beneficiaries dependent upon him" as he (Hooper) might direct. There is nothing whatever to show that Hooper was not in good standing in every way with his order, and consequently a new certificate would have issued, as a matter of course, if he had not died before there was time for the proper officers to issue it. Therefore that should be considered as done, especially in a court of equity; and, as the case stands, it may be considered as if a new certificate had been issued, payable to John Terrell, as executor, and in legal effect to the two sisters named; and the special master to whom this case was referred so determined.

As to the other question, that these two sisters were not dependent upon him, the record seems to be, in a measure, silent; but the special master finds that they were not dependent upon him in such sense as is contemplated in the constitution and by-laws of the Order of the Golden Chain. The provision of the by-laws is that a person becoming a member of this order, and applying for a benefit certificate, shall enter upon his application the "name or names of those dependent upon him to whom he desires his benefit paid"; and it also provides for such "future disposal among his dependents as the member may thereafter direct." The designation of the beneficiaries dependent upon him, to whom a member desires the amount for which he is insured paid at his death, is therefore a matter for the member. It may be that, within reasonable limits, the supreme lodge of the order might raise some question as to the person named not being of the member's family or dependent upon him; but is there any authority for third parties to make this question? A member insures his life, and pays the dues required by the order. Why should he not name such person or persons dependent upon him as he may desire, and why should he not be the judge, as between himself and his other relatives, as to which of them is dependent upon him, and as to who shall receive his insurance in the event of his death? It is his contract, and he pays the dues or premiums, and why may he not name the beneficiaries? By what right do third parties claim that a member's designation of beneficiaries is invalid? I am wholly unable to see how any other parties, even if they be of the same relationship to the member as the beneficiary named, can contest this question, when the supreme lodge of the order does not make it. The able special master, who has made a careful and well-considered report, takes the contrary view of this question, and so reports. He thinks that, under the constitution and by-laws, it is necessary that the beneficiaries should belong to the family of the member, or be dependent upon him, and that the question may be raised by third parties who would take, under the by-laws of the order, in the event no proper beneficiaries were named. Upon the question as to whether the two sisters named were dependent upon Ledrew R. Hooper, the special master reports as follows:

"The especially pertinent parts of these provisions I have underscored in the quotations. Construing these, I report that one belonging to said order can validly designate as beneficiaries only members of his own family, and persons who are dependent upon him. The two sisters were not members of the family of the deceased. They did not live with him, and there is not a line of evidence to show that he contributed to their support. I cite as pertinent here a Massachusetts case, decided March 30, 1897, construing an act authorizing benefits to be paid to members of the association and their families. \* \* \* It appears that even parents not living with one are not members of his family; and it is clear that sisters living apart from a member, and not receiving from him help in their support, are not dependent upon him. I report that the two sisters, to wit, Louisa West and Martha M. Standridge, at the time the will in evidence was made, and when Terrell, as executor, was designated as beneficiary, did not belong to the family of the deceased, and were not dependent upon him, and that, in accordance with the authorities cited above, their designation as beneficiaries by the deceased is void."

The facts seem to be that the two sisters who were named as beneficiaries were married at the time of Hooper's death; were people who were living in the country, engaged in farming, and in very moderate circumstances. Indeed, it seems likely, from the facts stated, that they were poor people, and yet not so poor as to make them absolutely dependent upon others for support. Giving full weight to the report of the special master, it would probably be necessary to find that they were not, strictly speaking, dependent, even if there was a conflict; but there seems to be none, and their condition in life is not seriously questioned. The conclusion which I have reached on this subject is this: The constitution provides for the payment of this benefit fund to the member's family, or "those dependent upon him, as he may direct." The by-laws have the same provision. In reference to making a redesignation of a beneficiary, the same language, substantially, is used. It is, such dependents as the member may direct. The member, in this case, for reasons satisfactory to himself, directed that the amount of his benefit should be paid to these two sisters. The provisions quoted seem to make it a matter entirely discretionary with the member as to who he shall name as the beneficiary, with the right, possibly, in the supreme lodge of his order to question the designation. But it appears to me to be a matter only between the order and the member. Who can know the exact facts on the question of dependents, as between a member and his sisters, and who can know how far, and for what reasons, he deemed these sisters dependent upon him? It is a matter for the member himself to determine, and after he determines it, the order being satisfied, it is not a matter upon which third parties may be heard. Some authorities have been cited which seem to take a different view of this matter, and some are cited which seem to support it; but on principle, and in the absence of any authority controlling in this court, I am compelled to hold that the designation of these two sisters as his beneficiaries should stand, and the exceptions to the report of the special master on the question will be sustained. A decree may be entered carrying these views into effect.

**CORBUS v. ALASKA TREADWELL GOLD-MIN. CO. ROBERTS v. MEYERS et al. STEWART v. WASHINGTON & A. S. S. CO. In re ALASKA S. S. CO. In re PACIFIC COAST CO. In re PACIFIC COAST S. S. CO. In re PACIFIC STEAM WHALING CO. In re ALASKA PACKERS' ASS'N.**

(District Court, D. Alaska. December 30, 1899.)

**1. INJUNCTION—SUIT BY STOCKHOLDER.**

An injunction by one stockholder against the corporation to restrain the latter from applying for a license and paying the tax or fee imposed by law for conducting a business upon which the congress has imposed such tax will not lie.

**2. EQUITY—ADEQUATE REMEDY AT LAW.**

Equity will not interfere where the parties have a plain and adequate remedy at law.

**3. SAME—MULTIPLICITY OF SUITS.**

To induce a court of equity to take jurisdiction of a suit on the ground that a multiplicity of suits is threatened, and irreparable injury thereby about to be sustained, the facts must be so pleaded that the court can reasonably infer that such allegations are true.

**4. COURTS—JURISDICTION.**

A mere protest against the payment of a license tax on the ground that the law seeking to impose the same is unconstitutional will not give the court jurisdiction to try and determine the constitutionality of the law.

(Syllabus by the Court.)

Maloney & Cobb, for Corbus.

M. E. McEnany, for Alaska Treadwell Gold-Min. Co.

John R. Winn, for Roberts.

F. D. Kelsey, for Meyers and others.

John G. Heid, for Stewart.

Lyons & Lyons, for Washington & A. S. S. Co.

John R. Winn, for Pacific Coast Co., Pacific Coast S. S. Co., and Pacific Steam Whaling Co.

Arthur K. Delaney, for Alaska Packers' Ass'n.

R. W. Jennings, for Alaska S. S. Co.

R. A. Friedrich, U. S. Atty., amicus curiæ.

**JOHNSON, District Judge.** The following cases were, at one and the same time, argued and submitted to the court for decision and determination: A. W. Corbus against the Alaska Treadwell Gold-Mining Company, John W. Roberts against C. F. Meyers and others, Charles Stewart against the Washington & Alaska Steamship Company, and protests against the payment of the license tax by the Alaska Steamship Company, the Pacific Coast Company, the Pacific Coast Steamship Company, the Pacific Steam Whaling Company, and the Alaska Packers' Association. The object and purpose of each suit and each protest being the same,—that is, to determine the constitutionality of the provisions of subchapter 44 of chapter 429 of the act of congress of March 3, 1899, entitled "An act to define and punish crimes in the district of Alaska and to provide a Code of Criminal Procedure for said district,"—they may all be disposed of together. As to the forms of action, they may be divided into two classes: The first three are suits in equity, wherein a

stockholder of the defendant corporation or a co-partner of the defendant co-partnership seeks to enjoin the corporation or co-partnership from applying for a license, or paying the license fee or tax required by said act to be paid as a condition precedent to conducting their respective lines of business. The remaining cases are simple protests against paying the license tax imposed by law, principally on the ground that the same is unconstitutional, and praying that they may pay the amount of the license tax into the registry of the court, there to be held until the final action of the court on their protests. In each and all of the cases the license fee or tax has been paid to the clerk of the court, there to remain, by order of the court, until the final determination of these suits and protests. In the case of Corbus against the Alaska Treadwell Gold-Mining Company the plaintiff seeks to enjoin the defendant corporation from paying the license tax imposed for operating certain quartz stamp mills and conducting a mercantile establishment. In Stewart against the Washington & Alaska Steamship Company the injunction is sought for the purpose of restraining the payment of the license for an ocean and coastwise vessel doing local business for hire, plying in Alaskan waters, the property of the defendant corporation. Roberts against Meyers and others is identical with the last-named case, except that the owner of the vessel in question is a company instead of a corporation, one member of which seeks to enjoin the other members. The protests of the Alaska Steamship Company, the Pacific Coast Company, and the Pacific Coast Steamship Company are against the payment of licenses on steamers and wharves, while the protests of the Pacific Steam Whaling Company and the Alaska Packers' Association are directed against the license imposed for operating steamboats and canning and salting salmon in Alaska. To each of the three bills a demurrer to the equity thereof was interposed by defendants. The attorneys for the defendants, however, made no arguments, and filed no briefs in support of their respective demurrers. Copies of the bills having been served upon the district attorney, he asked and obtained leave of the court to appear as *amicus curiæ*, and in that capacity, and disclaiming any intention to in any manner represent or bind the United States, he denied that the court had any jurisdiction under any of the forms of action presented to hear and determine the cases upon their merits. He denied the right or power of the court to enjoin the defendants in any case from paying the license in question, and he also argued in support of the constitutionality of the law, and offered a brief in support of both contentions. It is necessary, then, to first ascertain whether the court has jurisdiction, under the pleadings in any of these cases, to try and determine the constitutionality of the law in question. In the three equity suits the plaintiffs rely largely, if not wholly, upon the case of Pollock v. Trust Co., 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759, and *Id.*, 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108. It is contended that the suits at bar are identical with the Pollock Case, and that, the supreme court having in that case decided that a stockholder might enjoin a corporation from paying a tax alleged

to be unconstitutional, this court is bound thereby in these cases. If it be conceded that the cases are identical, and that the decision in the Pollock Case is entitled to the breadth of construction contended for by plaintiffs' counsel, then it will not be denied that this court is bound thereby. But are the cases identical? We think not. An examination of the bills before us discloses the existence of corporations and a co-partnership formed for the simple purpose, in the one instance, of mining and milling ores for the precious metals therein contained, and in the other two cases for operating steamers in Alaskan waters as common carriers. It is not claimed that any trusts have been committed to the respective defendants, their only obligation and duty being to their stockholders. And the threatened multiplicity of suits is charged as "suits and prosecutions for the violation of said act," and the irreparable injury threatened and complained of would be incurred by "defending said suits, and avoiding the fines and forfeitures provided by said act." In *Pollock v. Trust Co.* the bill alleged:

"That, under and by virtue of the powers conferred upon the company, it had from time to time taken and executed, and was holding and executing, numerous trusts committed to the company by many persons, co-partnerships, unincorporated associations, and corporations, by grant, assignment, devise, and bequest, and by orders of various courts, and that the company now hold as trustee for many minors, individuals, co-partnerships, associations, and corporations, resident in the United States and elsewhere, many parcels of real estate situated in the various states of the United States, and amounting, in the aggregate, to a value exceeding five millions of dollars, the rents and income of which real estate, collected and received by said defendant in its fiduciary capacity, annually exceeded the sum of two hundred thousand dollars."

The bill further shows:

"That voluntary compliance with the income tax provisions would expose the company to a multiplicity of suits, not only by and on behalf of its numerous shareholders, but by and on behalf of numerous minors and others for whom it acts in a fiduciary capacity."

Other radical differences appear between the bills under consideration and that in *Pollock v. Trust Co.*, but these are sufficient of themselves to place the two on an entirely different footing. Indeed, it was because of these allegations in the bill in the Pollock Case, and which are not found in the bills before us, that the supreme court determined it had jurisdiction in that case. The language of the syllabus, which embodies the judgment of the court upon that point, reads as follows:

"Such a bill being filed by a stockholder to prevent a trust company from voluntarily making returns for the imposition and payment of a tax claimed to be unconstitutional, and on the further ground of threatened multiplicity of suits and irreparable injury, \* \* \* the court will proceed to judgment on the merits."

A mere allegation in the bill that a multiplicity of suits is threatened is not sufficient to induce a court of equity to take jurisdiction of the suit. The facts must be pleaded in such manner that the court can reasonably infer that such danger is threatened, and such suits liable to be brought. This is not only sound in principle, but is sustained by the authorities. *Schulenberg-Boeckeler*



**Lumber Co. v. Town of Hayward (C. C.) 20 Fed. 422.** An examination of the bills before us in the light of the law governing the matters complained of discloses the fact that no such multiplicity of suits and no such irreparable injury as is contemplated in law or in equity is threatened, or is possible.

But we do not concede that, even in the Pollock Case, the supreme court holds that the plaintiff, as a matter of course, had the right to enjoin the defendant from paying the tax alleged to be unconstitutional. The chief justice, in passing upon this feature of the case, uses this language:

"The objection of adequate remedy at law was not raised below, nor is it now raised by appellees, if it could be entertained at all at this stage of the proceedings; and, so far as it was within the power of the government to do so, the question of jurisdiction, for the purposes of this case, was explicitly waived on the argument."

• The court was induced to some extent, no doubt, to hear the case upon its merits on the ground of public policy. At least Asst. Atty. Gen. Whitney was constrained to waive all objection to the form of action on that ground, as is evidenced by the following language used by him in his argument of the case:

"The method by which the questions are presented in the Pollock and Hyde Cases was not chosen with the consent of the government. The corporations have ample remedy at law, either by standing on the defensive or by paying the tax under protest, and suing to recover the amount paid. Plaintiffs would be sufficiently protected by decree restraining the corporations from voluntary payment. Yet the bills do not allege that the corporations intend to pay voluntarily. No injunction, it is believed, has ever been granted against the payment of a tax to the United States government, or against the execution of a law of the United States, on the ground that the law was unconstitutional. It is believed that in no case can such an injunction properly be granted, and it is regarded as important not to break the chain of precedent against such relief. These objections, however, are not jurisdictional in the strictest sense. \* \* \* In view of the great public interest aroused, and of the fact that no cases in proper form are now pending, these objections are waived on behalf of the government, so far as it is in the power of its officers to waive them."

It can avail nothing for me to here quote from the very able dissenting opinion of Justices White and Harlan on this branch of the Pollock Case. Their opinion, with authorities cited, leads me to the conclusion that, had the question of jurisdiction been raised in the court below, and insisted upon in the supreme court, the case would not have been heard upon its merits. And in the cases at bar the district attorney, so far as he had the right to do so, the government not being a party to the suits, raised not only the question of the jurisdiction of the court because the plaintiffs had a plain, speedy, and adequate remedy at law, but insisted that the suits were of a friendly nature, collusive in character, and brought for the sole purpose of conferring jurisdiction upon the court, to the end that the defendants might escape paying the license fee imposed by law. And when all the facts are taken together, as disclosed by the record, some color is lent to the latter contention. Take the case of Corbus against the Treadwell Company. The bill was filed July 17th, the subpoena served July 19th, commanding the defendant to answer the bill within 20 days. No appearance

was made by defendant, however, and no pleading filed until November 15th, nearly four months after the filing of the bill, and not until about the time the matter was called up for hearing, when a demurrer was interposed. Counsel for defendant did not contend for his demurrer, made no argument, and filed no brief in support of the same. And, in the very nature of the case, the interests of the plaintiff and defendant are identical. Then, if the object and purpose of the suit is solely to test the constitutionality of the law without first paying into the United States treasury the amount of the license tax (and there can be no other object), and if the court will sustain the plaintiff and enjoin the defendant as prayed, how is the private citizen to avail himself of a similar remedy? Who shall enjoin him, and save him from paying his tax, until the constitutionality of the law is determined? And, if he cannot avail himself of this manner of suit, why should corporations or co-partnerships be permitted to do so? Why should not corporations and individuals have and be permitted to exercise identically the same legal rights and remedies under the law? It is admitted in all the bills and protests now being considered that the respective plaintiffs have a plain remedy at law by resisting the enforcement of the statute in question. But they contend that the fines and penalties imposed are so severe they dare not pursue that course. When the congress passed the law in question, they also passed and made a part of this very chapter 44 the following provision, found in section 481:

"That in any case where a conviction occurs, except in a case of murder or rape, the court may, when in its opinion the facts and circumstances are such as to make the minimum penalty provided in this act manifestly too severe, impose a less penalty, either of fine or imprisonment, or both: provided, that in any such case the court shall cause the reasons for its action to be set forth at large on the record in the case."

It would seem the congress had in view the provisions in this very chapter, for the minimum penalty in all other criminal cases is extremely low; and, while it is not a part of the record of this case, it is a fact well known to every attorney appearing in these cases that the court has repeatedly exercised the power by that section vested in it, and has imposed a minimum fine of but one dollar in many cases arising under the provisions of this chapter. In view of the existence of this law, the plaintiffs can have nothing to fear from the severe penalties imposed if they are acting in good faith, and with an honest purpose to test the constitutionality of the law, intending, if the same shall be sustained, to then comply with its provisions.

As to those persons appearing by protests only, it is the anomalous contention that the papers on file are both applications for and protests against the issuance of licenses; that is to say, they are applications for license if the court shall determine that the businesses engaged in by the plaintiffs, respectively, subject them to the payment of a tax; and they are protests on the ground that the several lines of business engaged in by protestants are not subject to license and taxation, principally because the law attempting to

impose the tax is unconstitutional and void. It is further contended by them that in passing upon all applications for license under this law the court acts judicially, and therefore has the right to and must pass upon the constitutionality of the law itself. It is not necessary to determine whether, in passing upon applications for license, the court acts judicially; for, if we concede that it does so act, it is nevertheless perfectly clear that the petitioner can only allege in his petition those things required by the act itself to be set up, showing the applicant to be entitled to the license prayed for, and, if extrinsic matter is pleaded, such as denying the constitutionality of the law itself, the court is not required, nor, in our judgment, permitted, to take judicial notice of such extrinsic matter. An officer authorized to issue marriage licenses may be said to act judicially in determining whether the facts set up by the applicant for such license entitle him to receive the same, but it would hardly be contended that the applicant could deny the constitutionality of the law governing such matters, and require the officer to determine that question. If this were a court of last resort, we might feel constrained to seek some means by which the constitutionality of the law might be passed upon. The issue should be settled at the earliest possible moment. But we are powerless to finally settle it, even if we would, and we do not believe the question is legally before us. The giving to every one who may feel himself aggrieved the right to enjoin payment of a tax imposed upon him by the congress is fraught with so much danger, and it is so at variance with the policy of our government and the decisions of our courts, that we do not feel warranted in seeking for reasons to justify the taking of jurisdiction in these cases, even if any could be found. The demurrers to the three bills will be sustained; and as to the protests, in so far as they can be construed as an application for license for the respective businesses named, they will be sustained. The protests will be ignored, and, unless an appeal shall be taken from the decree rendered in conformity with this opinion within the time prescribed by law, the clerk will be directed and ordered to pay into the United States treasury the several sums of money paid into the registry of this court by the respective complainants and protestants. Let a decree be entered in conformity herewith.

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## SOUTHERN COTTON-OIL CO. v. HEFLIN.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1900.)

No. 843.

## SALE—BREACH OF CONTRACT—MEASURE OF DAMAGES.

Plaintiff, who was manufacturing out of cotton seed, by the same process, oil, meal, cake, hulls, and lint, all marketable products, sold to defendant, at a fixed price per ton, all the cake and meal to be produced by the mill during the year. After receiving part of it, defendant gave notice that he would not accept any more, but plaintiff continued to manufacture it, and tendered the balance, which defendant refused. *Held*, that the measure of damages was the difference between the market value and the contract price.

**In Error to the Circuit Court of the United States for the Eastern District of Texas.**

This suit was instituted in the district court of Waller county, Tex., on April 31, 1895, from which it was removed to the United States circuit court for the Eastern district of Texas, sitting at Galveston, in August, 1895. The plaintiff in error was a corporation chartered in the state of New Jersey, and owning a cotton-seed oil mill situated at Houston, Tex., at which mill it made the products of cotton seed from year to year. This was a suit instituted against the defendant in error upon the following contract:

"Philadelphia, April 12, 1894.

"R. L. Heflin, Esq.—Dear Sir: We have this day sold you all the prime cotton-seed cake and meal made at our Houston (Texas) mill during the season commencing September 1, 1894, and ending March 31, 1895; we guarantying a minimum quantity of six thousand (6,000) tons, and you not being required to receive a maximum quantity of more than ten thousand (10,000) tons. Any excess of ten thousand tons to be at your option. All at the price of eighteen dollars (\$18) per ton of two thousand pounds, free on board cars at our Houston (Texas) mill. Same to be packed in good, merchantable sacks, and marked or branded as ordered. Terms, sight draft bill of lading attached. Shipments as fast as made and ordered. It is distinctly understood that we are to have the privilege at all times during the season above stated of supplying our local demands for cattle feeding at Houston, Texas, and our jobbing trade for consumption at that and other Texas points. It is also a condition of this contract that, in case of accident to said mill by fire or act of God, such as may prevent our making the quantity guarantied by us during the season above stated, this contract shall be void as to any part unfilled in consequence of such accident. It is further agreed and made part of this contract that we shall not be required to furnish more than three-quarters of the total quantity delivered in meal, unless at our option.

"Yours, truly,

The Southern Cotton-Oil Company.

"By Henry C. Butcher, Prest.  
R. L. Heflin."

"I hereby accept the above.

When Heflin signed and returned the contract, he wrote, on April 15, 1894, to the president of the Southern Cotton-Oil Company as follows:

"Yours of the 12th inst., inclosing contracts, received. Same are in order, except as to shipments. After the words, 'shipments as fast as made,' I have added, 'and ordered,' and I now here agree that the mill shall not be without shipping orders at any time longer than ten days maximum, and for any excess I will pay both interest and insurance to date I give such orders. This is only fair, for, without any such stipulation last year, this mill had shipping orders always ahead of its production, except twice, and then not a whole week was it without them. \* \* \*

The declaration alleges that the plaintiff, in pursuance of its contract, delivered 2,084 tons of meal in September, for which the defendant paid in full; that the plaintiff delivered 1,904 tons in October, for which the defendant paid \$15 a ton, leaving \$3 a ton unpaid; and that the plaintiff tendered the balance, 6,012 tons, in pursuance of the terms of the contract, which the defendant refused to accept and pay for. This suit was brought to recover \$5,712, being \$3 a ton due on the 1,904 tons, with interest from October 31, 1894; and for \$39,047.94, the difference between the market price, \$11.50, at which the plaintiff was compelled to sell the 6,012 tons, and the contract price, \$18, which the defendant refused to pay. These, together with some expenses for insurance and for storage and handling the meal, aggregating about \$2,000, constituted the cause of action on the part of the plaintiff. The defendant defended on the ground that the 1,904 tons were not "prime cotton-seed cake or meal"; that \$15 was the full value thereof; and that the defendant was not compelled to take the 6,012 tons, because the defendant, on October 31, 1894, being thereunto justified by the failure of the plaintiff to deliver meal according to the standard of the contract, gave notice to the plaintiff that he revoked and canceled the contract, and would not abide by its terms any longer. The case was tried before the court and a jury at the March term of the circuit court at Galves-

ton, and there was a verdict for the plaintiff, on March 7, 1899, for the sum of \$5,712, being \$3 a ton on 1,904 tons, with 6 per cent. interest from November 1, 1894. The following extract from the charge of the court recites the facts necessary to be stated, and also shows the material question of law in the case: "This case was brought by the plaintiff, the Southern Cotton-Oil Company, against R. L. Heflin, charging, substantially, that in April, 1894, plaintiff and defendant entered into a contract by which defendant purchased from plaintiff its output of meal for the season of 1894-1895, commencing September 1, 1894, and ending March 31, 1895, for not less than 6,000 tons of meal, and not more than 10,000 tons, and any overplus of 10,000 tons being at the option of the defendant at the contract price of \$18 per ton free on board cars at Houston. The defendant has alleged a specific agreement between himself and the plaintiff in regard to the quality of this meal and putting in these meshes. That should have been determined by your special findings against the defendant. Under the undisputed evidence in this case there are two thousand and eighty-four tons of the meal that were contracted for that were received and paid for by the defendant. It is true that some complaint was made by the defendant that it was found, after the meal had gone abroad, there was some complaint in regard to it, and it was settled for thereafter. That is out of this case. There were one thousand nine hundred and four tons of meal received by the defendant, who refused to receive it under the contract, at the contract price, because he said it was not the kind of meal contracted for. Thereupon the plaintiff and the defendant agreed that the defendant should take the meal and pay \$15 a ton, which he did, and the question between them of the \$3 a ton should be thereafter determined; and, if it was determined that the meal was up to the quality called for in the contract, which was prime cotton-seed meal, the defendant would owe them \$8 a ton, and, if not up to the standard contracted for, he would not owe them \$3 a ton. That was substantially the understanding between the parties. Thereafter, my recollection is that on October 31st the defendant, Heflin, gave the plaintiff notice that he would not take any more of the meal; that it was not up to the standard, and could not be made up to the standard, with the appliances they had. That is my understanding of the effect of that letter. The plaintiff claims that it made all the meal up to ten thousand tons, and it sues for \$3 a ton on one thousand nine hundred and four tons, and it sues for \$6.50 a ton on six thousand and twelve tons, and sues for interest and insurance, basing it upon a contract or letter not embraced in the contract, but a letter written by Mr. Heflin, stating if the meal was not shipped out as fast as made on the 10-day clause about shipping orders, that he would pay the insurance and interest. Therefore the determining question in this case is the question of the measure of damages in the event the contract was breached. It is a very doubtful question, but my judgment of the matter is that the plaintiff in this action has mistaken his remedy on the measure of damages. The plaintiff sold this meal for \$11.50 a ton, and charged the defendant with the difference between that and the contract price. A notice that he would not take any more of this meal would not comply with the contract. The defendant did not escape liability, provided the plaintiff, in its action, asserted the right measure of damages. But when it was notified by the defendant that he would not take any more of the meal, then, in that case, the subsequent making of the meal was a matter which the plaintiff was making for its own account,—had a right to sell it to whom it wanted. But at the expiration of March 31st it had a right to bring its action against the defendant for such profits as it would have made by the defendant complying with the contract and taking the meal at \$18 a ton. But it does not assert any such measure of damages here. It claims the right to enforce the contract whether the defendant wants it enforced or not, and it claims the right to sell the article, charging the defendant with the difference in price realized on the sale of the six thousand and twelve tons and the contract price. I do not think that is the measure of damages. Therefore you will not regard the six thousand and twelve tons in this case, and all that is left for you to consider is the one thousand nine hundred and four tons." The plaintiff duly excepted to that part of the charge relating to the 6,012 tons and the measure of damages, and also excepted to the refusal to give special charges presenting the theory contended for by

the plaintiff, which is fully stated in the opinion. The jury rendered a verdict for the plaintiff for \$5,712, with interest from November 1, 1894, and judgment was entered for that sum. The plaintiff brings the case to this court on writ of error. The material error assigned is that the circuit court erred in the charge as to the measure of damages.

J. O. Hutcheson (Hutcheson, Campbell & Meyer and Jas. B. & Chas. J. Stubbs, on the brief), for plaintiff in error.

F. Charles Hume, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge, after stating the case as above, delivered the opinion of the court.

This is a suit for damages for breach of a contract. The material question in the case relates to the measure of damages. By the contract dated April 12, 1894, the Southern Cotton-Oil Company, the plaintiff in error, sold to R. L. Heflin, the defendant in error, all the prime cotton-seed cake and meal made at the mill of the former at Houston, Tex., during the season beginning on September 1, 1894, and ending on March 31, 1895, at \$18 a ton of 2,000 pounds, free on board cars at Houston. The plaintiff guaranteed a minimum quantity of 6,000 tons, and Heflin was not required to receive more than 10,000 tons. The cake and meal were to be packed in good, merchantable sacks, and marked or branded as ordered. The defendant agreed that the plaintiff should not be without shipping orders at any time longer than 10 days, and that for any excess (over 10 days) he should pay both interest and insurance to the date of the orders. 2,084 tons of meal were delivered by the plaintiff to the defendant under the contract, and were duly paid for. 1,904 tons were afterwards delivered in like manner, but Heflin claimed that the meal was not prime, and paid only \$15 a ton for it. 6,012 tons were afterwards made, and tendered by the plaintiff to the defendant under the contract, which the latter refused to take, and the meal was then sold by the former at public sale, after notice to the latter, and it brought the then market price of \$11.50 a ton. The plaintiff was engaged in the business, and had been for several years, of producing oil, meal, hulls, and lint from cotton seed. The 6,012 tons of meal were made after notice by the defendant to the plaintiff that the meal would not be received.

The first count in the declaration is for the difference between \$15 a ton and \$18 a ton on the 1,904 tons delivered under the contract, but not fully paid for. The plaintiff, under the ruling of the circuit court, had verdict and judgment for the difference, \$5,712, with interest, and the questions relating to that breach of the contract are eliminated. There is also a count for damages for the failure and refusal of the defendant to accept the 6,012 tons, the price of which, by the contract, being \$18 a ton. The plaintiff sold it, after notice to the defendant, at auction, for \$11.50 a ton, which is shown to have been the market price. The plaintiff claimed and sued for \$39,047.94, the difference between the contract price and the market price. The plaintiff recovered nothing on this count in

its declaration. The learned judge who presided in the circuit court was of opinion, and so instructed the jury, that the difference between the contract price and the market price of the 6,012 tons was not the proper measure of damages. The correct measure of damages, the learned judge held, was the profit which the plaintiff would have made if the defendant had received the meal at the contract price. The jury was, therefore, instructed to disregard the claim for \$39,047.94. The court also held, in effect, that the defendant's notice to the plaintiff that he would not accept the meal ended the contract. The idea is that the damages must be fixed by the condition of things at the date of the notice, because the notice itself was a breach of the contract. It is true that the plaintiff could have acted on the notice, and treated it as terminating the contract; but it was not compelled to do so. It had the right to hold to the contract as still in force, and tender the meal according to the contract. If the plaintiff had been building a house for the defendant, or cleaning and repairing paintings for him, or, to use a comprehensive phrase, if his contract had been one to do work and labor, an unequivocal notice to quit work would have fixed the period of the breach and the time from which to assess damages. But the contract was an executory contract of sale, and the purchaser cannot, by his action alone, deprive the vendor of any of the benefits of such contract. In such case the refusal of the purchaser to take the goods must be unequivocal, and "must have been acted on by the plaintiff"; otherwise, the refusal in advance of the time for delivery does not fix the period for assessing the damages. In *Smoot's Case*, 15 Wall. 36, 48, 21 L. Ed. 107, the court, quoting Benjamin on Sales, said:

"A mere assertion that the party will be unable or will refuse to perform his contract is not sufficient. It must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for, if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end."

The supreme court, in the case cited, in commenting on the English decisions, clearly affirmed the rule that, in the case of an executory contract of sale, where the defendant had agreed to receive and pay for wheat, and who gave notice that he would not receive it, the measure of damages would not be governed by the price of wheat at the time of the notice, but by its value at the time of the tender. In the case of *Dingley v. Oler*, 117 U. S. 490, 503, 6 Sup. Ct. 854, 29 L. Ed. 988, the court says:

"The words or conduct relied on as a breach of the contract by anticipation must amount to a total refusal to perform it; and that does not, by itself, amount to a breach of the contract unless so acted upon and adopted by the other party."

When the defendant gave notice that he would not receive the meal, he could not have complained if the plaintiff had acted upon the notice, and sued him at once. But he could not require the plaintiff to recede from its contract. The plaintiff had a vested right in the contract to deliver the meal sold at the time fixed by the agree-

ment, and no notice of the defendant could deprive it of this right. This seems well settled by authority. *Kadish v. Young*, 108 Ill. 175, 178; *Railway Co. v. Richards*, 152 Ill. 69, 100, 38 N. E. 773, 30 L. R. A. 33; *Marks v. Van Eeghen*, 30 C. C. A. 208, 85 Fed. 855; *Sedg. Dam.* (6th Ed.) § 284; *Zuck v. McClure*, 98 Pa. St. 541; *Cooper v. Young*, 22 Ga. 269.

The contention of the plaintiff is that the proper measure of damages is the difference between the market value of the cotton-seed meal and the contract price. If this contention is right, the instructions given to the jury were erroneous. The learned counsel for the defendant correctly says:

"It is not the concern of the defendant to define and maintain, as applicable to the case presented, the true measure of damages. It is enough for him to meet the claim of the plaintiff that the measure contended for by it is the true one."

It is not denied, however, by counsel for defendant, that on proper suit the plaintiff was entitled to damages in some measure for the breach in question. The learned judge who tried the case in the circuit court so held. He directed a verdict against the plaintiff as to the breach in question, because it had mistaken the measure of damages. He charged the jury: "It is a very doubtful question, but my judgment of the matter is that the plaintiff in this action has mistaken his remedy on the measure of damages." Notwithstanding his disclaimer of the burden of stating the true rule of damages in the case, it appears from the argument of counsel for the defendant that the rule he thinks should govern is that the damages should be measured by the difference between the amount it would cost the plaintiff to make and deliver the meal and the contract price; that is, that the plaintiff should prove and recover the profit it would have made if there had been no breach of the contract. We will state the two contentions side by side, so as to present both theories. The defendant contends that his notice that he would not accept the meal ended the contract; that, admitting his liability for damages, the following is the rule for assessing them:

"The measure of damages upon articles covered by such a contract, for which no materials had been bought, and upon which no work had been expended, at the time of the breach, is the difference between the amount it would cost the manufacturer to make and deliver them and their contract price, if that price is greater than the cost."

The plaintiff contends that the defendant's notice that he would not accept the meal did not end the contract; that the plaintiff could, at its option, notwithstanding the notice, still keep the contract in force, make and tender the meal according to the contract; and, having done so, that the measure of damages is the difference between the contract price and the market price, the former price being the higher. What the law aims at in all cases is to do justice between the litigants, and a just measure of damages is one which affords compensation, and only compensation. In the case of a breach of contract for work and labor done and materials furnished the rule is plain. The measure of damages in such case, where the employer stops the work, and the workman or contractor



sues, is (1) his outlay and expenses, less the value of materials on hand; (2) the profits he might have realized by performance. The first item he may recover in all cases. The second he may recover when the profits are the direct fruit of the contract, and not too remote or speculative. *U. S. v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168. If one who has contracted to build a creamery is notified not to build it, he cannot go on and build it, regardless of the notice, and recover the contract price. *Davis v. Bronson* (N. D.) 50 N. W. 836, 16 L. R. A. 655. In *Clark v. Marsiglia*, 1 Denio, 317, the plaintiff, an artist, was employed to clean and repair certain pictures, the property of the defendant. The defendant, before the work was completed, notified the plaintiff not to perform the work. It was held that the plaintiff could not recover the whole amount agreed on for the work, but only compensation for such injury as he had received by the breach of the contract. From these cases it is seen that the measure of damages contended for by the defendant is, in the main, correct, when applied to a suit for damages for a breach of a contract to build a house, or when applied to a contract for work and labor. What is the rule for the breach of a contract of sale? In 2 Benj. Sales (3d Ed.) p. 1075, §§ 1011, 1012, it is said:

"Where a contract to deliver goods at a certain price is broken, the proper measure of damages, in general, is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having his money in his hands, may go into the market and buy. So, if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market, and obtain the current price for them. The date at which the contract is considered to have been broken is that at which the goods were to have been delivered, not that at which the buyer may give notice that he intends to break the contract, and to refuse accepting the goods."

In *McLean v. Richardson*, 127 Mass. 339, the plaintiff had sold hides to the defendant, which he refused to receive. On suit for damages for breach of the contract it was held that the measure of damages was the difference between the contract price and the price received on the resale of the hides. In *Dustan v. McAndrew*, 44 N. Y. 72, on similar facts, it was held that, on the purchaser's refusal to take the property, the vendor could sell it, after notice to the purchaser, and recover the difference between the contract price and that realized on the sale. That the measure of damages for the refusal of a vendee to take the goods is the difference between the market price and the contract price seems well settled by authority. *Waples v. Overaker*, 77 Tex. 7, 13 S. W. 527; *Sedg. Meas. Dam.* (8th Ed.) § 753; *Id.* (6th Ed.) p. 340, § 284; *Suth. Dam.* (2d Ed.) 647; *Wood, Mayne, Dam.* § 150; *Chit. Cont.* (11th Am. Ed.) p. 1079. The authorities indicate that one rule as to damages would apply if the contract in this case be one for work and labor, and that another would apply if it be an executory contract of sale. Is the contract in question here one of sale, or is it one for work and labor? It is true that work was to be done to convert the cotton seed into meal, but this was to be done by the manufacturer on his own material to prepare it for market. If the cotton-seed meal had been re-

ceived, and suit had been brought to obtain payment, would the action have been for work and labor done or for goods sold? Clearly, no recovery could be had for work and labor, because the work was done on plaintiff's material, and for itself. If the contract is such that a chattel is ultimately to be delivered by the plaintiff to the defendant, when it has been delivered the action would be for the sale of the chattel, and not for work and labor done. *Lee v. Griffin*, 30 Law J. Q. B. 252; 1 Benj. Sales (3d Ed.) § 116. "From the very definition of a sale, the rule would seem to be at once deducible that, if the contract is intended to result in transferring for a price from B. to A. a chattel in which A. had no previous property, it is a contract for the sale of a chattel." 1 Benj. Sales (3d Ed.) § 117.

The case of *Masterton v. Mayor, etc.*, 7 Hill, 61, has been quoted approvingly more than once by the supreme court of the United States. We find the case cited in both briefs in the present case. That case sheds much light on the question contested here. The plaintiffs contracted to procure, manufacture, and deliver all the marble necessary for a certain public building, in consideration whereof the defendants agreed to pay the plaintiffs a specified sum in installments as the work progressed. Some of the marble was delivered and paid for. The defendants then stopped building, and notified the plaintiffs that they would not take any more of the marble. It will be seen at once that the case, in some of its features, is strikingly like the case at bar. The court held, in a suit for damages for breach of the contract, that the measure of damages "was the difference between what the performance would have cost the plaintiffs and the price which the defendants had agreed to pay." That is the rule which counsel for the defendant contends for. Without referring to other differences in the two cases, there is one thought running through the opinion quoted that shows that on the facts of the present case the New York court would have applied a different rule. The opinion shows that the rule as to damages adopted in that case was forced on the court by the fact that the marble had no well-ascertained market value. We first quote from the opinion the comments of the court on the English cases stating the general rule, and then the reasons given for departing from it:

"In *Boorman v. Nash*, 9 Barn. & C. 145, it appeared that the defendant contracted in November for a quantity of oil, one-half to be delivered to him in February following, and the rest in March; but he refused to receive any part of it. And the court held that the plaintiff was entitled to the difference between the contract price, and that which might have been obtained in market on the days when the contract ought to have been completed. See *MacLean v. Dunn*, 4 Bing. 722. The case of *Leigh v. Paterson*, 8 Taunt. 540, was one in which the vendor was sued for not delivering goods on the 31st of December, according to his contract. It appeared that in the month of October preceding he had apprised the vendee that the goods would not be delivered, at which time the market value was considerably less than on the 31st of December. The court held that the vendee had a right to regard the contract as subsisting until the 31st of December, if he chose, and recover the difference between the contract price and the market value on that day. See, also, *Gainsford v. Carroll*, 2 Barn. & C. 624. \* \* \* The only difficulty or embarrassment in applying the general rule grows out of the fact that the article in question does not appear to have any well-ascertained market value. But this cannot

change the principle which must govern, but only the mode of ascertaining the actual value of the article, or rather the cost to the party producing it. Where the article has no market value, an investigation into the constituent elements of the cost to the party who has contracted to furnish it becomes necessary; and that, compared with the contract price, will afford the measure of damages."

If the cotton-seed meal had no market value, we might be forced to adopt a similar rule to prevent a failure of justice. Such rule, however, if feasible at all, would be very difficult of application here. The market value of a staple product is not likely to be below the cost of its production. It is usually above. The excess of market value over cost of production is the margin of profit. If the cost of production was less than the market price, \$11.50 a ton, the rule contended for by the defendant would increase, and not diminish, his liability. Is not the contention, while it is fairly legitimate, really for the purpose of applying a rule that will make it difficult, if not impossible, for the plaintiff to make the required proof? The plaintiff was producing by the same process, out of the same raw material, several marketable products,—oil, meal, cake, hulls, and lint. The oil is the chief and most valuable product, but each product has a market value. The defendant insists that, to recover for the breach of the contract, the plaintiff must show the profit it would make on the meal at the contract price, and therefore show what it costs to make the meal. The proof would be difficult, and we know of no settled rule by which the costs of the material and labor could be apportioned among the various products. We do not say that damages could not be sufficiently proved to allow a recovery on such a basis, but we do hold that the application of such a rule in the present case involves such difficulty and uncertainty that it should not be applied when a just rule of easier application exists. In *Griffin v. Colver*, 16 N. Y. 489, 495, the court said that:

"Cases do not infrequently occur \* \* \* where the amount of damages may be estimated in a variety of ways. In all such cases the law \* \* \* uniformly adopts that mode of estimating the damages which is most definite and certain." 8 Am. & Eng. Enc. Law (2d Ed.) 611.

In applying rules as to the measure of damages the courts must have regard to the particular facts of the case in question. Each case is *sui generis*. The court should not attempt to formulate rules in one case to govern all possible cases. It could not be done successfully, any more than a definition of fraud could be formulated to cover all future cases. We have commented on the different rules generally applied to cases of contract of sale and of contract for work and labor. But, without disputing about names, let us examine the characteristic features of this case. The plaintiff was not making one product only; it was making several, obtained from the same perishable raw material. All were made for sale. The meal sold to the defendant was not the chief product. When notified by the defendant that he would not take the meal, the plaintiff could not quit making it without stopping the mill and abandoning its business of making the other products. To do this the plaintiff would violate its other contracts as to oil, hulls, and lint. The case is not

analogous to a contract to make a soda-water apparatus, as in *Tufts v. Lawrence*, 77 Tex. 526, 4 S. W. 165, where only one chattel and two contracting parties are concerned; nor is it strictly analogous to a contract to manufacture cornshellers, as in *Kingman & Co. v. Western Mfg. Co.*, 34 C. C. A. 489, 92 Fed. 486, where only one thing is being produced out of the same raw material. Cornshellers, or agricultural implements, cannot be said to have a well-established market value, like cotton, wheat, or cotton-seed meal. The courts may say in some cases that the work should be stopped on notice by one party of an abandonment of the contract, but in a case like the present one it would be impossible to fairly apply such a rule. The plaintiff must go on with its work, its regular business. One incident of its work is to produce the meal. On the defendant's refusal to receive it according to his contract, it having fallen in price, he is justly liable for damages, and the fairest and most certain measure of damages is the difference between the market value and the contract price. The circuit court erred in the instructions given the jury as to the measure of damages. The judgment of the circuit court is reversed, with instructions to grant a new trial, and to proceed in conformity to the opinion of this court.

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#### RANDLE v. BARNARD.

(Circuit Court, E. D. Missouri, E. D. February 1, 1900.)

No. 4,095.

**1. ACTION ON BOND—PLEADING—AVAILABLE DEFENSE.**

In an action against the surety on a bond for the performance of a contract to rent, and pay for the lease of, a hotel, which was to be ready for occupation by a certain date, defendant denied that his principal failed to pay, and alleged that there was nothing due; that plaintiff failed to complete and furnish the building by the time fixed by the contract, and that, without defendant's knowledge or consent, plaintiff's time for completion was extended; and that plaintiff wholly failed to keep his agreement. *Held* not to warrant the defense that when the lease was executed it was agreed, contrary to the original contract, that lessee should furnish the building, and defendant should allow him a certain sum therefor, to be paid in monthly installments in advance, or that, according to the original agreement, no sublease was to be executed, and that the lease, as executed, gave the lessee the unrestricted privilege of subletting the basement.

**2. SAME—ANSWER—PRESENTATION OF ISSUE—SUFFICIENCY.**

In an action against a surety on a bond for the performance of a contract to rent, and to pay for the lease of, a hotel, an averment in the answer that plaintiff wholly failed to comply with the contract, and wholly failed to keep stipulations agreed to, is not sufficiently specific to present an issue of fact.

**3. SAME.**

Where a surety for the performance of a contract relies in defense on the obligee's changes in the contract, made by the parties thereto without his knowledge or consent, he should distinctly plead the covenants of the original contract which were changed.

**4. SAME—WHAT INTEREST RECOVERABLE.**

Apart from statute, it seems that interest might be recovered on the damages resulting from a breach of the bond, from the date of the breach to the date of the judgment, even if the same exceeds the penalty of the

bond; but where the statute of the state in which the bond was executed and delivered, as construed by the supreme court of such state, forbids a recovery of such interest, such statute and construction thereof will be followed by the federal courts.

McKeighan, Barclay & Watts and A. W. Hope, for plaintiff.  
Geo. W. Taussig, for defendant.

ADAMS, District Judge. This is an action counting on a bond, in the penal sum of \$5,000, executed October 29, 1892, by the defendant as surety for one A. C. Ricksecker, the principal in the bond. The petition shows that the condition of the bond is for the faithful performance of the covenants of a certain contract, of even date with the bond, executed by and between the plaintiff and Ricksecker; and, by way of alleging a breach, the plaintiff avers that in and by the contract the principal agreed, among other things, to rent a certain building, situate in the city of Chicago, from the plaintiff for a period of 183 days, commencing on the 1st day of May, 1893, and to pay plaintiff therefor, as rent, the sum of \$140 for each and every day during the term, in monthly installments in advance, on the first business day of each calendar month during said term, and that Ricksecker failed to pay the rent so agreed to be paid by him, in a sum largely in excess of the penalty of the bond. The answer of the defendant admits the execution of the bond, subject to the condition already stated; admits that, among other things, the contract referred to in the bond required Ricksecker to pay rent for the building as alleged in the petition; denies that Ricksecker failed to pay the rent, and alleges that there was nothing due to plaintiff from him on account of rent at the time this suit was instituted; and, by way of affirmative defense, the defendant pleads, in substance, as follows: That, according to the terms of the contract referred to in the bond, the plaintiff agreed to build and complete the building there provided for on or before the 1st day of May, 1893, in accordance with certain plans and specifications which were made part of the contract; that said building, when completed, was to contain 140 rooms, to be furnished by the plaintiff with good and substantial bedroom furniture, and made fit for occupancy of guests, on or before the 1st day of May, 1893; that plaintiff did not build, complete, and equip the building on or before the 1st day of May, 1893, as required by the contract, in this: that he did not on or before that date furnish said rooms with good and substantial bedroom furniture, and did not, prior to that date, make the rooms fit for occupancy of guests. And, further answering, the said defendant alleges as follows:

"That after the execution of said contract of October 29, 1892, between the said Randle and said Ricksecker, the said Randle and Ricksecker, without the knowledge or consent of this defendant, did vary and change the said contract, in this: that the said Ricksecker and Randle did agree that the said building, to be erected, built, and completed, according to the said contract, on or before the 1st day of May, 1893, should be erected, built, and completed on a day subsequent to said May 1, 1893, and that said Ricksecker and said Randle did, after the execution of said bond of defendant, and without the consent of defendant, agree to change said contract of October 29, 1892, so that the said Randle should not be obliged to furnish each of said rooms with good and sub-

stantial plain furniture, as bedrooms, and make the same fit for occupancy of guests, on or before the 1st day of May, 1893, and did agree that in lieu therefor said Randle would furnish said rooms, and make the same fit for occupancy of guests, on a day subsequent to the said 1st day of May, 1893, all without the consent of this defendant. Defendant, further answering, states that the plaintiff wholly failed to comply with the agreement entered into by him (plaintiff) on October 29, 1892, with said Ricksecker, and that the said Randle wholly failed to keep each and every agreement by him stipulated to be kept by said contract."

The reply is a general denial.

I have stated the substance of the pleadings in this case because of the argument of counsel for the defendant, in his brief, in which he contends that by the original agreement, pursuant to which the bond was given, Randle was to furnish the chamber service for the hotel, and that when the lease was finally executed, on May 11, 1893, it was agreed that Ricksecker should actually furnish the service, and that the plaintiff should allow him, for supplying the same, \$1,000, to be paid at the rate of \$166.66 per month in advance. It is also claimed in argument that according to the original agreement no sublease was to be made by Ricksecker without Randle's consent, but that the lease, as executed on May 11th, conferred upon Ricksecker unrestricted privilege to sublet the basement for restaurant purposes. I am of opinion that, under the pleadings in this case, no such defenses are available to the defendant. The court's attention was not called to any such pretended defense during the trial, and I was not aware that any such claim would be made until I examined the briefs of counsel for the defendant preparatory to deciding this case. If such claim had been made at the time of the hearing, I should not have hesitated to rule it out, and to exclude any evidence concerning it under the pleadings as they stand. The clause found at the end of the answer of the defendant, already quoted, to the effect that plaintiff wholly failed to comply with the agreement entered into by him on October 29, 1892, and that the plaintiff wholly failed to keep each and every agreement by him stipulated to be kept in said contract, is not sufficiently specific to present an issue of fact. In cases like this it is incumbent upon the defendant to distinctly plead the covenants of the original contract which were changed by the principal and obligee in the bond, upon which the surety relies as a defense. The sole issue of fact, therefore, for trial in this case is whether there was an extension of time given by Ricksecker to the plaintiff to finish the building which Ricksecker was about to rent, and whether such agreement was known and consented to by the defendant surety. The original agreement of October 29, 1892, required the plaintiff to complete the building in question on or before May 1, 1893, and required Ricksecker to lease the same and pay the stipulated rent therefor; and each of the parties to the agreement were required, by its terms and provisions, to execute a bond conditioned for the faithful performance by them of their respective obligations. There is no doubt that plaintiff failed to have the building completed and ready for occupancy in accordance with the covenants of the contract, and there is no doubt that Ricksecker,

after being made aware of the fact that the plaintiff could not fully complete the building by May 1st, came to an understanding with the plaintiff with respect thereto, and claimed damages as a result thereof, and adjusted such damages with the plaintiff. In other words, Ricksecker, instead of rescinding the contract, or refusing to perform by reason of plaintiff's breach, waived his right to do so, and sought his remedy in the assertion of a claim for damages against the plaintiff by reason of his breach, and settled such claim by accepting, in full thereof, \$2,170, or one-half a month's rent. The plaintiff earnestly contends that such action by Ricksecker, taken under circumstances like those already disclosed, whereby the possibility of breaches by either side was contemplated, and surety required of and given by them, respectively, for the faithful performance of their covenant obligations, does not constitute such a change or variation of the contract as to discharge the surety, even if he did not consent specifically thereto at the time it was made. But I do not deem it necessary to rest the decision of this case on the soundness of this proposition alone. This view has much support in the case of *Rice v. Filene*, 6 Allen, 230. But, whether tenable or not, and whether applicable to this case, as already stated, I do not deem it necessary to decide.

An issue of fact is raised by the pleadings, touching the surety's actual knowledge of, and consent to, the adjustment made between Ricksecker and the plaintiff. In determining this issue, I have taken into consideration the evidence showing the relations of Ricksecker and defendant, Barnard, at the time the original contract and bond were executed. It appears that by an instrument bearing even date with the bond in suit, executed by Ricksecker and the defendant, they agreed as follows:

"I, A. C. Ricksecker, for and in consideration of Geo. D. Barnard's signing a five thousand dollar bond in favor of C. H. Randle, and the advancing of five hundred dollars in money as called for by me, do hereby agree to pay Geo. D. Barnard, of St. Louis, Missouri, the \$500.00 advanced by him to me, and twenty-five per cent. of all the net profits arising from the leasing of a certain property to be erected on Fortleth street, about three hundred feet west of Cottage Grove avenue, in the city of Chicago, Cook county, and state of Illinois, to be erected by Mr. C. H. Randle, and under contract of lease to the said A. C. Ricksecker, which contract of lease is hereby referred to, and made a part of this contract. The said A. C. Ricksecker further agrees to pay to the said Geo. D. Barnard fifteen per cent. of the net profits on all other deals to be made by the said A. C. Ricksecker in the city of Chicago, and which he is enabled to make because of the signing of the aforesaid \$5,000 bond, and advancement of the \$500 in money. The said A. C. Ricksecker hereby agrees to submit all trades or deals made by him to the said Geo. D. Barnard for his approval. In witness whereof, we have hereunto set our hands and seals this 29th day of October, 1892

"[Signed]

A. C. Ricksecker. [L. S.]  
"Geo. D. Barnard. [L. S.]"

The foregoing agreement relates primarily to the particular business project of securing the building involved in this case, and while, as has been held, this contract does not create a relation of partnership between the parties (*Randle v. Barnard*, 26 C. C. A. 568, 81 Fed. 682), it nevertheless throws some light on the question sharply at issue in the case now before the court. The defendant, it ap-

pears, had an important interest in the result of Ricksecker's venture. It is clear from the evidence that about the 1st of May, 1893, when it became apparent that plaintiff would not be able to complete the building within the stipulated time, Ricksecker entered into an active correspondence with the defendant, and continued it from that time until the 11th day of May, when the adjustment was reached between Ricksecker and the plaintiff. So Ricksecker and Barnard both testify. Much of this correspondence was not produced at the trial, and the court is compelled to consider the inherent probabilities, and rely largely upon the evidence of Mr. Barnard and Mr. Ricksecker with respect to its contents. After giving these things a careful consideration, I cannot resist the conviction that Ricksecker fully informed Barnard concerning the situation, and his negotiations with the plaintiff in adjusting the claim for damages by reason of the delay in completing the building, and that Barnard fully advised Ricksecker in relation to the same. How, in the nature of things, could it be otherwise? Barnard was largely interested in the venture, and had at the outset exacted a promise from Ricksecker to make no trades without his approval. What was this active correspondence at this particular juncture about? No occasion for it, other than the exigency of the building venture, is attempted to be shown by defendant. It seems to me so extremely reasonable, under the circumstances, that Ricksecker should have consulted Barnard, and secured his approval of the adjustment in question, that scarcely anything less than the production of the correspondence and a clear demonstration should suffice to establish the contrary. Instead of this, the proof shows that the defendant, in the midst of the correspondence, directs Ricksecker to follow an attorney's advice. Not only so, but the testimony of the defendant and Ricksecker, in my opinion, when considered as a whole, shows that Barnard was fully cognizant of what was being done by Ricksecker and fully advised him in the premises. A telegram dated May 5, 1893, was sent to Ricksecker by Barnard. It is as follows:

"St. Louis, Mo., May 5, 1893.

"Owner not filling contract, releases you and me as bondsmen. You follow Dent's advise. Do not pay for May. Can see you Monday.

"[Signed]

Geo. D. Barnard."

The Dent here referred to was an attorney at law, and, without doubt, he was consulted, and his advice followed. I am satisfied, from a consideration of the relations of the parties and all the evidence in the case, that the adjustment as made by Ricksecker with the plaintiff was known to, and approved by, the defendant. The fact relied upon by defendant, that he stated in his telegram and letter of May 5th, confirming the telegram, that he and Ricksecker, by reason of plaintiff's failure to complete the building in time, were both released from the obligations of the bond, seems, in the light of what they then and subsequently did, to be a statement of a right to a release which defendant conceived they had, rather than a right which the defendant then and there finally and conclusively determined to assert. Even if his purpose then was, by the use of



that language, to wash his hands of the entire transaction, it, in my opinion, was abandoned by his subsequent participation in, and approval of, the adjustment as made. Neither he nor his principal was apparently willing to rescind the contract by reason of plaintiff's breach. On the contrary, they agreed to waive the breach, take damages resulting therefrom, and go on with their joint venture, in the hope, doubtless, as stated by the defendant in a letter written to his principal on August 24, 1893, of making themselves whole out of the hotel.

The proof shows that Ricksecker failed to pay rent for the premises in question, in the amount of about \$18,000. Plaintiff is therefore entitled to a judgment for the full penalty of the bond, \$5,000.

It is urged by plaintiff's counsel that he is entitled to interest on the penalty of the bond, by way of damages for nonpayment of the money when the liability accrued, from the date of the breach to the present time; and he relies upon an array of cases, the reasoning of which strongly commends itself to my judgment. These cases are *Perit v. Wallis*, 2 Dall. 252, 1 L. Ed. 370; *U. S. v. Arnold*, 24 Fed. Cas. 868; *Id.*, 9 Cranch, 104, 3 L. Ed. 671; *Wyman v. Robinson*, 73 Me. 384; *Judge of Probate v. Heydock*, 8 N. H. 491; *Carter v. Thorn*, 18 B. Mon. 613; *Williams v. Willson*, 1 Vt. 266; *Sedg. Meas. Dam.* (9th Ed.) § 678. But inasmuch as the bond in suit was executed and delivered, as the proof shows, in the state of Missouri, its force and effect must be governed by the laws of Missouri relating thereto. Sections 866, 869, Rev. St. Mo. 1889, provide, in substance, as follows: That, in every action upon any bond for the breach of any condition other than the payment of money, judgment shall be rendered for the penalty of the bond, together with costs of suit. These sections were construed by the supreme court of Missouri in the cases of *State v. Sandusky*, 46 Mo. 377, and *Smiley v. Cockrell*, 92 Mo. 105, 4 S. W. 443, so as to exclude any other judgment than that particularly specified, namely, judgment for the penalty, with costs of suit. The case last cited was a suit on a bond for the penal sum of \$4,000, conditioned for the faithful performance of duties,—in other words, not for the payment of money, in terms,—and in this respect was quite like the bond now in suit. The trial court rendered a judgment for the amount of the penalty of the bond, with an additional sum of \$580 for interest, calculated thereon from the date of the breach to the day of trial. This, in the view the court took of the statutes just referred to, was decided to be erroneous. Following the interpretation of the highest tribunal in the state, of its own laws, which is a well-recognized rule of the federal courts, I cannot allow a recovery in this case for a sum greater than the penalty of the bond.

## UNION SEWER-PIPE CO. v. CONNELLY.

(Circuit Court, N. D. Illinois, N. D. January 29, 1900.)

No. 24,361.

## 1. NOTE TO TRUST—AVOIDANCE.

A note made for a balance due on goods bought from a corporation cannot be avoided merely because the latter is a trust organized to create and carry out restrictions in trade contrary to the common law.

## 2. SAME.

A note made for a balance due on goods bought from a corporation cannot be avoided merely because the latter is a trust organized to create and carry out restrictions in trade contrary to the "Sherman Act" (Act Cong. July 2, 1890), as that only covers contracts which are themselves in restraint of trade, and does not affect those which "merely indirectly, remotely, incidentally, or collaterally regulate, to a greater or less degree, interstate commerce between the states."

## 3. ILLINOIS TRUST LAW—CONSTITUTIONALITY.

Act Ill. July 1, 1893, defining trusts and conspiracies against trade, declaring contracts in violation of its provisions void, etc., provides (section 9) that it shall not apply to agricultural products or live stock while in the hands of producers. *Held*, that such section rendered the entire act void, as a violation of section 1 of the fourteenth amendment of the federal constitution, and the provision of Const. Ill. art. 4, § 22, that, in cases where a general law can be made applicable, no special law shall be passed.

Herbert W. Hamlin and Edwin Walker, for plaintiff.

O'Donnell & Coghlan and John R. McFee, for defendant.

KOHLISAAT, District Judge. Plaintiff in this case brings suit to recover on certain promissory notes given by defendant for balance due on purchases and deliveries of sewer pipe. Defendant pleads the general issue, and gives notices thereunder of three special defenses, all of which are based upon the theory that plaintiff was a trust or combination organized for the express purpose of creating and carrying out restrictions in trade, contrary (1) to the common law in force both in Ohio and Illinois; (2) to the act of congress of July 2, 1890, commonly called the "Sherman Act"; and (3) to the statute of the state of Illinois taking effect on July 1, 1893.

As to the matters set out in the first notice of special defense, it is undoubtedly true that by the common law contracts which are themselves directly in restraint of trade may, in a proceeding based thereon, be declared void and unenforceable by the courts; but there is no case brought to the attention of the court in which it has been held that at common law a contract not in itself in restraint of trade is void because one of the parties thereto is a party to a contract which is in restraint of trade, and the one contract is indirectly based upon the other. The fact that one party to a contract is engaged in illegal acts will not, at common law, avail the other party as a defense to the enforcement of a contract in itself legal. The first notice of special defense will therefore be stricken out.

It will be seen by an inspection of the so-called "Sherman Act," and of the opinion of Mr. Justice Peckham in the Addyston Pipe & Steel Co. Case (decided by the United States supreme court, Dec.

4, 1899) 20 Sup. Ct. 96, Adv. S. U. S. 96, 44 L. Ed. —, that the act only covers contracts which are themselves directly in restraint of trade, and does not affect those which “merely indirectly, remotely, incidentally, or collaterally regulate, to a greater or less degree, interstate commerce among the states.” It therefore follows that the second matter of special defense set up must be stricken out.

Now, coming to the ground of special defense set up in the third notice, to wit, the Illinois statute which went into effect on July 1, 1893: This statute, in terms, provides that the defense herein set up may be maintained as a bar; and, if the statute is valid, then plaintiff cannot recover in this case, if it be, as averred by defendant, a corporation organized in restraint of trade, and a trust, under the definition contained in said statute. Plaintiff contends that the said statute is unconstitutional (1) because it is obnoxious to section 1 of the fourteenth amendment of the federal constitution, which reads, in part, as follows: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;” and also (2) because it is in contravention of section 22 of article 4 of the constitution of the state of Illinois, which reads, in part, as follows: “In all other cases where a general law can be made applicable, no special law shall be enacted.” The said statute of July 1, 1893, after defining a trust, and setting out the various penalties provided for violation of the act, provides, in section 9, that “the provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser.” Can it be claimed that, under this clause 9, every person within the jurisdiction of the state of Illinois has equal protection of the laws? Is not this class legislation? Is it in accordance with section 1 of the fourteenth amendment to the federal constitution that those who produce or raise agricultural products or live stock shall be exempted from the provisions of a statute which, by its terms, are binding on every other citizen or person within the state? I think clearly not. I am of the opinion that this statute contains both class and special legislation, and is in contravention of both the federal and state constitutions, and therefore void.

It is urged that, granting the unconstitutionality of said ninth clause, yet it may be declared void without affecting the validity of the remaining clauses of said act. If this were so, then, by declaring said clause void, the courts would make the act binding upon those classes of persons within the state which the legislature had specially exempted from its provisions. This would be judicial legislation of the most flagrant character. In my opinion, the said clause 9 taints the whole act, and renders it all void. Therefore the special defense set up in the third notice must be stricken out. It follows upon the record, as it is with the said three matters of special defense stricken out, that a verdict must be given for the plaintiff for the face of the notes in suit, and interest thereon from maturity at 5 per cent., and the jury will be so instructed.

**PLATT et al. v. VERMILLION et al.****(Circuit Court of Appeals, Fifth Circuit. January 23, 1900.)****No. 804.****1. RES JUDICATA—PERSONS CONCLUDED—ADJUDICATION OF BOUNDARY.**

A judgment in an action between individuals, determining that land claimed by one party under a filing made thereon as public land of the state was not public land subject to such filing, but was included within a tract previously granted, is not conclusive upon the state, nor does it render the question *res judicata* as against one subsequently filing thereon, who was not a party or privy to the action.

**2. BOUNDARIES—DETERMINING SURVEY—REVERSAL OF CALLS.**

Where, in a suit involving the determination of a boundary, if effect was given to one of the calls for distance in the field notes of the survey, the last call was short, and left the survey unclosed, unless extended, other calls, having reference to the lines of other surveys, must be ignored, and the quantity of land embraced in the survey largely exceeded that intended, it was not error to charge that, if the jury believed that the lines and boundaries of the survey could be more certainly and definitely ascertained thereby, the calls of the survey might be reversed, and the lines traced the other way from the point of beginning, by which the shortening of only one line was necessary to give effect to all the other calls, and to make the quantity of land approximately what was intended; and this whether it was found that the survey was actually run upon the ground or not.

**3. SAME—EVIDENCE—SUBSEQUENT SURVEYS CALLING FOR COMMON BOUNDARY.**

Where surveys are run and marked on the ground, the line so made governs over a call in the field notes for the line of a previous survey as a common boundary, and such call does not necessarily bind the two surveys together.

**In Error to the Circuit Court of the United States for the Northern District of Texas.**

The plaintiffs in error instituted two actions of trespass to try title against the defendants in error, which actions were consolidated and tried as one cause. Plaintiffs in error, in their first amended original petition, charge that on January 1, 1895, they were lawfully seised and possessed of the following lands, situated in Archer county, holding the same in fee simple, and allege that on January 1, 1895, the defendants in error entered upon said premises, and with force ejected them, and now unlawfully withhold the possession thereof from them, to their damage \$5,000, and pray for the restitution of said premises and for their damages, costs, etc. The defendants in error, some 11 in number, filed their special plea to the jurisdiction of the circuit court of the United States, alleging that they have never claimed said land jointly, but have at all times asserted a separate claim to their own tract, and to no more, and describe that portion of the land claimed by each defendant, which in amount and value would be below the jurisdictional amount of the circuit court, which special plea to the jurisdiction was overruled by the court. Thereupon the defendants in error filed and presented to the court their original answer and special plea of *res adjudicata*, as follows:

**"Original Answer and Plea of Res Adjudicata.**

**"Filed Oct. 13, 1898.**

**"In the Circuit Court of the United States for the Northern District of Texas.**

**"Mrs. Agnes Platt v. A. Vermillion et al.**

**"Now come the defendants, and for special plea herein say that the plaintiffs ought not to have and maintain our aforesaid action against them, because they say that the matter which the plaintiffs attempt to litigate by this suit has already been determined by a court of competent jurisdiction, as herein-after stated, and that the matter is now in *res adjudicata* as to the said**

defendants, and plaintiffs plead said matter in res adjudicata, as follows: Defendants show that heretofore, to wit, on the ——— day of July, 1894, one C. C. Davis filed a certain suit in the district court of Archer county, Texas, against W. M. Coleman, Clyde D. V. Hunt, and Mrs. Lula P. Hunt to recover the title to and possession of 160 acres of land in Archer county, Texas, and that at the same time E. A. McDonald filed another suit in the same court against the same defendants to recover 160 acres near the other tract of land, to wit, the one claimed by Davis. The defendants answered in said causes, and afterwards, to wit, at the August term, 1894, of the district court of Archer county, said causes were consolidated by order of the court, and thereafter prosecuted under the name and style of 'C. C. Davis et al. vs. W. M. Coleman et al.,' and the court entered an order changing the venue in said court to the district court of Jack county, Texas; and on the 20th day of March, 1895, said cause came on for trial in the district court of Jack county, Texas, and resulted in a judgment for the plaintiffs E. A. McDonald and C. C. Davis against all of said defendants for the title to and possession of said land. From this judgment the defendants appealed to the court of civil appeals for the Second supreme judicial district of Texas, and on the 21st day of March, 1896, said judgment was duly affirmed by the said court. An application was made for rehearing, which was in all things overruled by said court, from which the defendants applied to the supreme court of Texas for a writ of error, and their application was dismissed for want of jurisdiction, and thereby the said judgment became final and conclusive as between the parties thereto and as against all persons claiming by, through, or under them. Defendants show that the question in controversy in this case and the question involved in the case of Davis et al. vs. Coleman et al., as above stated, are one and the same, and that the sole question in each case is as to the true location of the north line of the Brazos county school-land survey, situated in Archer county, Texas, and the true location of the John Minter and other surveys, north of said Brazos county, some of which were owned by said Lula P. Hunt at the time of the trial of said cause and at the institution of the said suit; and defendants show that the present plaintiffs in this suit claim title only and solely through the said Lula P. Hunt, arising after the institution of said suits, and that the true question in each case was as to whether there is a strip of land between the Brazos county school land on the south and the John Minter and H. & T. C. Ry. surveys on the north; and defendants further show that in said judgment it was fully determined and conclusively established that the said strip was not embraced in any of plaintiffs' said surveys, and that the title was not in plaintiffs to said land; that the said Davis and McDonald each claim 160 acres of said land strip, and the defendants in this case each claim 160 acres of said strip, and that the effect of said judgment was to fully establish the fact that the plaintiffs herein and their vendor, Mrs. Lula P. Hunt, had no title to said strip. Defendants further show that said strip contains in all about 2,000 acres, and lies wholly on the north side of the said school-land survey; that in the year 1897, at a regular term of the district court of Clay county, Texas, in a certain cause therein pending wherein J. T. S. Gant, E. C. Simmons, and W. H. Keen were plaintiffs and one C. W. Word and Robert Houssells were defendants, a part of the same strip was involved, and the question presented was as to the true north line of the Brazos county school land, and the true south line of the surveys belonging to the said Word on the north of said school land lying due east of said Minter,—the question, in other words, being as to whether there was a strip of land not included in said Brazos county and said Word surveys; that on the trial of said cause in said court a judgment was rendered in favor of said plaintiffs, and it was found and established that there was a vacant strip of land between said surveys, being a part of the same strip involved in this case. That said judgment so rendered is now final and conclusive, and has never been appealed from, and that by the rendition of said judgment it has become and is now res adjudicata as between all the parties to said suit, and is stare decisis herein. Wherefore plaintiffs say that the said judgments herein mentioned fully establish the fact that the plaintiffs ought not to prevail in this action, and that the land for which the plaintiffs are suing is a part and parcel of the strip of vacant land lying between said

Brazos school land and the old survey on the north thereof, and leaves no room for controversy or doubt that the defendants are entitled to said land. Wherefore defendants plead said judgments in bar of this action and pray for judgment for the title to and possession of said land, and for all costs of suit, and general relief.

F. E. Dycus, for Defts."

"And now come the defendants, and each for himself disclaims all rights, title, and interest in and to the lands in controversy, except that each defendant claims only the tract of land described as belonging to him in said original plea in abatement, etc. And each defendant says that he never did claim or possess any of the said land except said tracts, and that he has never claimed any land jointly with his co-defendants, but severally only; that is to say, the defendants have each claimed the tracts respectively claimed by him in his plea, and disclaimed as to all other land. As to the tract described and claimed by him in said plea (said plea being here referred to and made a part hereof) he pleads not guilty, and says that he is not guilty of the said supposed wrongs, injuries, and trespasses laid to his charge, nor any or either of them, in the manner and form as alleged by plaintiffs, and of this he puts himself upon the country.

F. E. Dycus, Attorney for Defts."

In reply to the original answer and special plea filed by defendants in error, the plaintiffs in error filed and presented to the court their first supplemental petition and plea of *res adjudicata*, as follows:

"Now at this come Mrs. Agnes Platt and Mrs. Lula P. Hunt, plaintiffs herein, and file this, their first supplemental petition in this cause, and by way of replication to defendants' original answer filed herein deny all and singular the allegations and averments therein set out, and call for strict proof of the same. Wherefore they pray as in their first amended original petition.

"And by way of further replication to defendants' original answer these plaintiffs say: That heretofore, on the ——— day of ———, 1890, Mrs. Lula P. Hunt, then Mrs. Lula P. Dickey, was the sole owner and holder in fee simple of the lands and tenements set out and described in plaintiffs' first amended original petition, claiming and holding the same as a part of the four-league grant in the name of the Brazos county school land. That on the day and date aforesaid Warren West, Polk West, D. T. Meredith, and W. D. Youngblood filed upon said land, claiming the same to be vacant and unappropriated public domain of the state of Texas, and as such subject to their file and settlement under the homestead donation laws of said state. That the said Mrs. Lula P. Hunt, then Dickey, instituted her action of trespass to try the title in the circuit court of the United States for the Northern district of Texas, at Graham, against said parties, claiming said land to be a part of her said Brazos county school-land grant, and as such not subject to the files and settlement of said parties. That said parties answered in said cause, and were represented therein by counsel. That said cause was styled on the docket of said court as 'No. 179, Mrs. Lula P. Dickey v. Warren West et al.' That on the 27th day of October, 1890, said cause was tried by said court, and judgment duly rendered therein in favor of the said Mrs. Lula P. Dickey. That it was thereby determined and adjudged by said circuit court of the United States that said land was a part of the Brazos county school land, and was not vacant and unappropriated public domain of said state, and not subject to the files of said parties. And these plaintiffs further aver and charge that on the ——— day of ———, 1890, Mrs. Lula P. Hunt, formerly Dickey, was the legal and equitable owner and holder in fee simple and in the peaceable possession of the land set out and described in plaintiffs' first amended original petition filed herein; that on said day and date R. K. Dunlap, Mrs. Woodward, J. B. Watson, G. W. Edgin, S. Kuykendall, G. L. Allen, and J. T. S. Gant entered upon said lands, claiming the same to be vacant and unappropriated public domain of said state, and as such subject to their files and settlement under the homestead donation laws of said state. That the said Mrs. Lula P. Dickey instituted suit in the circuit court of the United States for the Northern district of Texas, at Graham, against said parties. That said cause was styled on the docket of said court as 'No. 178, Mrs. Lula P. Dickey v. Tully Wilburne et al.' That on the 27th day of October, 1890, said cause was duly tried by said court, both plaintiffs and defendants therein being represented by counsel, and judgment was ren-

dered therein for Mrs. Lula P. Dickey; said court holding that said land was a part of the Brazos county school-land grant, and not a part of the vacant and unappropriated public domain of said state. Plaintiffs further aver that on the ——— day of ———, 1892, J. T. S. Gant and G. W. Edgin again entered upon said land, claiming the same as vacant and unappropriated public domain of said state, and as such subject to their file and settlement under the homestead laws of said state. That said parties instituted the suit in the district court of Archer county, Texas, each claiming 160 acres of the land hereinbefore set out, which said causes were consolidated and prosecuted under the style of 'J. T. S. Gant et al. v. W. M. Coleman et al., No. 186.' That defendant Mrs. Lula P. Hunt, then Dickey, and W. M. Coleman, her foreman, were defendants in said cause. That defendants therein, to wit, Mrs. Lula P. Dickey and W. M. Coleman, claimed said land as a part of the Brazos county school-land grant, and as such not subject to the files and settlement of said parties. That the said cause was tried by the said court on the 4th day of March, 1892, all of said parties being present, and represented by counsel. That said court rendered judgment in said cause for Mrs. Lula P. Dickey and W. M. Coleman for said land, thereby holding and finding that said land was a part of the Brazos school-land grant, and not vacant and unappropriated public domain, and not subject to file and settlement of said parties under the homestead donation laws of said state. That said case, after the rendition of said judgment as aforesaid, was by the said Gant and Edgin appealed to the court of civil appeals of said state sitting at Ft. Worth, Texas, which judgment and decree was by the court of civil appeals in all things affirmed, thereby holding that said lands were a part of the Brazos county school-land grant as aforesaid. That all of said judgments were rendered by courts of competent jurisdiction, and are in full force and effect, and are unreversed. Plaintiffs further aver and charge that on the ——— day of ———, 1894, Mrs. Lula P. Hunt, joined by her husband, Clyde D. V. Hunt, being the legal and equitable owner and holder in fee simple of the lands set out and described in her first amended original petition, and being in the actual possession of the same, in order and for the purpose of checking, restraining, preventing, and avoiding the annoyance and heavy expense of continued litigation over said land with any and all persons who should settle upon said land, claiming the same as vacant, filed her bill in equity in the circuit court of the United States for the Northern district of Texas, at Graham, claiming said land as a part of the Brazos county school-land grant in Archer county, and alleging that said land was not vacant and unappropriated public domain, and was not subject to settlement under the homestead laws of said state, and further alleging that one T. M. Cecil, surveyor of Archer county, Texas, had surveyed and was continually surveying and accepting files upon said land as vacant and unappropriated domain under the statute regulating homestead donations; that said cause was determined and adjudicated by said court on the 18th day of October, 1894, and a decree rendered by said court in favor of said Mrs. Lula P. Hunt against the said T. M. Cecil as such county surveyor of Archer county, Texas, adjudging said land to be a part of the Brazos county school land, and not vacant land, and forever and perpetually enjoining and restraining the said T. M. Cecil as such surveyor, his agents, deputies, assistants, and successors in office, and attorneys from accepting any file or files upon said land from any one whomsoever, and from furnishing any one with field notes to said land, or any part thereof, who might or desired to claim the same as vacant or public domain, or subject to file or settlement under the homestead donation laws of said state. Plaintiffs further aver and charge that the defendants in this cause claim the land in controversy as vacant land under the homestead donation laws of said state; that said land as claimed by each of the defendants herein is a part of the land embraced in the decrees hereinbefore set out; that the plaintiff herein Mrs. Lula P. Hunt was a party to all of said decrees; that the land involved herein was involved in all of said causes; that the law and facts are the same in this cause as in all of those hereinbefore set out; that these defendants are urging the same defense and setting up the same claim from the same source as urged in all of said causes; that defendants knew of such decrees, and could have known of the same by mere inquiry; that they were notorious throughout Archer county. Plaintiffs further aver and charge that by reason

of the rendition of said decrees as aforesaid the fact that the land in controversy is a part of the Brazos county school land, and that it is not vacant and unappropriated public domain, and is not subject to file and settlement under the homestead donation laws of said state, has become a settled and established fact, and is now res adjudicata as to all persons so claiming the same, and is stare decisis herein. Wherefore these plaintiffs say that defendants cannot be heard to assert such claim, and that the decrees herein set out are a bar to defendants' claim; wherefore they pray as in their first amended original petition."

Demurrers were by each party presented to the court touching the sufficiency of the separate pleas of res adjudicata as presented by plaintiffs and defendants in error. Said demurrers were sustained by the court, and both pleas of res adjudicata were held insufficient as a plea in bar. The trial was had before a jury, which rendered a verdict in favor of the defendants in error for the land in controversy, and thereupon this writ was sued out.

Stanley, Spoons & Thompson and R. F. Arnold, for plaintiffs in error.

F. E. Dycus, for defendants in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). The plaintiffs in error claim the land in controversy to be a part of the Brazos county school-land grant of four leagues, and that in former judicial controversies between them and persons other than the defendants in error they obtained judgments in accordance with their contention. The defendants in error deny that the land in controversy is a part of the Brazos county school-land grant, and show that in other controversies between the plaintiffs in error and persons other than the defendants judgments were obtained declaring that the lands in controversy were not included in the Brazos county school grant, but were vacant lands between said school land on the south and surveys on the north of it. Defendants in error further contend that each and all of said surveys were located on the ground in such a way as to leave room for the junior surveys under which they claim.

The first assignment of error, which takes up over three pages of the printed transcript, and is further fortified by a bill of exceptions showing the ruling of the court, is to the effect that the court erred in sustaining the demurrer to the plaintiffs' plea of res adjudicata. In regard to this assignment, counsel for the plaintiff in error say that the general rule in regard to res adjudicata is that there should be a concurrence of four conditions: (1) Identity in the thing sued for; (2) identity in the cause of action; (3) identity of persons and parties to the action; and (4) identity in the quality of the persons for or against whom the claim is made,—citing *Davis v. Brown*, 94 U. S. 423, 24 L. Ed. 204; *Philipowski v. Spencer*, 63 Tex. 607, and other authorities. But they claim that there are exceptions to the general rule, and that such exceptions become the rule in questions of boundary and in all other questions in which the general public may have or acquire an interest, and that in actions of this character a judgment of a court of competent jurisdiction declaring or adjudicating the fact involved concludes all persons, whether parties to the action or not. The adjudged cases and text-books cited in support of this proposition do not sustain it. In *Bone v. Walters*, 14 Tex. 564,



567, the former judgment was offered as a muniment of title, and the court held that, as there was no pretense that the defendant was a bona fide purchaser, it was wholly immaterial whether or not he was a party, or had notice of the proceeding. In *Girardin v. Dean*, 49 Tex. 243, it was held that the fact that the parties in the first suit were not identically the same as those in the second was no answer to the plea of former judgment as to the common parties, but otherwise the case might be permitted to proceed if the dismissal of the parties still left the court with jurisdiction. In *State v. Wygall*, 51 Tex. 621, the court held that, where the estate of a deceased person in the treasury of the state had been sued for and recovered by one set of heirs, another set of heirs, although without notice of the judgment, could not sustain another suit to recover from the state until the former judgment had been set aside. *McCleskey v. State* (Tex. Civ. App.) 23 S. W. 518, was a suit to dissolve a municipality, and the court held that a judgment in a former suit for the same purpose was identical as to parties, and the former judgment was binding. In *Pitman v. Town of Albany*, 34 N. H. 577, a judgment under a statute which empowered the court to establish a public boundary line between two adjoining towns was held to be a judgment in rem, and conclusive upon all persons. In *Freem. Judgm.* §§ 157, 174-176, 236, nor in *Bigelow, Estop.* (2d Ed.) 147, is there any text-book law which supports the pretensions of the plaintiffs. The true rule, as applied to private judgments, seems to be correctly stated in *Hunt v. Haven*, 52 N. H. 162, to wit: One cannot be privy in estate to a judgment or decree unless he derives his title to the property in question subsequent to and from some party who is bound by such judgment or decree. That the former judgments pleaded in this case were judgments in rem or public judgments, or judgments binding the state, cannot be successfully asserted.

Another difficulty in regard to the proposition as applicable to the present case is that the record does not show whether the title under which the defendants in error claim antedated or was subsequent to the adjudications pleaded in bar. If their title was prior to such adjudications, it is very difficult to see how, in any event, they could be prejudiced by subsequent judgments rendered in suits to which they were not parties nor privies. If the title was subsequent to the adjudication, then there is no force in the argument of counsel for the plaintiffs in error, and which they support by authority, to wit:

"They, being in reality privies, were in a position to have known of the pendency of the action in which the decrees were rendered, could have made themselves parties, and could have had their rights adjudicated in either action. Having remained silent while those cases were being adjudicated, they cannot now be heard to dispute the facts they have established."

Some argument has been presented to the effect that, while no particular adjudication declaring these lands in controversy to be a part of the Brazos county school-land grant is *res adjudicata* against the defendants in error, yet the several decisions rendered in different suits to the same purport should have the effect of *stare decisis*. This argument, if otherwise good, is subject to the objection in this case that from the record the decisions are shown to have been not

all one way, as the defendants in error show adjudications which have in effect declared the lands in controversy not to be a part of the Brazos county school-land grant.

The second assignment of error complains of the ruling and the charge of the court, and the questions presented are shown in the bill of exceptions, to wit:

"Be it remembered that on the trial of the above styled and numbered cause the court gave the jury special charge No. 2, requested by defendants, which was as follows: 'If you believe from the evidence in this cause that the beginning corner of the Brazos county school land was located upon the ground, and that the lines and corners of said school-land grant were actually surveyed by the locating surveyor; and if you further believe from the evidence that the lines and boundaries of said school-land survey can be more certainly and definitely ascertained by beginning at said beginning corner, thence running north 2396 vrs., thence west to the east line of the Griffin survey, thence south on the east line thereof to the N. W. corner of the Madison county school land, and so on east and south and north to the beginning, according to the calls in said grant,—then you are authorized to so locate said calls, if you believe from the evidence that all of the landmarks, courses, and distances called for in said grant will be thereby observed, and the configuration of the survey preserved, and the intent of the locating surveyor followed,'—to which special charge plaintiffs, by their counsel, except: Because said special charge was not authorized by the evidence, in this: That the testimony of W. C. Twitty, the original locating surveyor, shows that all of the lines and corners of said Brazos county grant were not located and run upon the ground (the testimony of W. C. Twitty being attached hereto, marked 'Exhibit A'); and because said special charge is misleading in this: The jury could and would infer and did conclude therefrom that they were thereby authorized to disregard the long call of the Brazos county grant on the west, and thereby cut off a strip on the north thereof 717 vrs. wide north and south (the field notes of the Brazos county school land and contiguous surveys being hereto attached, marked as exhibits); and because said special charge authorized the jury to disregard the certain call for course and distance in the Brazos county grant calls, and makes such course and distance yield to an uncertain call for a point in the E. B. line of No. 113; and because said charge does not specifically and with certainty inform the jury that, before the calls in locating a grant can be reversed, it must be definitely shown by testimony that the entire grant and all lines and corners thereof were actually located and established upon the ground by the original locating surveyor. The charge in controversy in a measure limits such original location on the ground to the beginning corner, which objections were overruled by the court, to which ruling the plaintiffs then and there excepted, and now here in open court tender this, their bill of exceptions, and pray that the same may be signed, allowed, and ordered filed and made a part of the record in said cause."

The Exhibit A contains the testimony of W. C. Twitty as follows:

"W. C. Twitty testifies that he was 71 years old. In 1854, before and after, was surveyor and land locator. He had done some locating and surveying in Archer county from 1854 to 1860. He could not remember the exact date. Witness, with Howeth, located the Brazos county school land, 4-leagues grant, together with the other surveys. The Brazos county school land was located on the ground. It was not an office survey. The north call of the west line of the Brazos county where it calls, thence north 4,468 vrs., is a mistake. I intended in this call to run the full distance north. I did not intend to stop still before reaching the full course and distance as called for in this call. Where a hearing is called for and marked, they were always made. Some of the corners might have been derived from some other surveys I had made. Witness further testifies that he could not state whether he found the bearings at the beginning corner or not, but said that he must have located said school land from its beginning corner, as stated in the field notes. Witness was unable to say how the discrepancy in the field notes of the Brazos occurred. He

only intended to give the Brazos county grant its quantity of 4 leagues of land, and did not intend to give it any excess. Witness could not state who located the W. R. Griffin and Sarah Ursey, lying west of the Brazos school land. Does not remember whether he intended to abut the school land survey on them or not. Witness could not swear that he ran all the lines and established all the corners called for in the field notes of said survey on the ground; will not swear that he ever located its most northern west corner on the ground or not. He could not state whether he located that line or corner on the ground. Witness did not know whether or not he made the N. W. corner of the Brazos in the east line of No. 113. It is a fact that witness did not run the whole distance of the west line on the ground. It is a fact that he did not intend to locate the north line or the N. E. corner of said school land in conflict with No. 34, or 38, or any other survey. He did not intend to give the Brazos any excess. It is also a fact that he intended to run the north line due east from its N. W. corner, allowing only about 10 degrees variation."

The land claimed by the plaintiffs in error is shown and proved as follows:

"State of Texas, District of Cooke.

"Plat and field notes of a survey for Brazos county of four leagues of land for school purposes by virtue of an act appropriating certain lands for a general system of education. Approved Jan. 26th, 1839. Situated on the waters of Little Wichita. Beginning at the most eastern N. E. corner of No. 38, in the name of A. Sterne and Wm. Duckworth; thence W. 1,900 vrs. to another N. E. cor. of same sur.; thence S. 950 vrs. to another N. E. corner of said survey; thence S. 3,534 vrs. to the N. E. cor. of No. 60; thence W. 1,208 vrs. to the N. W. corner of No. 60 at 4,808, the N. W. corner of No. 61; thence S. 800 vrs. the N. E. cor. of No. 65; thence W. 1,980 vrs. the N. W. cor. of the same; thence N. 800 vrs. pass the S. E. cor. of No. 114, 4,112 vrs. the N. E. cor. of No. 114; thence W. 7,650 vrs. the N. W. cor. of No. 114; thence N. 4,486 vrs. a cor. in the east line of No. 113; thence E. 20,056 vrs. a cor. in the W. line of No. 34; thence S. 2,396 vrs. to beginning. Surveyed Oct. 4th, 1854.

James Mann,

"John A. Knight,

"Chainmen."

"I, William C. Twitty, dept. surveyor for the Cooke land district, do hereby certify that the foregoing survey was made according to law, and that its limits, boundaries, and corners, with the marks, natural and artificial, are truly described in the foregoing plat and field notes.

"William C. Twitty, Dept. Sur. C. L. D."

"I, Daniel Montague, district surveyor for Cooke land district, do hereby certify that I have examined the foregoing plat and field notes, and find them correct, and that they are recorded in my office in Book B, page 570. Given under my hand at Gainesville, this 20th day of Jan., 1856.

"Daniel Montague, Dist. Sur. C. L. D."

"I hereby certify that the above survey has this day been relocated in my office this 22nd day of Sept., 1856.

J. M. Perry, Dist. Sur. C. L. D."

"I, J. P. Hart, county surveyor of Archer county, Texas, do hereby certify that the pages contain a true and correct copy of the field notes and certificates for the Brazos county school land as by the records in my office in Book C, pages 171 and 172. Given under my hand this April 27th, 1890.

"J. P. Hart, Surveyor, Archer County, Texas."

It is conceded that all the surveys referred to in the plat and field notes of the Brazos county school land were about the same period—1854 to 1856—located, surveyed, and patented, and no question is made as to the correctness of any such surveys. It appears that the disturbing call in the survey of the Brazos county school-land grant is the call for distance in the west line of the same. A strict adherence to the calls for distance in the order as given in the survey locates the northwest corner of the grant a long distance north

of any corner in the east line of the survey No. 113, leaves the call for distance on the east line short 717 varas, and the survey unclosed, unless the east line is extended that distance, produces a conflict not intended with the prior survey No. 34, and gives the Brazos county school-land survey an excess of 3,400 acres of land. A reversal of the calls permits full effect to be given to each and all of them except the call for distance in the west line, and at the same time gives the Brazos county school-land grant a slight excess of land,—some four acres. It is the call for distance in the west line that Twitty now says is a mistake. At the same time he says, "I intended in this call to run the full distance north." It is proper to say that the evidence shows that, if the calls for course and distance are followed in the order given, but the surveys on the south referred to are disregarded, the grant will have an excess of 1,900 acres; and that, if the calls for course and distance are reversed, and the surveys on the south referred to are disregarded, the grant will be deficient some 1,200 acres. There appears to be no good reason why the surveys on the south referred to in the field notes should not be regarded, as it is not doubted that the said grant as located is bounded on the south by said surveys.

"When unmarked lines of adjacent surveys are called for, and when, from the other calls of such adjacent surveys, the position of such unmarked lines can be ascertained with accuracy, and when, in the absence of all evidence as to how the survey was actually made, there arises a controversy as to whether course and distance or the unmarked line of another survey shall prevail, we see no good reason why the survey line should not be given the dignity of an 'artificial object,' and prevail over course and distance." *Maddox v. Fenner*, 79 Tex. 279, 291, 15 S. W. 239.

In regard to excess of grant and a reversal of calls the same case holds:

"The calls of a survey may always be reversed, and, if this be done in this case, the last call in the Stevens patent, or the one 950 varas north from the William Ryan southwest corner, would be entitled to as much regard as the first or east call from that point. The effect of reversing the calls of the Stevens survey, and assuming the last one to be correct, upon the survey of plaintiffs, has not been discussed by counsel, and need not be by us. It is evident that the officer who made the Stevens survey did not discharge his duty accurately in every particular. His failure to do so is most strikingly shown by the quantity of the land included in the survey, if he actually ran the lines according to the surrounding surveys. Such excess, however, has never been held by this court a ground for disregarding surveys actually made. In this case the greatness of the excess is not without force as an argument indicating that the surveyor actually intended to make the Stevens embrace all of the land left by the surrounding surveys." 79 Tex. 292, 15 S. W. 239.

In *Scott v. Pettigrew*, 72 Tex. 321, 328, 12 S. W. 163, a charge limiting the effect of the excess in the survey of a land grant being under consideration, the court held:

"If the grant was for land located between older surveys having marked and identified boundaries, and these older surveys were called for in the field notes of the grant, and the 'footsteps' of the surveyor who located the grant could not be found upon the ground, then excess in area would be of no consequence, because the intent to grant the land between the marked boundaries of the older surveys would be clear. *Bigham v. McDowell*, 69 Tex. 100, 7 S. W. 315. But where no older surveys are called for in the grant, and there is nothing indicating an intent to embrace in the grant land not included in the area named,

and the footsteps of the surveyor who made the location are found upon a part only of the boundaries of the grant, we think the jury should not be instructed to fix the unmarked and undefined boundaries regardless of the fact of excess. The fact of excess in area should have been left to the jury to be considered in connection with all other evidence, without suggestion from the court as to what weight it was entitled to in determining so much of the boundaries as were not identified by marks and objects upon the ground."

The law presumes that all surveys are actually located and run upon the ground. *Stafford v. King*, 30 Tex. 257, 270; *Phillips v. Ayres*, 45 Tex. 601; *Boon v. Hunter*, 62 Tex. 582, 588; *Gerald v. Freeman*, 68 Tex. 201, 204, 4 S. W. 256; *Maddox v. Fenner*, *supra*.

In *Phillips v. Ayres*, *supra*,—a case much relied upon by the plaintiffs in error herein,—the court found from the evidence that it was quite probable neither the western nor northern limits of the survey involved were ever in fact run by the surveyor; and it is said, "If the grant were identified in no other way than by the beginning corner, a survey might be constructed from it by the calls for course and distance; but we are reduced to no such necessity;" and the court declared and applied this rule: "The order in which the surveyor gives the lines and corners in his certificate of survey is of no importance to find the true position of the survey. Reversing the courses is as lawful and persuasive as following the order of the certificate,"—citing *Thornberry v. Churchill*, 4 T. B. Mon. 32, which case we have examined, and find that therein the rule as above given was declared, and no limitation to its application expressed. Referring to the last-cited case and *Ayers v. Watson*, 113 U. S. 594, 5 Sup. Ct. 641, 28 L. Ed. 1093, we find in *Ayers v. Harris*, 64 Tex. 300, a case involving the same *Moreno* grant, the following:

"The present case differs materially from the two cases just cited in this important particular: That the evidence of *Johnson* and *Duty* both shows that all the lines of the *Moreno* grant were actually traced and measured upon the ground, while in the case of *Phillips v. Ayres* there was no such proof, and the west and north lines were treated in the opinion of Judge Moore in that case as lost lines, or at least as lines that had not been found; and in the later case, decided in the supreme court of the United States, the evidence was that *Johnson* marked, without measuring the east line of the grant, from the northeast corner to the southeast corner on the river. If it is permissible to reverse the calls, and trace the lines a different way from that indicated in the field notes, in cases where the proof shows some of the lines were not actually run upon the ground, but their length was determined by estimation or calculation simply, it seems to us it is infinitely less hazardous to adopt such a rule in a case where all the lines are shown to have been actually measured by the surveyor who made the original survey. The object of all rules which have been formulated by the courts for locating, fixing, and determining boundaries has been to ascertain and discover, if possible, the footsteps of the surveyor, and in this way identify the survey that was actually made, and it is apparent that a charge which prescribes such a rule for the conduct of the jury can lead to no mischievous results. We conclude, therefore, that the charge complained of in the third assignment is not obnoxious to the objections urged by appellant."

In *Ayers v. Lancaster*, involving the same grant, and also reported in 64 Tex. 805, it was said the proof showed that the western and northern limits of the survey were in fact run and measured on the ground by the surveyor, and the reversal of the calls was held to be proper. But the court said, in addition:

"We are of opinion, however, that it would not be proper to reverse the calls, and to run in reverse from the southeast corner for the purpose of ascertaining where the northeast corner would be found, by the measurement called for in the grant, if in fact the east line was not actually measured at the time the survey was originally made, there being affirmative evidence showing that the western and northern lines were actually measured on the ground. Whether all or any of the lines were, in point of fact, measured on the ground should be submitted to and decided by the jury; and, if all were so actually measured, then the calls may be reversed; if not, they should not be." Page 812.

The dictum of the court in *Ayers v. Lancaster*, to the effect that a reversal of the calls in a survey can only be permitted when the lines are all actually run upon the ground, is in conflict with the case of *Phillips v. Ayres*, supra, which the court cited with approval, and was disregarded by the supreme court in *Maddox v. Fenner*, supra, and by the court of civil appeals of Texas in *Hill v. Smith*, 25 S. W. 1079. In the last-mentioned case the court says:

"We believe, in ascertaining the boundaries of surveys, where all of the calls made by the surveyor cannot be strictly observed, as few should be disregarded as can be consistently done, and that in this instance the proper way to locate the survey is to commence at the beginning corner, and run in both directions, following the calls in the patent as long as it can be done, and then close the gap in the manner which seems to be most consistent with all the calls. By doing this the only change that will be necessary will be to add about 150 varas to the line called to run south from the river 1,229 varas, and to change the call from this point on the river for Louisa peak from N., 18¼ W., to N., 10¼ W., which would have the effect to add about 2,300 varas to the river line. The amount of land that would thus be included in the survey, we understand, would about correspond with the amount called for in the patent. We think it quite probable that the surveyors who testified in the case were right in their conclusion that the only work done on the ground in making the original survey was the meandering of the river. But it is quite evident that the surveyor, in making his calculations to include the amount of land desired, estimated the distance it would be necessary for him to go west of the surveys on the south, and therefore called for their corners and lines; and the fact that he made a mistake as to the stopping point on the river should not have the effect to annul all these calls when the result will be to create such a decided shortage in the amount of land intended to be granted by the patent. Had the surveyor gone entirely around the survey, his footsteps should be followed, notwithstanding the deficiency in quantity; but when he stops on the line, and undertakes to give directions as to the route to be taken from that point to the place of starting, without himself visiting the designated places, these directions should be followed in such way as to best locate the grant according to the calls thus made. *Robinson v. Doss*, 53 Tex. 496."

*Simpkins v. Wells*, 26 S. W. 588, is a case where the supreme court of Kentucky approved the reversal of calls in order to harmonize a survey as far as possible, and apparently did not trouble themselves to inquire whether the survey was actually run.

In *Ayers v. Lancaster*, supra, where it is declared obiter that, while the calls for a survey may be reversed when the lines of the survey are actually upon the ground, and that it is not proper to reverse the calls of a survey where all the lines are not actually run upon the ground, no reason for such a rule is given or suggested, and we find neither in the arguments reported in that case nor in the briefs and arguments in the present case any suggestion or reason for such a rule. The only reason that occurs to us (there may be others) is that the last call of a survey is more elastic than the others, it being sub-

ject to variance both as to course and distance, in order to close the survey, and therefore it is less expressive of the surveyor's intention than any other call. Here it may be remarked that the intention of the surveyor, which is to be sought in settling a survey, is to be derived from the plat and field notes as made and from the facts and circumstances as they existed at the time of the survey. The subsequent declarations of the locating surveyor, particularly when made 40 years after, as to what he intended as to the running and extent of lines in the survey, are of little, if any, value. See *Ayers v. Watson*, 137 U. S. 584, 597, 11 Sup. Ct. 201, 34 L. Ed. 803. We take it, if the last call of the survey is more elastic than any other call, and yet where the survey is actually run on the ground, and the calls may be reversed so as to follow backward the footsteps of the surveyor, that in an office survey, where there are no footsteps of the surveyor, and the plat and field notes are the result of calculation and estimation by the surveyor, his intention being to have a survey which shall have a certain quantity of land within certain lines and boundaries, the last call of the survey is just as good, and as little subject to variation, as any other call. Of course, it is to be understood that, whether the survey be actually run on the ground or not, a reversal of the calls is not to be allowed in disregard of natural or artificial objects called for in the plat or field notes.

The testimony of Surveyor Twitty, *supra*, is conflicting and irreconcilable, and, while it may leave a strong impression that the lines of the Brazos county school-land survey were not actually run upon the ground, it is doubtful whether it was sufficient to overthrow the legal presumption shown by authorities hereinbefore cited that the lines of all surveys are actually run upon the ground; and certainly the question whether the lines of the Brazos county survey were actually run upon the ground was a question for the jury. See *Ayers v. Watson*, *supra*. If the jury found—as they had a right to do—that the presumption of law above mentioned was not overcome by the conflicting testimony of Twitty, and they further held that the lines of the survey were actually run upon the ground, then it is indisputable that the jury had a right to reverse the calls in order to harmonize the lines of the survey. On the other hand, if the jury found, on the evidence of Twitty, that the lines of the survey were not actually run upon the ground, yet, as we have shown that the rule declaring that the calls of an office survey may not be reversed is of doubtful authority, and, even if sound, ought not to be held a hard and fast rule subject to no exceptions; and as we have shown that, where surveys are not actually run upon the ground, the quantity of land intended to be called for in the survey is a material matter, to be considered in determining the survey; and as it appears that the real question at issue in the present case was whether the long call for distance in the west line of the Brazos county school-land survey should prevail over the short call for distance in the east line and several other calls of the same survey; and as it appears that by reversing the calls all the calls in the survey, with the exception of the call for distance in the west line, are harmonized, the conflict with prior surveys is avoided, and the Brazos

county school survey given its full quota of land,—we are of opinion that the learned judge of the trial court might very properly have instructed the jury in the language used by Judge McCormick in a noted and much litigated case, as follows:

"In order to reconcile or elucidate the calls of a survey in seeking to trace it on the ground the corner called for in the grant as the 'beginning' corner does not control more than any other corner actually well ascertained; nor are we constrained to follow the calls of the grant in the order said calls stand in the field notes there recorded, but are permitted to reverse the calls, and trace the lines the other way, and should do so whenever by so doing the land embraced would most nearly harmonize all the calls and the objects of the grant." *Ayers v. Watson*, 137 U. S. 598, 11 Sup. Ct. 206, 34 L. Ed. 809.

This was approved by the supreme court, and the opinion concludes as follows:

"If an insurmountable difficulty is met with in running the lines in one direction, and is entirely obviated by running them in the reverse direction, and all the known calls of the survey are harmonized by the latter course, it is only a dictate of common sense to follow it." Page 604, 137 U. S., page 208, 11 Sup. Ct., and page 811, 34 L. Ed.

In either view, a reversal of the calls was proper, and the charge complained of was more favorable to the plaintiffs in error than the case warranted, and any error of the court, if error therein, was not prejudicial to them.

The third assignment of error complains of the refusal of the trial judge to give the following special charges:

"You are further charged by the court that, when unmarked lines of adjacent surveys are called for by the field notes of contiguous surveys, and such unmarked lines can, from other calls, be ascertained and located with certainty, such unmarked lines, under such circumstances, are given the dignity of an artificial object. Therefore, if you find from the evidence in this case that the north line of the Brazos county school-land survey can be located with certainty, either from its own calls and corners or from the calls and corners of contiguous surveys, then such north line becomes an artificial object, which will control course and distance; and if you find, from the evidence, that such line can be so established, and that the surveys lying north of such line, to wit, the John Minter S. P. R. R. Co. survey, the H. H. Duff survey No. 8, H. & T. C. R. R. Co. surveys, Nos. 1, 2, and 3, call for the northern boundary line of said Brazos county school-land survey as a common divisional line, then no vacancy can occur between such survey and the Brazos county school land, and you will find for the plaintiffs." "The testimony in this case shows that there was no vacancy existing north of and adjoining the Brazos county school land at the time of the attempted appropriation of the land claimed by the defendants in this suit, because, without reference to the true location of the north line of the Brazos county school land, the surveys north, to wit, the John Minter S. P. R. R. Co. survey, H. H. Duff survey No. 8, H. & T. C. R. R. Co. surveys 1, 2, and 3, all call for the north boundary line of the Brazos county school land, and exclude the existence of a vacancy, and therefore your verdict will be for the plaintiffs. Both of said charges being necessary from the field notes of the John Minter, H. H. Duff, and H. & T. C. R. Co. surveys, and the testimony of T. M. Cecil and J. P. Hart. Said field notes showing that these surveys were located from the north line of the Brazos county school land and each and all were tied to such north line as a common divisional line, and could not be separated to admit of a vacancy between them."

It appears from the testimony of Hart, surveyor, who located the Minter and a tier of surveys east of it, that he began the said Minter survey at a point 10,471 varas north of the common southwest corner of the H. S. Smith survey No. 68, and the southeast corner of



the Sarah Ursey survey as fixed by a large elm bearing tree, well marked, which corner and tree were found and identified, and then located said surveys by running out their boundaries on the ground and establishing the southwest and southeast corners of the said Minter survey by driving a stake in the ground at each corner, and at the same time located the other surveys east of said Minter survey covering the same ground now covered by surveys Nos. 1, 2, and 3 in the name of the H. & T. C. R. Co. If the Brazos county school-land survey was determinable by reversing its calls, and giving effect to the short call on the east line and the call for a corner in the east line of No. 113, there would be a strip of vacant land between said Brazos county school-land survey and the above-mentioned surveys actually located and surveyed on the ground. The first proposition contained in the above assignment was correctly refused, because it directed the jury to disregard the above testimony. See *Gerald v. Freeman*, supra; *Adams v. Crenshaw*, 74 Tex. 114, 11 S. W. 1082; *Busk v. Manghum* (Tex. Civ. App.) 37 S. W. 459; *Colonization Co. v. Flippen* (Tex. Civ. App.) 29 S. W. 813. The second proposition was also correctly refused, because it disregarded the testimony of J. P. Hart and T. M. Cecil, surveyors, and was otherwise against the evidence in the case.

The last assignment of error is that the court erred in overruling the plaintiffs' motion for a new trial, and needs no consideration.

As none of the errors assigned are well taken, and as we discover no plain error upon the face of the record, the judgment of the circuit court is affirmed.

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CLEVELAND, C., C. & ST. L. RY. CO. v. TARTT.

(Circuit Court of Appeals, Seventh Circuit. January 25, 1900.)

No. 557.

1. RAILROADS—INJURY OF PERSON ON TRACK—TRESPASSERS.

As between a railroad company and a trespasser on its right of way, no duty of care to avoid injury to such trespasser arises until those in charge of the train have discovered his presence on or dangerously near the track, and have reasonable cause to believe that injury will result unless the progress of the train is arrested. That he might have been seen before he was, or that the train was running at a dangerous or illegal rate of speed, is merely evidence of negligence, which in such case does not give a right of action for the injury.

2. SAME—ACTION FOR INJURY—PLEADING.

Where it is sought to charge the willful injury of a trespasser upon a railroad track by those in charge of a train, the intention on their part to commit such injury must be directly and explicitly alleged, and an allegation of willful negligence is not sufficient.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

George F. McNulty, for plaintiff in error.

A. R. Taylor, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

BAKER, District Judge. This case has been before this court, when it was reversed and remanded, with instructions to grant a new trial, and to permit the declaration to be amended. *Railway Co. v. Phillips' Adm'r*, 24 U. S. App. 489, 12 C. C. A. 618, 64 Fed. 823. On the return of the case a new trial was granted, and the declaration was amended by simply inserting the word "willful" in three places next before the word "negligence." The evidence on the last trial differs in no essential particular from that on the former, except that upon the last trial evidence was introduced showing that the train could have been stopped within the distance of 2,000 feet, or thereabouts. The statement of facts found in the former report of this case, except the evidence in reference to the distance within which the train could have been stopped, is adopted as a substantially correct statement of the facts in the present case. To set out the numerous instructions given and refused to which exceptions were taken would needlessly protract this opinion. The record contains 52 assignments of error. The instructions are not entirely harmonious in their statement of the legal principles applicable to the case, and it is not apparent how the jury could have reached the verdict they did, if they had been governed by the instructions given. But, as the case ought to be reversed for error in refusing to direct a verdict for the plaintiff in error, a careful examination of the other errors assigned is unnecessary.

It was decided when the case was here before that the deceased was, at the time he was killed, a trespasser or mere naked licensee on the right of way of the plaintiff in error, and, as such, that it owed him no duty of care to provide against accidents to him. We also held that the court erred in refusing to direct a verdict in favor of the plaintiff in error on the ground that the evidence was insufficient to justify a submission of the case to the jury. These rulings became the law of the case, and must control the decision on the present writ of error, unless the case made by the evidence differs in some material and controlling aspect from that made on the former trial. A careful study of the evidence which is in the record fails to disclose any material difference, except that in relation to the distance within which the train could have been stopped. That the deceased was a trespasser or mere naked licensee at the time he was killed is clearly shown, and is the settled law of the case; and as no new or additional evidence was produced, except as above stated, the court below, in obedience to the opinion of this court, ought to have sustained the request of the plaintiff in error to direct the jury to find a verdict in its favor. But, if this was the first time this case was before us, the result must be the same. The undisputed evidence shows that the deceased and his son were trespassers on the right of way of the plaintiff in error at the time he was killed. The evidence fails to show negligence on the part of the plaintiff in error or its servants which was the proximate cause of the death of the plaintiff's intestate. It is firmly settled that it is not the duty of the employés operating a railroad train to exercise care and diligence in looking for trespassers on the railway track, and that no duty of care in respect of such trespasser arises until he is seen upon or so near the rail-

road track as to show that he is liable to injury from the train moving thereon. Nor does it become the duty of the trainmen to arrest the progress of their train as soon as they discover a trespasser on or dangerously near the track. They have the right to proceed on the assumption that the trespasser, having a due regard for his own personal safety, will voluntarily withdraw from the track, and not remain in a place of known danger until he is injured or killed. It is only when it becomes apparent that such trespasser is either unaware of, or unable to avoid, impending danger, and when those in charge of the train have reasonable cause to apprehend that injury will probably result unless an effort is made to stop the train, that it becomes their duty to do so. As between the railway company and the trespasser, no duty of care to avoid injury arises until those in charge of the train have discovered his presence on or dangerously near the track, and have reasonable cause to believe that injury will result unless the progress of the train is arrested. Although the railway track may be level and straight, so that those in charge of the train by the exercise of due care might have seen the trespasser long before they did, still such negligent failure to discover his presence on or near the track will of itself constitute no actionable wrong of which he can complain. If the train is running at a high and dangerous rate of speed, in violation of an ordinance, it is mere negligence, of which the trespasser cannot successfully complain; nor in such a case would any special duty of care arise until the presence and apparent danger of the trespasser was actually discovered. Hence, even if those employed on the engine which killed the plaintiff's intestate could have seen him when he was 2,400 feet from the train, their failure to discover his presence or that of his son until the train was a little more than 700 feet from them would give no right of action. There was no evidence offered on behalf of the plaintiff below to prove that the employes on the train actually discovered the presence of the deceased or his son on or near the track until just before the accident happened. The evidence clearly shows that the presence of the deceased and his son on the track was not actually discovered by any of the trainmen until the train was within less than 800 feet from them, and that as soon as they were seen the danger signal was sounded, the emergency brakes applied, and everything was done which with due care for the safety of the train and its passengers could have been done in the exercise of ordinary care and prudence, and that the train was actually stopped within 2,000 feet or thereabouts from the point where the train was when the deceased and his son were first seen upon or near the track. The case made by the evidence was such as made it the duty of the court to grant the request of the plaintiff in error to direct a verdict in its favor. Deciding, as we do, that the court erred in refusing to direct a verdict for the plaintiff in error, it becomes unnecessary, and would not be profitable, to consider the other 51 errors assigned.

WOODS, Circuit Judge (concurring). When this case was first here, our ruling was that "the declaration \* \* \* counts upon

negligence, and not upon willfulness, as the ground of action," and that it was therefore unnecessary to express an opinion whether, upon the facts disclosed, the action could be maintained for a willful injury. Apparently for the purpose of raising that issue the declaration was amended by inserting the word "willful" to qualify the alleged negligence, so that as amended the charge is that the defendant's servants, with gross, reckless, wanton, and willful negligence, failed to reduce the speed of the engine, and to give any signal or warning to the deceased and his child of the approach of the train by which they were run down. Manifestly, the amendment did not affect the essential character of the charge. It is one thing to allege the willful or intentional infliction of an injury, and quite another to allege the willful doing or omitting to do something which caused, or contributed to the causing of, the injury. The defendant's servants, according to the amended averment, willfully (that is to say, knowingly and purposely) failed to reduce the speed, and to give to the deceased any signal or warning of the approach of the train; but it is not alleged or implied that there was in the mind of the engineer or fireman any intention to inflict injury, or any perception that the deceased and his son were not properly regardful of the situation, and would avoid harm, as they might easily have done, by stepping aside. "Willful or intentional injury," as we said before, "implies positive and aggressive conduct, and not the mere negligent omission of duty"; and the willful omission to do something which duty requires, it is equally clear, does not of itself imply an intention to injure, and such intention should not be imputed unless directly proven, or, under the circumstances, that result must have been perceived to be probable. In other words, as a matter of pleading, it is the same whether an act or an omission to act be alleged to have been negligent or intentional. If it be sought to charge a willful injury, the intention to inflict it must be directly and explicitly alleged. As a matter of proof, it may be enough to show negligence of such gross, wanton, or willful character as to justify the inference of an intention or willingness to injure. It is easy to suppose circumstances or conditions which, if they did not in the particular case justify an omission to retard the speed of a train, or to sound the whistle sooner than it was sounded, would exclude all suspicion of bad faith. The engineer in this instance might have seen the deceased upon the track 2,000 feet away, instead of 700 feet, as he testified; and, disregarding his testimony, the jury may have inferred that he ought to have seen, and did sooner see, the deceased upon the track. But, that conceded, there is no evidence whatever to justify an inference that he entertained any purpose or had any thought of harming the deceased or his boy. The affirmative testimony of a number of witnesses is that the alarm whistle was sounded when the engine was near 700 feet from the point of collision, and against that is the testimony of a single witness that she heard neither bell nor whistle. The affirmative testimony, it is clear, ought not to be considered as overborne by the negative; but, whether the truth in this respect was one way or the other, the case was, at most, one of negligence only, against one whose position as a trespasser made a right of action on that ground alone im-

possible. That he was a trespasser upon the track of the defendant's road is conceded in the brief for the defendant in error. The trial proceeded throughout on that theory, and no question, it is admitted, was made upon the point; but it is insisted that the defendant's servants, notwithstanding the negligence of the deceased, could, after discovering the peril, have averted it by timely warning, or by slackening the speed of the train. On this point reference is made to *Cahill v. Railway Co.*, 46 U. S. App. 85, 20 C. C. A. 184, 74 Fed. 285; *Railroad Co. v. Morlay*, 58 U. S. App. 526, 30 C. C. A. 6, 86 Fed. 240; *Anderson v. Hopkins*, 63 U. S. App. 533, 33 C. C. A. 346, 91 Fed. 77, and other cases, as overthrowing the doctrine that there can be no recovery for an injury to a person wrongfully upon a railroad track unless the injury was wilful or intentional. The *Cahill* Case is plainly distinguishable; and the doctrine of the *Anderson* and *Morlay* Cases is manifestly not applicable here, because in this case the deceased and his son were not perceived by the engineer to be in a position of peril from which they were not likely to escape by their own exertions.

The only tangible proof of negligence which went to the jury was that the train by which the deceased was killed was running at the rate of fifty to sixty miles an hour, in violation of an ordinance of the town which forbade a speed exceeding ten miles an hour. The proof of that ordinance should have been withdrawn from the jury. It consisted of a copy of the ordinance, with a certificate of the town clerk attached, verifying the ordinance, and certifying that it was passed on July 7, 1877, and was duly published. This certificate was attached to the ordinance as found in a printed book of ordinances, which contained copies of other ordinances of the town of Venice; and it is claimed, on the statement of a witness, that a copy of that pamphlet was kept or preserved by the town board. The book, however, did not purport to be published by authority of the board of trustees or city council, and therefore was not admissible, under the statute, as evidence of the passage and publication of the ordinances found in it. *Lindsay v. City of Chicago*, 115 Ill. 120, 3 N. E. 443. And while, as shown by the opinion in that case, the certified copy of the ordinance was competent and prima facie evidence of the passage and publication of the ordinance, yet when it was shown, as it was, that in the original record there was no notation at the foot of the ordinance, of the fact or date of publication, upon which the clerk could have based his certificate, and further was shown by the testimony of the clerk, who made the certificate, that he knew nothing of the fact, and did not intend to certify to the publication of the ordinance, but signed the certificate as prepared and presented to him by counsel for the defendant in error, the force of the certificate in that respect was destroyed, and there remained no adequate proof of the publication of the ordinance. But, if the publication of the ordinance were conceded, its violation by the defendant was, at most, evidence of negligence only, and afforded no ground for recovery for injury to a trespasser. The train by which the intestate was killed was running on time, and at its usual speed, as for two years or more it had been run, and as, to the knowledge of the de-

ceased, it had been run for six weeks or more before the date of the accident. He probably had no knowledge of the ordinance, and certainly neither counted, nor had the right to count, upon the train being run in accordance with its requirement. The judgment below is reversed, and the cause remanded, with directions to grant a new trial.

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**LANGAN v. ÆTNA INS. CO. SAME v. SPRING GARDEN INS. CO. SAME  
v. GERMAN ALLIANCE INS. CO. SAME v. PALATINE INS. CO.**

(Circuit Court, N. D. Iowa, Cedar Rapids Division. January 20, 1900.)

**1. FIRE INSURANCE—ELECTION TO REBUILD—PLEADING.**

Where, there being a controversy between insured and the insurer whether the latter had lost its right to elect to rebuild, the former brought action for the money indemnity, and the insurer set up its election, and alleged its willingness to rebuild, and the court decided that it had not lost such right, and thereupon insured accepted the offer, the insurer cannot rescind its position assumed in such pleading, and deny all liability on its contract of insurance, because, pending the controversy, the cost of the building has increased.

**2. SAME—ACTION FOR MONEY INDEMNITY.**

Though an insurer elects to rebuild, it having failed to do so insured may sue on the original contract for the money indemnity.

Actions at law on four policies of insurance issued by the above-named companies on same building. Jury waived, and cases heard together by the court.

R. C. Langan and Walsh Bros., for plaintiff.

Hayes & Schuyler and George Steere, for defendants.

**SHIRAS, District Judge.** The facts necessary to an understanding of the legal questions involved in these cases, briefly stated, are as follows:

The plaintiff, Daniel Langan, being the owner of a brick dwelling house situated in the city of Clinton, Iowa, obtained insurance against loss by fire in the defendant companies, the policy issued by the Ætna Company being dated October 24, 1895; that in the Spring Garden Company being dated December 31, 1897; that in the German Alliance being dated January 1, 1898; and that in the Palatine Company on the 8th day of January 1898,—each of said policies being for the sum of \$5,000. On the 23d day of January, 1898, at which time the four policies above named were in full force, a fire occurred, greatly injuring the building insured, and due notice thereof was given to the four insurance companies carrying risks upon the premises. Not being able to agree upon the amount of the loss, the parties in interest, as required by the terms of the policies, entered into a written agreement for the appointment of appraisers to ascertain the total loss, and award the amount each company would be liable for under its policy. The appraisers thus appointed fixed the total loss to the insured at the sum of \$20,095, and awarded the amount for which each of the companies would be liable at the sum of \$5,000; or, in other words, as the total loss exceeded in amount the aggregate of the policies, the sum chargeable against each company would be the full amount called for by the policy issued by it. The award of the appraisers was dated June 30, 1898, and on the 27th day of July the four insurance companies united in a written notice to the insured that they elected to repair and rebuild the destroyed dwelling. To this notice, and under date of August 4, 1898, the insured responded, in writing, denying the right of the companies to elect to

repair or rebuild the premises, claiming that the right secured by the policies to the companies to repair or rebuild could not be availed of after the lapse of 30 days from the reception of the notice of the fire; that by the act of the companies in agreeing to, and participating in, the appraisal of the damage to the property, the companies had elected to treat the policies as money contracts, and they could not afterwards change this election, and undertake to rebuild the premises; and the insured further notified the companies that they must make prompt payment in money of the sums awarded against them, or suits for recovery of the amounts would be brought against them. Thus the parties were at issue as to the construction of the terms of the policies, and thereupon, on or about the 30th day of December, 1898, these actions were brought against the several named insurance companies, in the district court of Clinton county, Iowa, from which court, on petition of the defendant in each case, they were removed into this court in the Cedar Rapids division. The defendant company in each case, in answer to the petition of plaintiff, set forth various matters with respect to the action of the appraisers upon which it was claimed that the appraisal of the damages was not valid and binding upon the company, and then averred that, under the terms of the policy, the company had the right to elect to repair and rebuild the premises; that it had exercised this right by giving written notice of the election to rebuild; and that the plaintiff had refused to permit the rebuilding of the injured property, and therefore could not maintain the action. In reply to the answer, the plaintiff made counter charges of bad faith on part of the appraiser selected by the company, averred the validity of the appraisal, and denied the right of the company to repair or rebuild, under the facts of the case. The defendant filed a motion to strike out parts of the reply, and at the September term, 1899, of the court at Cedar Rapids, the cases having been noted for trial at that term, the motion was argued and submitted to the court, it being claimed on behalf of the defendant that all matter averred in the reply touching the appraisal, and the action of the parties and the appraisers in connection therewith, was wholly immaterial, for the reason that the company, by the notice given under date of July 27, 1898, had secured the right to perform its contract by restoring the burned premises; that, by giving the notice, all objection to the appraisal had been waived, and the rights of the parties were to be determined by the construction of the clause in the policy which gave the right to repair or rebuild. Thereupon the court held that the ruling to be made on the motion to strike involved the more important question of the construction of the clause in the policy giving the election to the company to repair or rebuild the premises, and that it would be advisable to fully present this question to the court, and obtain a ruling thereon, before going to the jury on the questions involved; and thereupon counsel were heard upon the question, and, after consideration thereof, the court ruled that, under the language of the policies sued on, the companies had the right to elect to rebuild the premises, by giving notice of such election within 30 days after reception of the proofs of loss, and that this 30-day period did not begin to run until the proofs of loss had been completed by the appraisal of the amount of the damages,—the opinion of the court at length being found in 96 Fed. 705. It will be noticed that in the opinion given the court, in view of the doubt existing upon the proper construction of the terms of the policy, suggested that the question should be settled by an immediate appeal to the circuit court of appeals; but, after consultation, the counsel for plaintiff announced in open court that they would abide by the view taken by this court, and that all objections to the company rebuilding the premises were withdrawn. Thereupon counsel for the defendant companies asked for time within which to consult with their clients as to their further action in the premises, and to that end it was finally agreed between the parties, with the approval of the court, that the hearing should be postponed until the December term of the court at Dubuque. At that term of the court the defendants filed amended and substituted answers, in which are set forth the clause of the policies providing for the repairing and rebuilding the premises; the giving of the notice that the companies elected to rebuild; the written refusal of the plaintiff to permit the premises to be rebuilt; and it is then averred that, during the time the plaintiff refused to permit the rebuilding of the premises, the

cost of the labor and material necessary to restore the premises had so increased that in September, 1899, and ever since, the expense to the companies of rebuilding would be about 33 per cent. greater than it would have been during the summer or fall of 1898. By consent of the parties, a jury trial was waived, and the cases were submitted to the court upon the law and the facts, and a finding of facts has been made in writing to the effect of the recitals herein set forth, and thus are presented the questions of law arising in the cases.

The facts found, under the evidence and the pleadings of the defendant company in each case, show that when the fire occurred, in January, 1898, the plaintiff held a valid policy of insurance in each company for the sum of \$5,000; that due notice of the happening of the fire was given to the companies; that, in order to ascertain the amount of the total loss caused by the fire, the parties, by mutual agreement, caused an appraisement to be made, and this appraisement fixed the total loss at \$20,095, and the amount chargeable against such company at the sum of \$5,000; that the completed proofs of loss, including the appraisement, were furnished to each company about June 30, 1898. These facts, which are not in dispute, show that, upon the completion of the proofs of loss, the plaintiff had established a valid right to indemnity from each one of the defendant companies, according to the terms of the several policies issued by them, respectively. It was then open to each of the companies to perform its contract of indemnity in one of two methods. It could pay the amount chargeable against it in cash, or it could restore the injured premises by repairing or rebuilding the same.

By the terms of the policy, the company had secured to itself a period of 30 days, after service of proofs of loss, within which it could determine upon the method of performance on its part. During this period of 30 days it had the right to elect whether it would undertake to perform its contract of indemnity by payment in money or by repairing or rebuilding the premises. If it elected to perform by payment in money, then the payment must be made in 60 days from service of the proofs of loss. If it elected to rebuild or repair, then it would be bound so to do within a reasonable time. The exercise on part of the company of the right of election between the two methods of furnishing indemnity to the insured is not, in any proper sense, a performance of the contract to furnish indemnity. To discharge the obligation assumed by the company, it must furnish the indemnity in one of the two agreed methods. The giving of the written notice of the election to rebuild the premises only secured to the companies the privilege of furnishing indemnity in that mode, but the making the election, and giving notice thereof to the insured, was not a performance of the contract of indemnity. To complete performance, the company must follow up the notice of its election by actually rebuilding the premises. If it does not do so, then it is bound to furnish the indemnity to which the insured is entitled by paying the amount of loss in money.

But it is contended on behalf of the defendants that the failure to rebuild is not chargeable to the companies, but has resulted from the action of the plaintiff in denying the right of rebuilding. The



facts show that there was an honest difference of opinion between the insured and the companies upon the question whether the companies could elect to rebuild after entering into an appraisal of the damages. This question was strictly one of law, and, in order to settle it, the adjudication of a court was necessary. To that end these actions were brought in the state court, and thence removed into this court. The answers were filed in this court on June 24, 1899, and, after reciting therein the giving of the written notice of election to rebuild, it is then averred "that this defendant and said other companies have ever since, and now are, ready and willing to comply with said notice, and repair and rebuild said insured property, according to the terms and the provisions of the said policy of insurance, but that said plaintiff has not permitted, and will not permit, the same to be done." As already stated, in September, 1899, the question of the right to rebuild was submitted to the court, and it was held, in effect, that the companies, by entering into the appraisal, did not lose the right to rebuild, and by the giving the written notice dated July 27, 1898, the companies had signified their purpose to furnish indemnity for plaintiff's loss by repairing and rebuilding the injured premises, and that, as pleaded in the answers, this right was still open to the companies. Thereupon the plaintiff accepted the ruling then made as a finality upon the question, and thus the way was opened to the companies to undertake the work of restoring the damaged premises, the further hearing of the case being postponed in order to enable the companies to determine whether they would in fact avail themselves of the conceded right to rebuild.

By the amendment to the answers made at the December term, the companies, in effect, decline to rebuild the premises, assigning as a reason therefor that the increase in the cost of labor and material is such that it would greatly increase the expense of so doing, and hence they now ask that it be adjudged that they are not bound to furnish indemnity to plaintiff, either by a cash payment or by rebuilding the insured property. The fact of the increase in the cost of rebuilding may be a sufficient reason for the action of the companies in not undertaking to repair or rebuild, but it ought not to operate as a discharge to the company from all liability upon the policy. When the answers were filed in these cases, in June, 1899, and when the question was submitted to the court, in September, 1899, the companies claimed that they were then ready and willing to rebuild the premises, and the plaintiff at that time, after hearing the opinion of the court, accepted the offer to rebuild, and it is not now open to the companies to rescind the position assumed in the pleadings, and to deny all liability on the contracts of insurance, on the ground of the increased cost of rebuilding. The facts in the case show that the company had become bound to fulfill its contract of indemnity.

The company claimed that it had the right to furnish indemnity by a cash payment or by rebuilding. The insured claimed that by the action of the company it had waived or lost the right to rebuild. The insured brought these actions on the contracts evi-

denced by the policies, claiming a money indemnity, and the companies answered that they had the right to furnish indemnity by rebuilding the injured premises, and that they stood ready to fulfill the contract by that method of performance. The court, upon the pleadings thus made, held that it was still open to the companies to meet the obligation of their contracts by rebuilding the premises. The companies now seek to escape all liability by averring that the increase in the cost of labor and material is so great that they ought not to be required to be bound by their election to rebuild, and ought not to be held to pay the indemnity in money. The court will not require them to rebuild, nor does the plaintiff demand indemnity in that form; but upon what ground should the companies be relieved from making payment in money of the sums due upon the policies? The theory of the defense is that, if the companies had been permitted to rebuild in the summer or fall of 1898, it would have cost them much less than if they now rebuild, which may be a fair reason why the companies should be excused from rebuilding; but why should that fact relieve the companies from their obligation to make indemnity to plaintiff by a payment in money? It is argued that, if the companies had been permitted to rebuild in the summer of 1898, they could have done so at an expense less than the amount of the money payment awarded against them; but how can this be proven? The defendants have not undertaken to show what the cost of rebuilding the premises in 1898 would have been, and it is a matter of common knowledge that the actual cost of building almost always outruns the original estimate.

The gist of the objection to being held liable for the money payment on the policies is that, if the companies had been allowed to rebuild in 1898, they might have succeeded in rebuilding at an expense less than the \$20,000, which they were bound to pay if they did not rebuild; but there is no fact shown from which the inference can be drawn that it would have been cheaper for the companies to rebuild than to pay in money, nor is it averred in the substituted answers that such is the fact. It is not now averred in the answer, nor is it proven as a fact, that, if the companies are now required to pay the amount of their policies in cash, it will place a greater burden on them than they would have assumed had they undertaken to rebuild the premises in the summer of 1898. The position now taken by the companies is that, if they should now rebuild, it would be at a cost greater than that they would have assumed had they been permitted to rebuild in 1898. This fact may constitute a good and sufficient reason why the companies should be excused from rebuilding, but it does not constitute a reason why they should not pay in money the indemnity they owe to the plaintiff.

But it is further contended that when the companies notified the plaintiff in July, 1898, that they elected to rebuild the destroyed premises, they thereby converted the contracts for indemnity, evidenced by the policies, into contracts for the rebuilding of the premises, and that the plaintiff should have declared upon the substituted building contract and the failure to perform it, and not upon

the original contract for indemnity. If this position is well taken, it follows that in every instance wherein policies of the form of those sued on are issued, and a loss happens, the company can signify its election to rebuild, and then fail so to do, and thus compel the plaintiff to sue for the unknown and uncertain amount of damages which might be awarded by a jury for the breach of the alleged contract to rebuild. Upon the company would be placed the burden of responding to the damages for not rebuilding, which, in the majority of cases, would exceed the money payment necessary to discharge the contract for indemnity. In this case the contracts evidenced by the policies issued by the four companies have no relation to each other. They were issued at different dates, and in each case the company bound itself to furnish indemnity against loss by fire by a payment in cash or by repairing or rebuilding the injured premises. Under the terms of the policies, in case of a loss in amount less than the aggregate amount of the insurance, each company would be bound to pay only its proportionate amount of the total loss; but if the original contracts are merged into building contracts, as contended for by the defendants, then the plaintiff would have a separate contract with each company, whereby the latter had become bound to rebuild the injured property, and for a breach thereof the plaintiff would be entitled to judgment against each company for the full amount of the damages caused by its failure to rebuild. Again, suppose, in this case, two of the companies had paid their policies in money, and the others had elected to rebuild; it certainly would not be true that the latter would have the right to half repair or rebuild the house, or to rebuild in such a manner that, as rebuilt, the house would be worth only one-half what it was when the fire occurred. Again, suppose, after the companies had given notice of their election to rebuild, two thereof had become insolvent, and had refused to engage in rebuilding the premises; would it be open to the remaining companies to only half repair or rebuild, and then claim that they were exonerated from further responsibility? These suggestions show that, if the theory of the conversion of the contracts evidenced by the policies into contracts for rebuilding the injured premises is adopted, then, for the proper protection of the insured, it must be held that each company is bound to fully repair or rebuild, and, in case that is not done, then each company is liable to a judgment for the full damages resulting from the breach of the rebuilding contract. This would cast a heavy burden upon the company, and yet can there be any escape therefrom, in justice to the insured? These difficulties are all avoided, however, by holding that a mere notice of an election to rebuild on part of the company does not merge, convert, or affect the contract for indemnity contained in the policy. The giving of the notice of the election to rebuild within the time limited in the policy secures the privilege to the company of discharging its obligation by rebuilding, but if the company, for any reason or for no reason, does not in fact repair or rebuild, then the contract remains unchanged, and the insured is entitled to demand of the com-

pany that it shall pay in money the sum due on the policy, and, if payment is not made, then to enforce it by judicial aid.

The conclusion reached is that, when the completed proofs of loss were furnished to the defendant companies, the plaintiff had established a clear right to demand from the companies indemnity for the damages caused to the property by the fire therein; that the obligation rested upon each company to furnish the indemnity either by a money payment, or by rebuilding the premises within a reasonable time; that the companies have had a reasonable time within which to undertake the rebuilding of the premises, but they have not undertaken so to do, and now aver that they are not bound to rebuild; that, therefore, the companies are bound to furnish indemnity by a payment in money of the sum awarded against each company, and, as this payment has not been made, the plaintiff is entitled to judgment for the sum due in each case. The question of the interest to be allowed depends upon the time when it is held that the companies became in default for a failure to pay the indemnity in money. There is much force in the argument that it should not be held, under the peculiar facts of these cases, that the companies are chargeable with interest during the time the parties were litigating over the question of the right to rebuild, the question being decided in favor of the companies. If, however, the court should hold that interest is to be allowed only from the date when the final failure to undertake the rebuilding took place, then, in order to present the question in the appellate court, the plaintiff would be compelled to take a writ of error, although the judgment on the merits is in his favor. As it is understood that the defendants purpose going to the court of appeals on the question of liability for any sum, the question of the amount of interest allowable, in case it is finally held that plaintiff is entitled to recover, can be presented, on the writ sued out by the defendants, by this court ruling that interest is to be allowed from September 1, 1898, or, in other words, from 60 days after the furnishing the completed proofs of loss; and if in the court of appeals it be held that plaintiff is entitled to recover, but that the amount of interest allowed is excessive, the proper reduction can be ordered in the final judgment. The amount for which judgment will be entered in each case is \$5,000, with interest thereon at 6 per cent. per annum from September 1, 1898, to January 20, 1900.

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PULLMAN'S PALACE-CAR CO. v. KING.

(Circuit Court of Appeals, Second Circuit. January 9, 1900.)

No. 57.

**L. CARRIERS—SLEEPING-CAR COMPANIES—BREACH OF CONTRACT.**

Plaintiff, having a railroad coupon ticket for passage from New Orleans to New York over connecting lines of road, on application to an agent of defendant, and on showing his ticket, was sold a berth in a sleeping car from New Orleans to Jersey City. From Washington to Jersey City such car was run over a line different from that named in plaintiff's ticket, and on his refusing to pay fare he was ejected by the

employees of the railroad company. *Held*, that defendant, by selling plaintiff accommodations in a particular car, virtually represented and warranted that such car passed over the lines named in plaintiff's ticket, and was liable for a breach of the contract when plaintiff, under the circumstances stated, was compelled to leave the car before reaching Jersey City.<sup>1</sup>

**2. SAME—MEASURE OF DAMAGES.**

Plaintiff having been rightfully ejected by the employees of the railroad company from a car in which, under his contract with defendant, he was entitled to remain without payment of further fare, defendant was liable, not only for the direct, but also for the consequential, damages, which should have been anticipated as the natural and probable result of its breach of the contract, subject to the limitation that the damages recoverable could not be enhanced by the negligence or willful conduct of the plaintiff.

**3. SAME.**

There being evidence to warrant a finding that plaintiff was not chargeable with notice, before leaving Washington, that the car would not go over the road named in his ticket, such question was properly submitted to the jury under instructions which, in case of such finding, permitted a recovery, not only for the increased expense to which plaintiff was subjected, but also compensation for the inconvenience and loss of time, and for the indignity of a public expulsion from the car.

Wallace, Circuit Judge, dissenting upon the question of damages, on the facts shown in regard to notice, and upon the further ground that plaintiff was not entitled to enhanced damages because of his forcible ejection from the car, which he might have avoided, without a waiver of any of his rights, by payment of his fare, or by leaving the car without force, upon the conductor's refusal to permit him to remain without such payment.

Wallace, Circuit Judge, dissenting.

**In Error to the Circuit Court of the United States for the Eastern District of New York.**

This cause comes here upon a writ of error to review a judgment in favor of defendant in error, who was plaintiff below, upon the verdict of a jury awarding him \$2,000 for damages for ejection from a sleeping car of the plaintiff in error, who was defendant below. Plaintiff had a round-trip railroad ticket from New York to San Francisco and return, which provided for passage from Washington to New York via the Baltimore & Ohio Railroad. In New Orleans, plaintiff showed this ticket to defendant's agent, and asked for through accommodations on a sleeping car from New Orleans to New York. The agent sold him a berth ticket for the car *Dioces* from New Orleans to Jersey City. From Washington north, the car *Dioces* was run over the Pennsylvania Railroad. Plaintiff, having no railroad ticket for that line, was put off the train at Baltimore by the Pennsylvania conductor upon his refusal to pay railroad fare from Washington to New York.

Allan McCulloch, for plaintiff in error.

Samuel H. Wandell, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

**PER CURIAM.** The majority of the court concur in the opinion that the evidence sustains the conclusion that defendant contracted to furnish to plaintiff the accommodation of its sleeping car *Dioces* from New Orleans to Jersey City, and warranted that, upon presenting his round-trip ticket to the train conductor, he should be

<sup>1</sup>As to duties and liabilities of sleeping-car companies, see notes to *Duval v. Car Co.*, 10 C. C. A. 335, and *Edmunson v. Car Co.*, 34 C. C. A. 386.

allowed to ride undisturbed the whole distance in that car, without being required to make any further payment for transportation, and that such contract was broken by the defendant. It seems unnecessary to add anything to the exhaustive discussion of this branch of the case which will be found in the opinion of Judge WALLACE.

Upon the question of damages in cases of this kind, it is also well settled that if the plaintiff, by negligence or willfulness, allows his damages to be unnecessarily enhanced, he cannot thereby augment his recovery. But, where there has been no negligence or willfulness on the part of the plaintiff, he may recover not only the increased expense to which he may be subjected, but also compensation for inconvenience and loss of time, and for the indignity of a public expulsion from the car. *English v. Canal Co.*, 66 N. Y. 454; *Murdock v. Railroad Co.*, 137 Mass. 293. In this latter case a verdict for \$4,500 was sustained, the case being distinguished from the earlier decision of the same court in *Bradshaw v. Railroad Co.*, 135 Mass. 407, upon the theory that in the earlier case plaintiff was negligent in accepting without examination a ticket which was on its face insufficient to secure him the accommodation he expected to obtain.

Upon the question of damages the court in the cause at bar charged:

"Of course, there is no physical injury here, beyond the invasion of a right. If there wasn't anything more than the conductor putting his hands upon him, it would be a matter of nominal damages. But, if Mr. King was in the right, there is something more than that, or at least it is for you to say. A man ejected from a car, a man whose rights have been invaded, may, if the jury so find it, be regarded as having suffered from a sense of indignity ('insult,' as the plaintiff puts it),—endured that mental suffering, mental grievance, which all men can appreciate, and yet which is so difficult to describe; and for that he would be entitled to recover damages. But please remember that under no circumstances in this case are you to give damages as smart money. You are not to give any exemplary damages. You are not to say, 'We are going to punish this railway company.' This is not a case of that nature. You can compensate Mr. King, if you feel, under the instructions I have given, that he is entitled to it, fully for the indignity and mental distress of which I have spoken. You can also compensate him for any expense to which he has been subjected. I don't know as there is any evidence on that subject, but it would be at least the value of a ticket from Baltimore to New York."

The court also charged, upon defendant's request, that:

"If you find that the plaintiff was advised before reaching Washington that he could at that point take a train over the line of the Baltimore & Ohio Railroad, which would arrive at Jersey City at about the same time as the train he was then on, and if you further find that there was such a train, and that by the use of due diligence the plaintiff could have caught said train, it was the duty of plaintiff to use such due diligence; and there can be no recovery for any damages for delay arising from his failure to do so, provided he had notice that the car was not going over the Baltimore & Ohio road."

And that:

"It doesn't make any difference where he got the notice, if he received notice from any source which was sufficient to have put a man of ordinary prudence upon his guard, so that he should have investigated the matter and acted accordingly."

The court further charged, upon defendant's request, that:

"If you find that before defendant's car left Washington the plaintiff knew or had reason to believe that he had no railroad ticket entitling him to a passage over the lines of the Pennsylvania Railroad from Washington to Jersey City, and that he knew or had reason to believe that defendant's car would run over the lines of the Pennsylvania Railroad between said points, it was contributory negligence of the plaintiff to remain on the car without procuring right of transportation on that train, which precludes a recovery; that is, from Washington to New York."

This part of the charge was more favorable to defendant than it was entitled to. Such contributory negligence would only preclude recovery for anything in excess of the cost of the additional railroad fare.

This was a complete and accurate presentation of the case as to the measure of damages, if there was evidence from which the jury were entitled to find that plaintiff was not informed before leaving Washington that the Dioces would be carried over a line of railroad (the Pennsylvania) on which the return-trip ticket did not entitle him to transportation. The soundness of the charge is challenged upon the theory that there was no such conflict of evidence. As to any notification being given him by the sleeping-car conductor, there was a flat contradiction between the plaintiff and the conductor, and the notification relied on is a chance remark of plaintiff's traveling companion, Ruttman. The entire evidence on this point is that of the plaintiff, as follows:

"No notice was given to me at any time from the time I purchased my ticket before I arrived at Washington, or after my arrival at Washington, that I would be obliged to change this car,—no notice that I was to go on the Pennsylvania Railroad. Mr. Ruttman spoke to me about the subject the night before. None of the railway people gave me any notice of any kind. The night before, Mr. Ruttman said to me that the car was going to run over the Pennsylvania road. I said that didn't make any difference. That was the evening before we reached Washington,—Sunday evening. I was not notified to change at Washington by any railroad official or any sleeping-car official. When I left Washington I didn't know, as a matter of fact, whether I was on the B. & O. or Pennsylvania, and I was not notified by anybody."

Ruttman was a witness, but was not questioned by either side as to his conversation with plaintiff. We do not think that, upon this state of the proof, it was the duty of the court to charge the jury that the plaintiff knew before the car reached Washington that it was going to be run on a road over which he had no ticket good for transportation, and that therefore he could not recover more than the additional fare. The disposition made of this branch of the case by the court seems to us the correct one, viz. leaving it to the jury to say whether plaintiff knew of this change from the Baltimore & Ohio to the Pennsylvania, or had received notice from any source which was sufficient to have put a man of ordinary prudence upon his guard, so that he should have investigated the matter and acted accordingly, with instructions that his remaining in the car after such notice, without procuring right of transportation, would be contributory negligence. Upon the evidence, it seems to us this was the utmost defendant could demand. The judgment is affirmed.

WALLACE, Circuit Judge (dissenting). This is a writ of error by the defendant in the court below to review a judgment entered upon a verdict for the plaintiff. The action was brought to recover damages for the ejection of plaintiff from one of the defendant's sleeping cars. Upon the trial, evidence was introduced showing the following facts: The plaintiff had made a trip from New York to San Francisco upon a round-trip ticket, with coupons attached, entitling him to passage to and from those cities over various connecting railway lines. The last coupon was for one first-class passage from Washington to New York over the Baltimore & Ohio Railroad. On his return trip he went to the office of the defendant at New Orleans, and asked the agent for a lower berth to New York. According to his testimony, the agent asked him for his railroad ticket; plaintiff showed it to him, the last coupon being attached; and the agent took it, examined it, and then sold him a berth ticket for the car Dioces from New Orleans to Jersey City, the terminal for New York. The berth ticket had printed on its face, "Good for this date and car only when accompanied by a first-class ticket." The plaintiff took passage upon the car, and the defendant's conductor took up the berth ticket. Before the car reached Washington, plaintiff was informed that from that city the car would go over the Pennsylvania Railroad. The cars of the defendant were run from Washington over the Baltimore & Ohio Railroad, and also over the Pennsylvania Railroad. The Dioces was run over the latter line. When the train reached Washington, plaintiff was asleep; but he then awoke and dressed, and found the car moving out of the city. Subsequently the train conductor called for his ticket. He handed it to him, and the conductor then told him that the ticket was not good for that road, and refused to accept the coupon for passage by the Baltimore & Ohio Railroad. The plaintiff declined to pay fare, and, upon his refusal to leave the car when the train reached Baltimore, the train conductor directed him to be removed. At Baltimore he was delayed until he was able to take a train over the Baltimore & Ohio Railroad for New York.

At the close of the evidence the defendant requested the court to direct a verdict in its favor upon the ground that the plaintiff was ejected by the employes of the Pennsylvania Railroad, and these were not servants of the defendant, and upon the further ground that the sleeping-car ticket did not entitle plaintiff to transportation in the car over the Pennsylvania Railroad, and he was rightfully ejected for not paying fare. The trial judge refused the request. The trial judge also denied a request by the defendant for instructions to the jury that if they found that plaintiff refused to leave the car without the application of force, and that no more force was used in expelling him than was necessary for that purpose, there could be no recovery against the defendant for damages occasioned by the use of such force. The exceptions to these several rulings raise all the important questions presented by the assignments of error.

Upon the facts the jury was justified in finding that the defendant undertook, for a compensation received, to furnish the plaintiff



the accommodations of the sleeping car from New Orleans to Jersey City. It in effect represented to him, by its agent, that the car would go by the line of the Baltimore & Ohio Railroad, because by showing him his ticket the plaintiff virtually informed the agent that he proposed to go by that line. The representation was in the nature of a warranty, and the contract may therefore be treated as embodying it, as a part of its terms. It is plain that this contract has been broken if the plaintiff was without just cause compelled by the defendant, or those for whose acts it was responsible, to leave the car at any time before reaching Jersey City; and in that event he was entitled to recover for the breach, as he could if he had been wrongfully ejected by a common carrier of passengers or by an innkeeper.

The proprietor of a sleeping car is not, however, a common carrier of passengers, nor an innkeeper. 22 Am. & Eng. Enc. Law, 797. And the liability of the sleeping-car corporation rests upon the breach of its implied obligation to furnish the accommodations which it holds itself out as offering to the public. It does not hold itself out as offering to supply the motive power for the transportation of passengers, or any of the instrumentalities or facilities for the management of the train. The passenger understands that these are to be supplied by the railway company of which he has bought or is to buy his ticket, and that, unless he complies with the proper rules and regulations of the railway company in respect to the payment of fare, he is not entitled to be carried, and may be ejected from the car. *Lemon v. Car Co.* (C. C.) 52 Fed. 262; *Duval v. Same*, 10 C. C. A. 331, 62 Fed. 265, 33 L. R. A. 715. In *Ulrich v. Railroad Co.*, 108 N. Y. 80, 15 N. E. 60, the court observed that the purchase of a ticket for a seat in a drawing-room car has no effect upon the status of the purchaser as a passenger, and said:

"The contract for a seat did not make the purchaser a passenger, in any sense; but it simply provided that, if the purchaser secured a right to ride on the train, he could also enjoy the advantages of a specific seat during the trip, if he so desired."

The plaintiff knew, or the law presumes he knew, when he bought the sleeping-car ticket, that he could not be carried in the car over the line of the Pennsylvania Railroad unless he had a ticket entitling him to passage, or unless he should pay his fare. He did not know, and was under no obligation to assume, that the car would run from Washington over that line. The defendant's contract was broken when the car reached Washington, because from that time the car did not go over the Baltimore & Ohio Railroad; and the plaintiff was not entitled to occupy it, except as a passenger of the Pennsylvania Railroad, paying passenger's fare.

It is not material whether he was compelled to leave the car by the employes of the railway company or by those of the defendant; and it may be conceded that, when employes of a sleeping-car company are enforcing the rules and regulations of the railroad company in ejecting passengers for refusal to pay fare, they are the servants of the railway company, and the ejection is its act, and not that of the sleeping-car company. *Car Co. v. Lee*, 49 Ill. App. 75;

**Lawrence v. Car Co.**, 144 Mass. 1, 10 N. E. 723. Having broken its contract by putting the plaintiff where he could not rightfully remain without submitting to an exaction not contained in his contract, the defendant became responsible, not only for the direct, but also for the consequential, damages which should have been anticipated as the natural and probable sequence. The defendant would not have been liable for the wrongful acts of the employes of the Pennsylvania Railroad, but it was liable for their rightful acts in requiring him to vacate the car, because its breach of obligation was the cause which necessarily set those acts in motion. As respects the railway carrier, the plaintiff was rightfully ejected for refusal to pay his fare; but, as respects the defendant, he was not under obligation to pay it, and the defendant was responsible for the legitimate consequences of his refusal to pay fare. The trial judge was correct in so ruling, and in refusing to direct a verdict for the defendant upon any of the grounds assigned.

The ruling upon the question of damages remains to be considered. The general rule that a party who has been injured by the tort or breach of contract of another cannot aggravate the damages by his own willful and unnecessary conduct, but can recover of the delinquent such damages only as with reasonable effort upon his own part could not have been prevented, is familiar. The law imposes upon him an active duty to exert himself to make the damages as light as possible; and if, by negligence or willfulness, he allows them to be unnecessarily enhanced, he cannot thereby augment his recovery. **Dolph v. Machinery Co.** (C. C.) 28 Fed. 558; **Costigan v. Railroad Co.**, 2 Denio, 609; **Hamilton v. McPherson**, 28 N. Y. 72; **Milton v. Steamboat Co.**, 37 N. Y. 210; **Warren v. Stoddart**, 105 U. S. 224, 26 L. Ed. 1117; **The Baltimore**, 8 Wall. 377, 19 L. Ed. 463; **Dodd v. Jones**, 137 Mass. 322. The rule has been applied in several adjudged cases between passengers and railway carriers. In **Hall v. Railroad Co.** (C. C.) 15 Fed. 57, the plaintiff had bought a ticket of the defendant's ticket agent, upon its face good only for a specified period, upon the representation of the agent that the limitation would not be enforced. Having offered it at a later date, the conductor of the train refused to accept it, and, the plaintiff refusing to pay his fare to the next station, he was put off the train by force. The action was brought for the injuries sustained by his forcible expulsion. The court held that the conductor was justified in his conduct, and that the plaintiff could not recover for the expulsion, but only for the price of the ticket. In **Poulin v. Railroad Co.**, 6 U. S. App. 298, 3 C. C. A. 23, 52 Fed. 197, 17 L. R. A. 800, where a ticket agent had negligently furnished a ticket which did not purport to be one for the trip for which it was purchased, and the passenger discovered the mistake before going upon the train, it was held that the passenger was bound to know that the conductor would be justified in refusing to receive it, and under such circumstances, if he chose to incur the risk of expulsion from the train by taking passage with the ticket, could not, when expelled, recover in tort. In **Frederick v. Railroad Co.**, 37 Mich. 342, it was held that a passenger to whom a ticket agent had sold a wrong ticket, and who was compelled

by the conductor to relinquish his seat or pay his fare, could recover against the railway carrier for breach of contract, but not in trespass for ejecting him. In *Railroad Co. v. Griffin*, 68 Ill. 499, where a passenger had paid for a ticket to a certain station, and the agent had inadvertently given him a ticket to an intermediate station, it was held that the demand for another ticket by the conductor was the breach of the implied contract on the part of the company to carry him to the proper station, but that his remedy in such a case was for breach of the contract. The court said:

"By paying such a demand, his cause of action would be as complete as if he resists the demand and suffers himself to be ejected, and his rejection in such a case will add nothing to his cause of action."

In *Railroad Co. v. Pierce*, 47 Mich. 277, 11 N. W. 157, it was held that a passenger taking a train, by the direction of an agent of the company, which did not stop at the destination called for by his ticket, could recover upon the failure of the train to stop for breach of contract, but could not recover for the indignity of being put off after being notified by the conductor that the train would not stop there, and refusing to pay additional fare. In *Bradshaw v. Railroad Co.*, 135 Mass. 407, the passenger had received, by the mistake of the conductor, a wrong transfer ticket, which was declined by a second conductor upon presentation. It was held that the passenger could not, after refusing to pay his fare to the second conductor, and being by him expelled from the car, maintain an action against the company for such expulsion. The court said:

"If the company had agreed to furnish him with a proper ticket, and has failed to do so, he is not at liberty to assert and maintain by force his rights under that contract, but is bound for the time being to yield to the reasonable practices and requirements of the company, and enforce his rights in the more proper way."

In *Townsend v. Railroad Co.*, 56 N. Y. 295, the passenger's ticket had been taken up by one conductor without giving him any check or other evidence showing his right to proceed upon a subsequent train. Upon being requested to pay his fare by the conductor of the subsequent train, the passenger refused, informing the conductor of the action of the other conductor, and he was thereupon ejected from the train. The court held that the railway company was liable for the wrongful conduct of the first conductor, but not in exemplary damages for the act of the second conductor. Grover, J., after observing that the second conductor owed to the company the duty of enforcing its rules, and that the passenger could have resorted to his remedy after notice that he could not proceed upon the ticket which had been taken up, used this language:

"If, after this notice, he waits for the application of force to remove him, he does so in his own wrong. He invites the use of the force necessary to remove him, and, if no more is applied than is necessary to effect the object, he can neither recover against the conductor nor company therefor. This is the rule deducible from the analogies of the law."

These adjudications were all in cases in which the conductor, pursuant to the regulations of the railway carrier, was justified in requiring the passenger to pay, although by the mistake of the com-

pany's agent the passenger had not obtained such a ticket as he was entitled to.

Other authorities are to the effect that in cases where the carrier has failed to furnish the passenger a proper ticket, or, having furnished one, the carrier's agents have refused to honor it, the passenger's recovery is not limited to the increased expense to which he is subjected, but includes as elements his inconvenience and loss of time, and also compensation for the indignity attending the violation of his rights. 4 Elliott, R. R. § 1594. In cases where the passenger is unable to pay the fare, or for other reasons is constrained to leave the car under humiliating circumstances, it is reasonable that complete indemnity should include compensation for the indignity as well as for his pecuniary loss.

In the present case, if the plaintiff had left the car at Washington, he would not have been exposed to any indignity. He could have taken a train on the Baltimore & Ohio Railroad without serious inconvenience. After he was informed that the car would go over the Pennsylvania Railroad, he was bound to know that the defendant could not fulfill the contract which its agent had mistakenly made. Under these circumstances, it was his duty to leave the car at Washington, or elect to become a passenger of the Pennsylvania Railroad. If he had done either, he could have secured ample redress for the breach of his contract. There is nothing in the evidence to suggest that the defendant's agent, in selling him a berth upon the sleeping car, willfully or knowingly sold him one upon the wrong car. There is no reason why the plaintiff, as the victim of an innocent mistake, should be entitled to a larger recovery of damages than he would for the breach of a similar contract by an individual. The protection of the traveling public does not require an exaggerated indemnity for an unintentional breach of contract by a carrier to the party aggrieved. If the plaintiff, recognizing the situation, had adjusted his own conduct accordingly, he would have been entitled to a recovery of the actual compensation for his loss; and this would have afforded him adequate indemnity. It is said, however, that he was not informed before reaching Washington that the car would not go by the Baltimore & Ohio Railroad, or, rather, that the evidence presented a question of fact for the jury whether he had received the information. Assuming that he was not aware until after the car had left Washington that it was not to go by the Baltimore & Ohio Railroad, and that he did not discover that his contract with the defendant had been broken until the train conductor called upon him to pay fare as a passenger of the Pennsylvania Railroad, it was not necessary for him then, in order to vindicate his rights, to insist upon being ejected from the car by force. If he had left the car without force, he would have been entitled to recover, not only his additional expenses and for his inconvenience and loss of time, but also for the humiliation and indignity, if there was any, of having to do so compulsorily, such compensation as the circumstances might warrant. Instead of doing this, however, he insisted upon being ejected by force. Having obstinately invited the force that was used by the employes of the train,

he ought not, when no more was used than was necessary, to have been allowed to recover of the defendant therefor. Upon the principle by which he was allowed to recover for the force used, a party would be entitled to recover for a broken arm or leg, or other serious personal injury brought upon himself by his unnecessary resistance to the acts of the employes in enforcing the regulations of the railway company.

In my opinion, it was error on the part of the trial judge to refuse the instruction to the jury which was requested by the defendant.

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In re GOOD.

(Circuit Court of Appeals, Eighth Circuit. February 3, 1900.)

No. 14.

**BANKRUPTCY—APPEAL AND REVIEW—ADJUDICATION OF BANKRUPTCY.**

A judgment of the district court, adjudicating a person a bankrupt in involuntary proceedings against him, can be reviewed by the circuit court of appeals only on an appeal taken by the respondent within 10 days after the judgment appealed from, as prescribed by Bankr. Act 1898, § 25a, and not on an original petition for review of the decision of the district court, under section 24b.

Petition for Review of a Decision of the District Court of the United States for the Western District of Missouri, in Bankruptcy.

G. M. Sebree (John S. Farrington, on the brief), for petitioner.

T. T. Loy (W. O. Mead, on the brief), for respondent.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. In this case A. B. Good, the petitioner, who was adjudicated a bankrupt by the district court of the United States for the Western district of Missouri on January 2, 1900, has presented a petition for review under subdivision "b," § 24, of the bankrupt act of July 1, 1898, wherein he prays that the adjudication may be set aside and annulled for error of law apparent upon the face of the proceedings in the district court. Such relief we feel constrained to deny for the following reasons: Section 25a of the bankrupt act provides:

"That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeals of the United States and to the supreme court of the territories in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt. \* \* \* Such appeal shall be taken within ten days after the judgment appealed from has been rendered and may be heard and determined by the appellate court in term or vacation, as the case may be."

Inasmuch as congress has seen fit to prescribe by this section the method in which a judgment adjudicating a person a bankrupt may be reviewed, and for obvious reasons has fixed a short period, to wit, 10 days, within which such appeal must be taken, we think it is manifest that such judgments cannot be reviewed on an original petition filed in this court in the mode prescribed by subdivision "b" of section 24. No time limit has been fixed under section 24 within which an

original petition to "superintend and revise in matter of law" the action of the district court in proceedings in bankruptcy may be filed, and for that reason we consider it improbable that it was the intention of the lawmaker to allow a judgment adjudicating a person a bankrupt to be reviewed otherwise than by appeal, and within the time expressly limited in section 25. As more than 10 days have now elapsed since the petitioner was adjudicated a bankrupt, and as no appeal has been taken, it follows that the petition for review must be dismissed, and it is so ordered, with directions to certify that fact forthwith to the district court.

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In re HARRINGTON.

(District Court, N. D. Texas. February 12, 1900.)

**BANKRUPTCY—BUSINESS HOMESTEAD—ABANDONMENT.**

The bankrupt, who was a cabinetmaker and undertaker, owned and used in his business a brick building, standing on the same lot with his residence, and also a small workshop. Under direction of his attorney he closed and locked the brick building at the time he filed his voluntary petition in bankruptcy, and the building and its contents, the bankrupt's stock in trade, passed into the possession of the trustee. The bankrupt continued to work at his trade in the small shop, and testified that he intended to resume the same business in the brick building as soon as possible. *Held* not such an abandonment of the brick building as a business homestead, under the laws of Texas, as would forfeit the bankrupt's right to claim it as exempt, and the same should be surrendered by the trustee to the bankrupt.

In Bankruptcy. On review of decision of referee in bankruptcy.

Chas. Crenshaw and Wilkins, Vinson & Batsell, for bankrupt.

J. F. Holt, for trustee in bankruptcy.

MEEK, District Judge. At the request of A. Harrington, bankrupt, F. B. Dillard, referee, certifies to the court the question as to whether or not the brick storehouse located on the north end of lot No. 8 in block No. 1, O. T. P., of Sherman, Tex., is exempt to the bankrupt, as his business homestead, under the exemption laws of the state of Texas. The bankrupt, in his schedule of exempt property, claims lot 8 in block 1, and all the buildings thereon, as being exempt to him as his family residence and business homestead. No question was made by the trustee in bankruptcy as to the exempt character of all of the buildings on said lot, save and except as to the brick storehouse. He claimed that this brick storehouse was not exempt, and passed to the trustee as a part of the estate of the bankrupt, to be reduced to money and distributed among his creditors. The referee heard the evidence upon this issue, and resolved the question in favor of the trustee; holding that the brick storehouse was not exempt to the bankrupt as his place of business, and that the title passed to the trustee as of the date of the adjudication in bankruptcy. The evidence taken upon the trial of that issue is before me, and I quote from it. A. Harrington, the bankrupt, in the course of his examination, testified as follows:

"I am 68, going on 69, years of age. I have a family, consisting of myself, wife, and children. I have a residence in the city of Sherman, being the lot where I live. I live on lot 8, block 1, of the old addition to the city of Sherman. I bought it 32 years ago. I have been living on the place 32 years, and I have continued to live there ever since. I had a family when I bought the property,—wife and small children. My wife is still living. She is 67 years of age. I paid \$400 for the property. Bought it for the purpose of a residence and workshop. Was working at the cabinet trade at that time. Worked in that cabinet shop when I bought the property. First established the house as a place of business as soon as I bought it. Have continued in business there ever since. No cessation at all. My trade is a cabinet workman, but I have worked nearly all the time as an undertaker. The term 'undertaker' includes that of embalming. All undertakers should know how to embalm. Have practiced embalming. I was one of the first in the state of Texas. I have gone to several schools of embalming. At the time I filed my petition in bankruptcy I was living at the same place, and was doing business right on the same lot. My present business house stands where the original workshop stood. The old house that I commenced business in was afterwards displaced by another house. I built a house right over it,—a wooden house,—and that was used for a hotel for a while. After that I tore it down and built a brick house, about six or seven years ago. The brick house was 25x70 feet in size. My workhouse was just back—just west—of the brick house, which fronted on Crockett street. They are not together, but I consider them together. That is where I done my work. I have done considerable business. I have furnished coffins for over six thousand persons. I carried no other goods in connection with my business, except a little molding. Kept a very good stock of coffins, which were used for burying people. Carried a stock of about two thousand dollars' worth, most of which was kept in the brick house, below stairs. They were there exposed for sale. That part of my business occupied the brick house. That was my store, in which was the principal part of my business. I stored coffins in the upstairs of that building. Kept coffins there most all the time the last four or five years. At the time I filed my petition in bankruptcy my stock was worth \$1,400 or \$1,500. The coffins upstairs were moved down two to four days before the filing of my petition. Were bound to have them all together, for the purpose of filing my petition in bankruptcy. The trustee, Mr. Dulin, has had possession of the lower floor of the brick building since I filed my petition. Has had it locked up. Has been locked up for about two months. Was locked up before I filed my petition. Was advised to lock it up by my attorney. Was locked up a week before the filing of my petition. When the trustee took charge, he locked it up, and has held it ever since. I have had possession of the upper story. The trustee has not interfered up there. There has been in the workshop in the rear of the brick house carpenter's tools and some lumber used in working in any kind of carpenter work. The tools were kept there to cut lumber in making coverings for coffins when lowered in the grave. Lumber was used in the undertaker's business. The tools were used in carpenter work. The lumber was necessary in my business, and so were the tools. Everything in that shop was necessary to my business. Since filing my petition I have used that shop every day or so, nearly. Have made several homemade coffins. That is the principal part of what I have been doing. Have used it for nothing else. My work since filing my petition has been on the lines of the undertaker's business, but on a much smaller scale. \* \* \* I have engaged in no other business since filing my petition, and have followed no other business for 20 years. It certainly is my intention to resume business in the brick building as soon as I can. \* \* \* My intention at the time I filed my petition in bankruptcy was, just as soon as I could, to resume business. Never thought of anything else. Don't know anything else. Have no other business house. Have no other place of business. Have no other place I can use as a place of business. Have no other means of supporting my family, besides my trade. I know no other business. It was built for that purpose. It was necessary for the support of myself and family. The embalming instruments, apparatus, etc., are in that shop; and, when I said everything in that shop was necessary in my trade as undertaker, I included embalming instruments. Could not do without

them. \* \* \* The little workshop spoken of is right at the west end of the brick house,—about ten feet from the brick house, I reckon. My residence is on the south side of the lot. It is about ten or twelve feet between my residence and the brick house. Since I filed my petition I have been working in my shop, making coffins. I have been making them for the county. It was a general workshop before I filed my petition. I have used it ever since the brick house was built. It was built for that purpose,—the same purpose I have used it for since filing my petition.”

In response to the question, “In regard to carrying on your business in future, suppose you are unable to secure material and goods to carry on your business as you carried it on prior to your petition in bankruptcy, what would you do with the building then?” the bankrupt answered:

“Well, sir, I would simply use it for this purpose: I have the contract with the county to make pauper coffins, and, as I am a cabinetmaker by trade, I would have a cabinet shop in the rear of the building. Of course, I have to make a living, and will have to do what I can with the cabinet and undertaker's business. I started in life as a cabinetmaker, and added the undertaker's business to it. If I could not carry on the undertaker's business as I did, I would do as much in that line as I could. It would require the biggest portion of the building for storage and work. It would take about all the building to carry on the business. In carrying on the business I have just described, it would be necessary to make a display of my goods, and some space would be necessary. It would be necessary to use the greater portion of the building, and I would do it. I don't see how I could make a living for myself and family unless I could get up a cabinet business and carry on a branch of the undertaker's business. \* \* \* I had very small means when I started in the undertaker's business. The first means I had was very hard work, and got little for making a coffin. I had about ten dollars. I could carry on the undertaker's business without any means in my own possession. It would take a very small means to carry it on. I think I made a coffin the other day for about four dollars,—about the cheapest thing I could put up. I went and got lumber and made it, and I think it cost me about four dollars to do it. I could carry on some business with five or six dollars. \* \* \* The shop back of the brick building was moved there a year ago, or something like it. The woodwork has not always been done in the shop. After the coffins were made and put together they were brought in the end of the brick house, and there stained and got ready for use. I think I stated that the outside was all done in the shop, but that would not include the whole thing. There was this to do, and which I always did do, after making the coffins: After making the coffin in the shop, as soon as it was done and thoroughly finished it would be stained and varnished, and set back until I wanted to use it. I have one setting there now [meaning in the rear end of the brick house]. There is not room enough in the shop to do all the work. I have not been doing any cabinet work lately, except picture-framing etc. If I ever return to business, there would not be room enough in the shop. I would not try it.”

Charles Crenshaw, Esq., attorney at law, testified, in part, as follows:

“Mr. Harrington's petition in bankruptcy was prepared by me about two or three weeks and a half before it was filed. It was held by me, with instructions from Mr. Harrington to see if a compromise could not be effected with his creditors. \* \* \* The petition was then mailed by me on Saturday, at 11 o'clock. After I mailed the petition to the United States clerk at Paris. I went to Mr. Harrington's place of business, and told him to hold open until his usual hour of six, and not to open or Monday morning; that the clerk would receive the petition either on Sunday or Monday, and after it was filed he must not sell any goods, and to keep his store closed until the petition came back to Judge Dillard. On Tuesday of the following week I saw Judge Dillard.



and learned that the petition had not been returned; and on the next day (Wednesday) I met Judge Dillard, and he told me that he had the petition. Judge Dills was appointed receiver on the next day, is my recollection, and Harrington was instructed to turn over the key to Mr. Dills, the house remaining closed that week."

For many years before and at the time of the preparation of Mr. Harrington's petition in bankruptcy, he had been an undertaker and embalmer. Starting with a capital of \$10 and his own skill and energy, he had built up, through years of industry, quite a large undertaking business in the city of Sherman. Before his bankruptcy his place of business consisted of a brick storehouse and a small wooden shop in the rear. He had his stock of coffins in the brick storehouse, and used the shop in making cheaper grades of coffins, which, after being fashioned, were placed in the brick storehouse, and there stained and varnished, and held for use and disposition. He had, according to his testimony, furnished coffins for over 6,000 persons since becoming an undertaker. The door of his business house was closed by direction of his attorney at the time his petition in bankruptcy was mailed to the clerk of the court, at Paris, for filing. From that moment he held the stock of goods in his store, together with his other assets, outside of his exemptions, as a fund to be distributed among his creditors.

The trustee, in his contention that there was an abandonment of the business homestead which defeated the right to its exemption, relies largely upon the decision of the supreme court of Texas in the case of Tackaberry v. Bank, 85 Tex. 488, 22 S. W. 151, 299. In that case Mrs. Tackaberry made a general assignment for the benefit of her creditors. Her stock of goods and the storehouse in which she was conducting a general merchandise business passed to the assignee, who sold the storehouse to the City National Bank of Ft. Worth. Mrs. Tackaberry brought suit in trespass to try title against the bank, seeking to recover the storehouse and lot on which it stood, on the ground that it was her business homestead. The supreme court, under the facts of that case, held that there had been an abandonment of the business homestead, and that she could not recover it. The record in that case, so far as it is contained in the statement of the case and the opinion of the court, does not disclose any evidence of intention on the part of Mrs. Tackaberry either to continue or to resume her business in the place she was conducting it at the time she made her general assignment for the benefit of creditors. Chief Justice Stayton, in the course of his opinion in that case, says:

"Cessation of business, the pursuit of which gives the exemption, has practically the same relation to the right to have the exemption continue as has the removal of the family from the home; and in these cases the intention with which the removal of the family or cessation of business is made determines the further right to exemption. It has been held in several cases that the making by an insolvent of a general assignment for the benefit of his creditors does not of itself defeat his right to have exemption of his place of business continue; but it never has been held that the exemption would continue if at the time the assignment was made there was no intention to continue on the premises the former business, or to pursue some other of character such as to give exemption."

In the case now under consideration there is not only an avowed intention on the part of Mr. Harrington to resume business, but to resume the same business, on the same premises. More: The resumption of the business on a portion of the premises was already accomplished, though in a humble way, at the time the bankrupt testified in this case. Chief Justice Stayton further says in the discussion of the Tackaberry Case:

"It is not like a case in which a mechanic, having a shop and tools with which he carries on his business, makes an assignment in general terms conveying all his property except such as is exempt from forced sale. In that case everything owned and necessary for the business is excepted, while in this and like cases all the personal property necessary to the existence of the business, it must be conceded, passed, and was intended to pass, by the assignment. The business was practically destroyed by the conveyance of the things necessary to its existence, and the same inferences as to discontinuance of business ought to be drawn in the two cases, solely from the fact that an assignment was made. If it were shown that the business, however, was carried on until the very moment the deed became operative, we do not see that, upon principle, the result would be different; for all persons making such conveyances do so with the knowledge that the act, in its consummation, destroys the business, and must be held to have contemplated that result. Thus is furnished one of the facts on which abandonment must depend."

The undertaker's business, as defined and explained by Mr. Harrington, and as carried on by him, involved more than the mere purchase, display, and sale of coffins in his place of business at Sherman. In his shop he had the tools and instruments necessary for the making of coffins, and boxes within which to place coffins before they were lowered into the graves. He also had embalming instruments which he used in treating and preserving bodies of the dead before interment. The filing of his petition in bankruptcy, while it deprived him of the stock in trade that filled his place of business, did not and could not entirely destroy his business, and he did not contemplate such a result. Since his adjudication in bankruptcy, and since the door of his business house has been closed upon him, he has carried on the business and occupation of an undertaker. He has made several coffins for the pauper dead of Grayson county. He has left to him his tools and his own skill, and raw material for coffins is fortunately within his reach. It is therefore demonstrated that his business was not destroyed by the conveyance of his stock of coffins in the storehouse, because the things necessary to the existence of his business still belong to and subsist in him, and cannot be taken away by the filing of a voluntary petition in bankruptcy. It is not for the court to say that the little shop in the rear of the brick storehouse affords reasonably sufficient accommodations for Mr. Harrington to prosecute the calling of an undertaker and embalmer in now; for he has prosecuted that calling for many years in the brick storehouse, and the calling is still his, and he is still prosecuting it, and the law provides that the business homestead shall be exempt and saved to a man and his family in the time of their need. It may be that, while Mr. Harrington occupies and uses the brick building as an undertaker and embalmer, it will never again contain the assortment of coffins it once contained, because he is old and his energies are waning; but, so long

as he makes the coffins of even the pauper dead of Grayson county, the law will protect him in the use of his premises. At what hour the body of some wayfaring man may be brought to Mr. Harrington's undertaking establishment, there to be embalmed and prepared for shipment to friends, no man can tell, and when this happens Mr. Harrington's brick storehouse will give cover to him in the prosecution of his solemn calling; and the surroundings and appointments of the brick house will be much more fitting and appropriate than the surroundings and appointments of the little shop in the rear, which has been set apart to him by the trustee. This being the view of the court, the action of the referee herein is reversed, and the order heretofore made by him directing the trustee to take charge of the brick storehouse on lot 8, block 1, in the city of Sherman, as part of the estate of the said A. Harrington, bankrupt, is hereby set at naught. It is ordered that the trustee forthwith turn over to the said A. Harrington, bankrupt, the possession of said brick storehouse on lot 8, block 1, and that all costs of the proceedings in relation hereto be paid by the trustee out of the funds of the bankrupt estate.

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In re CHAPMAN.

(District Court, N. D. Georgia. February 8, 1900.)

**1. BANKRUPTCY—ACTS OF BANKRUPTCY—SUFFERING LEGAL PROCESS.**

Bankr. Act 1898, § 3a, cl. 3, providing that it shall be an act of bankruptcy if an insolvent debtor shall suffer a creditor to obtain a preference through legal proceedings, and not vacate or discharge the same at least five days before sale of the property affected, does not apply to the recovery of a judgment against the debtor for the foreclosure of the lien created by a deed in the nature of a mortgage, securing the payment of a promissory note, and a levy on the land conveyed, where the note and security were given before the enactment of the bankruptcy law, and for a valid debt.

**2. SAME.**

Although the creditor, in such proceeding, has recovered a general judgment against the debtor, as well as a judgment for the foreclosure of the lien, yet, if the levy made affects only the property bound by the lien, the debtor does not commit an act of bankruptcy in failing to release the property from such levy.

In Bankruptcy. On petition for adjudication in involuntary bankruptcy.

Brandon & Arkwright, W. A. & E. R. Black, and John B. Hutcheson, for petitioning creditors.

Goodwin & Hallman, and C. P. Goree, for respondent.

John M. Graham, for lien creditor.

NEWMAN, District Judge. On the 2d of January, 1900, A. F. Jencks and two others, as creditors of E. M. Chapman, of Atlanta, Fulton county, Ga., filed a petition against said Chapman to have him adjudged a bankrupt. After the necessary allegations as to the residence of the alleged bankrupt, the amount of his debts,

and that the amount due the petitioners exceeds the amount required by the bankrupt act, the petition states:

"Your petitioners further represent that said E. M. Chapman is insolvent, and that within four months next preceding the date of this petition the said E. M. Chapman committed an act of bankruptcy, in that he heretofore, to wit, on the 7th day of November, 1899, permitted, while insolvent, his creditor Elizabeth Sydney Herring to obtain a preference through legal proceedings, in that he allowed said creditor, after filing her suit to the November term, 1899, of the city court of Atlanta, upon an indebtedness represented by a promissory note for twenty five hundred dollars, to secure a judgment for said sum on the 7th day of November, 1899, and suffered and permitted said creditor to advertise said property for sale under said judgment, which sale is to occur January 2, 1900, and did not, five days before the sale or final disposition of the property, to wit, the following property [describing certain real estate in Atlanta], which property was affected by said preference, vacate and discharge such preference, and that by doing all of these things the said E. M. Chapman did commit an act of bankruptcy. The said E. M. Chapman suffered and permitted said judgment and sale in order that the said Elizabeth Sydney Herring might have thereby a preference over your petitioners and other creditors of said Chapman."

The act of bankruptcy alleged in this petition is under clause 3 of section 3a, which language is:

"Suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference."

Chapman's answer sets up that the judgment referred to in the petition was obtained on a promissory note executed more than five years ago, which note was secured by a loan deed made at the time the note was given; that the note was given for borrowed money; that, when it became due, Elizabeth Sydney Herring proceeded, under the statutes of Georgia, to foreclose said loan deed, and defendant had no defense to make thereto. He states that the title to the property was in Elizabeth Sydney Herring, and denies that the legal proceedings gave her any preference over Chapman's other creditors, but claims that the preference already existed.

While it is not fully stated in the answer, counsel have conceded in the argument that something over five years ago Chapman borrowed \$2,500 from Elizabeth Sydney Herring, and, after making a promissory note for the amount borrowed, executed and delivered to her a deed to the land which is now levied on, under sections 2771-2775 of the Code of Georgia, for the purpose of securing the same. Although it is not so stated in the answer, Chapman probably received from Elizabeth Sydney Herring a bond conditioned to reconvey the property on the payment of the debt, as provided in the sections of the Code referred to. The suit which resulted in the judgment on the 7th of November, 1899, referred to in the petition, was on the note thus secured, and after judgment was obtained, conformably to the provisions of section 5432 of the Code of Georgia, a quitclaim deed was made by Elizabeth Sydney Herring to Chapman, and filed in the office of the clerk of the superior court of Fulton county, to the land in question, and thereupon the same was levied on and advertised for sale as stated in the petition.

It is conceded that when Elizabeth Sydney Herring obtained a judgment on November 7, 1899, against Chapman, she not only obtained a judgment enforcing the special lien given by the deed which was executed to secure the note, but also a general judgment against Chapman. It is upon this last fact (the obtaining of a general judgment against Chapman by the plaintiff in the judgment) that petitioners in the proceeding in bankruptcy rely for an adjudication under the clause of the bankrupt act referred to. Elizabeth Sydney Herring had acquired a lien by contract long before the passage of the bankrupt act, so that the lien she acquired was not a preference at all under the bankrupt act. Consequently a proceeding only to enforce this lien, and a judgment foreclosing or declaring the existence of the same, would not be a preferential proceeding under the bankrupt act. If the judgment only had this effect, there would be little difficulty about deciding this question. The difficulty arises from the fact that in the suit the plaintiff obtained a general judgment. The reply to this, however, is that, while the plaintiff has a general judgment, she is only proceeding to enforce it against the particular property on which she had the contract lien, and for that reason the proceeding to sell, whatever may have been the character of the judgment, is not a preferential proceeding. The plaintiff is only seeking for the time being to enforce the judgment against the property on which she had the contract lien, and the bankruptcy act could never have contemplated that a person should be adjudged a bankrupt for permitting the enforcement of a lien against particular property, when the lien as to that property was in no sense a preference under any of the provisions of the act. I see no practical difference between this execution proceeding, as it now is, against the property conveyed to the plaintiff to secure the debt, and an ordinary proceeding to enforce a mortgage against the particular property on which the mortgage was given. If a levy was made on property other than that as to which the plaintiff in the judgment had a special lien, and an attempt was being made to sell the same, and the defendant failed within five days of the time of sale to vacate or discharge the judgment, then, undoubtedly, it seems, an act of bankruptcy would be committed. To constitute an act of bankruptcy, under the clause in question, it would be necessary that the debtor should suffer or permit, while insolvent, a judgment to go against him, which judgment would of itself be a preference under the act; that he would then allow execution to be issued and levied, and proceedings to sell to be instituted by the necessary advertisement, and fail, within five days of the time of sale, to vacate or discharge the judgment. The sale which the defendant, by the act, must prevent, would consummate and make effective the preference given by the judgment. This is very different from the case at bar, in which an antecedent lien, not obnoxious in any way to the act, is being enforced by legal proceedings. In the first instance practical results beneficial to the creditors would be obtained by the institution of the bankruptcy proceedings, inasmuch as the preference created by the judgment lien would be annulled and vacated, and, as a consequence,

the property of the defendant equally divided. Such is evidently the intent of this act of bankruptcy,—that a preference might be avoided, and an equal distribution of the debtor's property result. In the case now before the court, the institution of the bankruptcy proceedings will not affect the lien of the judgment on the land which was about to be sold. Should the bankruptcy proceedings go on, the court must either allow the plaintiff to proceed to enforce her judgment as a special lien on this property, by execution of the city court, as she is now doing, or must allow the trustee to sell the property subject to the lien, should it be thought probable that anything could be realized for the general creditors over and above the amount of the judgment. The court would declare it to be an act of bankruptcy in Chapman not to have prevented the sale, and would then, by its own order, allow the sale to go on. This is not, in my opinion, such a case as congress had in view in enacting the clause in question.

The authority mainly relied on by counsel for the petitioning creditors is *Manufacturing Co. v. Stoever* (C. C. A.) 97 Fed. 330, and it appears from a casual reading to be a case favorable to them; but a more careful examination will show that the court never intended in that case to decide the question raised here. It is said in that opinion that:

"The propositions submitted by the appellant are two: That the period of four months within which the petition might be filed dates from the day of the attachment, and not from the seizure or sale on execution; and that the words 'suffered or permitted,' found in the statute which we have cited, must have a narrow, literal interpretation."

Both of these questions were decided adversely to the alleged bankrupt. The only thing in the opinion that could be considered applicable to the question raised here is the close of the opinion, in which the court says:

"In order to prevent any misapprehension, we will add that the question whether or not the attaching creditor acquired a valid lien, as against these proceedings in bankruptcy, is not in issue on this appeal."

This case is only inferential authority for the petitioning creditors here, even if there be no distinction between the lien of an attachment and a contract lien, such as we have in the present case. More like this case, and more pertinent, because the exact question was presented, is the case of *In re Ferguson* (D. C.) 95 Fed. 429. The part of the opinion material here is as follows:

"As to the last point, although the case would be literally within the language of subdivision 3, it does not, I think, lie within its intent. Subdivision 3 should be construed in connection with the provisions of section 67. That section provides that all 'levies \* \* \* at any time within four months prior to filing the petition shall be deemed null and void in case the debtor is adjudged a bankrupt.' If the levy of March, 1898, was valid, and remained a continuous lien, assuming that the lien was lawfully acquired, the preference gained thereby being long before the bankruptcy act was passed, and more than four months prior to the filing of the petition, it could not now be disturbed. The act of bankruptcy referred to in subdivision 3, cl. a, of section 3, must, I think, be limited to such acts as, by construction of law, and in view of the bankruptcy act, work an injury to other creditors, by securing to them a preference which the bankruptcy law is designed to prevent. The language of this sub-

division shows this intent. This cannot apply, therefore, to such levies and liens as are acquired long prior to the passage of the act, and more than four months prior to the petition, which the bankrupt act does not vacate or disallow. Such a lien the debtor cannot be required to satisfy or vacate."

In this connection it may be remarked that an examination of the provisions of section 67 with reference to liens that are dissolved, and conveyances and incumbrances that are annulled, by proceedings in bankruptcy, and those which are unaffected, will strengthen the view which has been presented on the question here involved.

The whole question resolves itself into this: That the lien held by Elizabeth Sydney Herring is a valid lien, not repugnant to any of the provisions of the bankruptcy act, and a failure to stop a legal proceeding to enforce such a lien by sale of the incumbered property is not an act of bankruptcy, under clause 3 of section 3a of the act. No preference violative of any of the provisions of the act is being enforced, and the debtor is under no obligation to interfere with the sale. It is unnecessary to pass upon the question of insolvency. It really has not been discussed, and, in the view taken in this case, it becomes immaterial. The prayer for adjudication against Chapman will be denied, and the petition dismissed.

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In re WESTLUND et al.

(District Court, D. Minnesota, Fourth Division. February 14, 1900.)

No. 329.

**BANKRUPTCY—PRIORITY OF LABOR CLAIMS—ASSIGNMENT.**

Under Bankr. Act 1898, § 64b, according priority of payment in full, out of bankrupts' estates, to "wages due to workmen, clerks or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant," a claim for wages of labor so earned, which has been assigned to a third person, and is held by such assignee at the commencement of the proceedings, is not entitled to priority.

**In Bankruptcy.** On question certified by referee in bankruptcy.

Francis Bergstrom, for appealing creditors.

Chas. R. Fowler, for trustee.

**LOCHREN, District Judge.** In this case creditors who were owners by assignment of claims for labor performed for the bankrupt within three months before the date of the commencement of the bankruptcy proceedings—each separate claim so assigned being less than \$300—duly filed and made proof of such claims; and the question certified by the referee for decision is whether such claims, so owned, are debts having priority. The answer to this question depends upon the proper construction of that clause of section 64b of the bankruptcy act which gives priority to "wages due to workmen, clerks or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant." This language requires

that a debt for wages, to have priority, must be due to the wage earner. If the claimant entitled to priority might be an assignee, there would be no reason why such claimant should be restricted to \$300, as he might be the owner of many small claims, each less than that amount, but aggregating more. The clause referred to is intended to favor the class whose reliance for the maintenance of themselves and families is generally upon their wages, as earned. There is nothing in the nature of security or lien for the payment of the wages which could pass to an assignee. No right to priority arises or exists until the proceeding in bankruptcy is instituted, and then the wages assigned are not "due to workmen, clerks or servants," but to their assignees, and are outside the language of this clause. If debts for wages so assigned can be allowed priority, they may come in conflict, or at least in competition, with other claims for wages due and owing to the same workmen, clerks, or servants, earned within the same three months, and lessen the payments, if the assets will not pay in full all debts having priority. It must be held, therefore, that debts of a bankrupt for labor and services which at the commencement of the proceedings in bankruptcy are not due to the workmen, clerks, or servants, but to assignees, have no priority.

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In re FT. WAYNE ELECTRIC CORP.

COLUMBUS ELECTRIC CO. v. WORDEN.

(Circuit Court of Appeals, Seventh Circuit. January 25, 1900.)

No. 640.

**1. BANKRUPTCY—PROOF AND ALLOWANCE OF CLAIMS—PREFERRED CREDITOR.**

Under Bankr. Act 1898, § 57g, providing that the claims of creditors of a bankrupt who have received preferences shall not be allowed unless they surrender their preferences, a creditor who has actually received a preference, by a partial payment of his debt, within four months before the bankruptcy of the debtor, cannot have his claim allowed against the estate of the bankrupt without surrendering the preference; and this, notwithstanding the fact that he received the payment innocently, and that he had no knowledge or cause to believe that the debtor was insolvent or that a preference was intended.

**2. SAME—PREFERENCES—PAYMENT OF MONEY.**

Payment of a debt in money is a transfer of property, within the purview of Bankr. Act 1898, § 60a, providing that a debtor shall be deemed to have given a preference if, being insolvent, he has made a transfer of any of his property, and the effect of the enforcement of such transfer will be to enable one of his creditors to obtain a greater percentage of his debt than other creditors of the same class.

**Appeal from the District Court of the United States for the District of Indiana.**

The Columbus Electric Company, the appellant, on the 9th of December, 1898, was the creditor of the Ft. Wayne Electric Corporation to the amount of \$14,646.08, and on that day received the three notes of the debtor, each bearing date upon that day, and being for equal portions of the indebtedness, and payable, respectively, in 30, 60, and 90 days from that date. The first note matured January 11, 1899, and on the 20th of January, 1899, that creditor



received from its debtor, in part payment of the note, the sum of \$2,500 in money; and this without the knowledge of the insolvency of the debtor, and without reason to believe the debtor to be insolvent, and without reason to believe that any preference was thereby intended by the debtor over other creditors. Afterwards, creditors of the Ft. Wayne Electric Corporation filed their petition in bankruptcy against that corporation, and on the 25th day of January, 1899, the corporation was duly adjudged a bankrupt. On the 24th day of March, 1899, the appellant filed its claim in such bankruptcy proceedings for the balance of the amount due upon the three promissory notes. The referee certified the question of the allowance of the claim to the district court sitting in bankruptcy, which court afterwards ordered as follows: "(1) That if the said Columbus Electric Company shall, on or before thirty days from this date, surrender to the trustee, for the benefit of the estate of said bankrupt, the sum of \$2,500 so paid January 20, 1899, then the full amount of said claim, at the date of filing the petition in bankruptcy herein, to wit, the sum of \$14,884.56, is allowed as an unsecured claim, and that said sum is ordered to be entered upon the books of the trustee as the true sum upon which to compute dividends; (2) that, if such claimant shall fail or refuse to repay said sum of \$2,500 on or before thirty days from date hereof, the said claim is disallowed and expunged from the list of claims upon the trustee in this cause." This ruling is brought here for review. The opinion of the court below is reported in *Re Ft. Wayne Electric Corp.* (D. C.) 96 Fed. 803.

R. S. Robertson and William S. O'Rourke, for appellant.

William J. Vesey, John Morris, Jr., O. N. Heaton, and William P. Breen, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge, after the foregoing statement of the case, delivered the opinion of the court.

The question presented is this: Can a creditor, who has within four months of his debtor's bankruptcy innocently received a payment upon his debt, be permitted to prove his debt in the bankruptcy proceeding, and to receive from the estate of the bankrupt a dividend thereon, without surrendering the preference received? The question is one purely of statutory law, and depends for its solution upon the construction to be given to certain sections of the bankruptcy act. 30 Stat. 541.

Section 60a defines a "preference" as follows:

"A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Section 60b provides that the trustee may recover from the recipient any preference received within four months of the bankruptcy, if the latter had reason to believe that a preference was intended. Section 3 defines acts of bankruptcy, one of which is: "(2) A transfer, while insolvent, to a creditor of any portion of his property, with intent to prefer such creditor." Subdivision b of that section provides that an involuntary petition in bankruptcy may be maintained for such act of bankruptcy committed within four months before the filing of the petition. Subdivision 25 of section 1, treating of definitions, provides that the word "transfer," as used in the act, shall "include the sale and every other and different

mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security." Section 57g provides as follows: "The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences." It is apparent from these provisions of the law that not all preferences by an insolvent debtor may be avoided. The congress has seen proper to provide that the trustee in bankruptcy may recover preferences in the event only that the creditor had reasonable cause to believe that a preference was intended. It was not designed to interrupt the usual course of business, or to compel a creditor to pay back that which he had innocently received. This, however, does not conclude the case. When a creditor, who has in fact received a preference, comes into the court of bankruptcy seeking to share with other creditors in the estate of the bankrupt, he must come, if at all, upon the terms and the conditions that the law imposes. It is the fundamental principle of the bankrupt law that "equality is equity." The act seeks to marshal the assets of the bankrupt, recovering all property disposed of by the bankrupt in fraud of the act, and to distribute the fund equally among all the creditors in proportion to the amount of their respective claims. This principle we conceive to be distinctly recognized by section 57g. That section takes notice of the fact that a creditor who has been innocently preferred cannot be compelled to return that which he has received, but it says to him: While the law will not interfere with you with respect to that which you have received, and because you received it innocently, yet, if you come to the court asking that you may share with the other creditors in the remaining estate of the bankrupt, you must surrender the preference which you have received, however innocently; for equality is equity, and he who seeks equity must do equity. The act of preference is condemned by the law, but because you were innocent in the taking of it the law will not disturb your possession of that which you received; but, when you ask the aid of the court to give you a further share of the estate, you must be content to place yourself upon an equality with other creditors, and that can only be done by a surrender of the preference which you have received. We think this the clear intent of the lawgiver. We do not need to enter upon a critical examination of the various phrases of the act, or to indulge in an investigation of the technical meaning of the words there used. That has been fully gone over in the opinion of the court below whose decision is here under review, and in which, in general, we concur.

This view of the proper construction to be given to section 57g finds support in the provisions of section 65d, which declares that a creditor, who has received through a court of bankruptcy in a foreign country a share of his debt, and seeks to prove the balance of that debt in bankruptcy in this country, shall not receive any part of his debt here, until the creditors resident here shall first have received a dividend equal to the amount received by that creditor through such foreign proceedings. This goes upon the doctrine of equality among creditors. The courts here had not jurisdiction over the

property of the bankrupt in the foreign country. What the creditor there received was legally obtained and adjudged to him as of right. The court here could not take it from him, and yet, in the same view in which we regard section 57g, the law declares that such creditor shall not, in the distribution of the estate here, have the benefit of that which he legally received elsewhere, but he must stand upon the footing of equality with creditors here, and they shall first be paid out of the estate here an amount equal to that which such creditor received there. The language of section 57g is broad and comprehensive, and is not susceptible of the restricted construction sought to be placed upon it, unless the word "preference" should receive a narrow and strained construction.

It is urged that the term "preference" means a transfer of property, and not a payment of money. In other words, that an insolvent debtor, seeking, in fraud of the act, to prefer in part certain of his creditors, cannot so do by transfer to them of his property, but he may sell that property, and turn it into money, and with impunity pay his creditors with that money, and, although they have received it with guilty knowledge of the intent to prefer and of the insolvency of the debtor, the trustee cannot recover it back, because it was paid in money, and not in property. We think this a narrow view of the law, and one that would work incalculable mischief. We are not disposed to place such a construction upon the act, if it can in reason be avoided, and we are unwilling to put upon the section what we deem to be a strained construction of a broad term, in view of the mischief which would follow. It may not be denied that there are words and phrases in the act, as pointed out in the case of *In Re Piper*, 2 Nat. Bankr. N. 7, elsewhere unreported,<sup>1</sup> which lend support to the opposite contention, but we think that the general harmony of the act would be marred by the narrow construction sought to be placed upon the phrase "preference." The bankrupt here intended to prefer the appellant in the sense that while insolvent it sought to give an advantage over other creditors. It was received, to be sure, innocently, and without knowledge of that intent, but the payment none the less worked a preference. It gave to the appellant an undue advantage over other creditors, and, while the act will not permit a recovery by the trustee of the payment because it was received innocently, it none the less remains that the meaning of the act is that, if the appellant seek further payment out of the estate of the bankrupt, he shall share equally with other creditors with respect to his claim. That can only be accomplished by a surrender of the preference received as a condition of further payment out of the bankrupt estate.

This construction, as we think, works out the highest equity between creditors. It may be difficult to reconcile the various phrases used in the act, but the construction which we place upon the section gives to the language therein employed its natural meaning. The case of *In re Conhaim* (D. C.) 97 Fed. 923, reaches the same conclusion. The order is affirmed.

<sup>1</sup> Oral ruling. No opinion filed.

In re SCOTT et al.

(District Court, E. D. North Carolina. January 26, 1900.)

**1. BANKRUPTCY—REVIEW OF REFEREE'S DECISION—EXCEPTIONS.**

General order No. 27 in bankruptcy (18 Sup. Ct. viii.), providing that a party desiring a review by the judge of an order made by the referee "shall file with the referee his petition therefor, setting out the errors complained of, and the referee shall forthwith certify to the judge the question presented," is mandatory; and the court, on review of the referee's decision, will not consider exceptions not duly filed with the referee.

**2. SAME—RECEIVERSHIP—EXPENSES OF RECEIVER.**

Where a receiver in bankruptcy was appointed to take charge of and preserve the property of the bankrupt, consisting of stocks of general merchandise in three stores in three different towns, and had charge of the same for 109 days, an allowance to him by the referee of \$1.95 per day for each store, to cover his actual expenses in taking care of the property and for clerk hire, *held* reasonable and proper.

**3. SAME—COMPENSATION OF RECEIVER.**

Where a temporary receiver is appointed by the court of bankruptcy to take charge of and preserve the property of the bankrupt, the court has authority to allow him a just and reasonable compensation for his personal services, payable out of the estate, the amount of which rests in the sound discretion of the court, and is not necessarily a per diem allowance, nor influenced by the consideration that the duties of the receivership did not occupy his entire time.

**4. SAME.**

A receiver in bankruptcy, selected by the parties in interest as "a good, reliable business man," had possession of three stores belonging to the bankrupt, each containing a stock of general merchandise, of the aggregate value of about \$9,000, situated in three different towns, and took care of the property for 109 days. Upon the completion of his trust, the referee in bankruptcy allowed him \$250, payable out of the estate, as compensation for his personal services, over and above actual expenses. *Held*, on review, that as nothing appeared showing error or abuse of discretion on the part of the referee, and as the allowance appeared reasonable and just, the referee's order would be affirmed.

**5. SAME—EXPENSES OF MARSHAL.**

A deputy marshal appointed to take charge of a bankrupt's store and the stock of goods therein, and responsible on his bond for the value of the property, may hire a competent person as watchman, if he has any reason to apprehend danger to the property; and a charge in his accounts of \$1 per day for the services of such watchman will be allowed by the court as expenses.

**6. SAME—COMPENSATION OF MARSHAL.**

A deputy marshal appointed to take charge of a store of the bankrupt in a town other than that in which he resides, and to inventory the stock of general merchandise contained therein, who remains in possession for a month, will be allowed compensation at the rate of \$2.50 per day, together with his actual and necessary expenses, but not including the cost of his board and lodging.

In Bankruptcy. On questions certified by referee in bankruptcy.

Iredell Meares, for receiver.

H. L. Stevens and W. R. Allen, for bankrupt and creditors.

PURNELL, District Judge. A petition was filed by creditors May 24, 1899, to have I. J. Scott and W. T. Grisham, trading as Scott & Grisham and Scott & Co., declared bankrupts, and an adjudica-

tion made June 20, 1899. Two days thereafter an order was passed requiring the marshal to take possession and hold the property, which consisted of stocks of goods in stores at three points,—Rosehill, Warsaw, and Wallace. Proceedings were had to have C. J. Scott declared a member of the firm, pending which an arrangement was made between the creditors and bankrupts by which the adjudication was revoked and petition dismissed; all claims having passed to parties who joined with the bankrupts in asking for such order,—such parties agreeing to pay all costs. On June 23, 1899, by consent, to save expense, a temporary receiver was appointed to take charge of the stores, take an inventory, and preserve the property. By a receipt for a fee of \$300 paid the attorney for the petitioning creditors June 30, 1899, by Heyer Bros., it appears an arrangement was concluded on that day by which petitioning creditors were settled with, and their claims assigned; but the receiver continued on until October 10th, when the proceedings were dismissed, except as to costs, and the cause retained for the settlement of costs. The marshal held the property from May 26th to June 24th, when it was turned over to the receiver, Boney, who held it from that date to October 10th. On November 14, 1899, the referee certified a report of a hearing before him on the question of the adjustment of costs, with certain exceptions taken on such hearing. The cause was set for hearing before the judge at chambers on December 4, 1899, and counsel notified that exceptions must be filed within 10 days in accordance with general order No. 27 of the supreme court (18 Sup. Ct. viii.). The hearing was continued from time to time, and heard January 12, 1900. On November 29, 1899, counsel filed exceptions other than those taken before the referee, and took depositions on such exceptions on January 2, 1900.

The general orders or rules promulgated by the supreme court in accordance with the statute (section 30) are obligatory and binding upon courts of bankruptcy. They confer rights, as well as prescribe rules of practice. After the time within which an act is required to be done by parties to proceedings in bankruptcy has expired, rights are thereby conferred by law, and the courts will not deprive the party to whose benefit such rights inure by such neglect or omission on the part of his adversary. Courts "cannot do as they please" to as great extent as some attorneys think and assert. General rule No. 27 provides:

"When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of; and the referee shall forthwith certify to the judge the question presented, a summary of the evidence relating thereto, and the finding and order of the referee thereon."

Hence exceptions taken after the 10 days expired, unless there was an order before, enlarging the time, no matter what may have been the excuse, cannot now be considered. The court must follow the rules.

Taking the record as sent up for review in accordance with the rule, the receiver is allowed actual expenses, clerk's hire, etc., of

taking care of the stocks of goods, airing the stores during the hot weather to prevent mildewing, etc.,—an average per store of \$1.95 per day. This seems to be reasonable, and, under the circumstances, as economical as could be expected. The order of the referee allowing the receiver these expenses is affirmed.

The receiver excepts to the order of the referee making a "lump" allowance of \$250 to him for personal services as receiver, and in the record files a petition asking for a per diem allowance of \$3 for the 109 days he was engaged in caring for the property of the bankrupts. On the other hand, the bankrupts object to the referee's allowance of \$250, as excessive, for that the same is not warranted by law, and, further, that said receiver was not taken away from his own business, but during the entire time looked after his individual business, and insist that 50 cents per day would be adequate allowance. The receiver was selected or recommended by the parties as a good, reliable business man, and required to give bond for the performance of his duties under the orders of the court, and was responsible on such bond for the property. The pittance contended for by the bankrupts is too absurd to be seriously considered. When a party is appointed a receiver, he is not expected or required to give up all other business, or devote himself exclusively to the duties of receiver. If he preserves and accounts for the property, and obeys the orders of the court of which he is an officer, the court will not look beyond, or fix his compensation by what he is making from other enterprises or investments. Neither the bankrupt act, the law, nor equity, contemplates any such communistic reasoning,—to keep him down on a level with day laborers or less enterprising citizens. "That such allowance is not contemplated in law" does not seem to be supported by any authority. Bankr. Act, § 2, subsecs. 3, 5 (Loveland, Bankr. §§ 77-79), expressly authorize the appointment of receivers, and make such receivers officers of the court. Section 62 provides that "the actual and necessary expenses incurred by officers in the administration of estates shall \* \* \* be paid or allowed out of the estate in which they are incurred." These provisions cover fully the question of expenses. The section quoted (2), after specifying powers conferred on courts of bankruptcy, provides, "nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated." The powers enumerated seem to be ample to authorize an allowance to an officer of the court for services rendered the estate, especially when appointed by consent, and utilized by the bankrupts and their friendly creditors, who have "arranged" to have the proceedings dismissed, pay the costs, and take charge of the estate. The provisions of the act, as said Judge Hawley in *Blake, Moffitt & Towne v. Francis-Valentine Co.* (D. C.) 89 Fed. 691, should be interpreted reasonably, and according to a fair import of its terms, with a view to effect its objects and to promote justice. The act seems to contemplate that receivers, when appointed and authorized to take charge of property, shall be as substitutes for the marshal;

and in bankruptcy proceedings the marshal is allowed the fees allowed by law, as in other proceedings. The receiver (section 54) is required to report to the attorney general, as is the marshal and other officers, when required, such information as he may have. It would be absurd to contend that the court having the right to appoint has not the power, having jurisdiction of the entire estate, to pay its receiver out of the estate. The compensation is not fixed in the statute. How, then, shall it be regulated? Appointed as a substitute for the marshal, when the circumstances of the case, in the discretion of the court, require it, he should be paid as the marshal is paid under similar circumstances. For keeping personal property the marshal is allowed by law such compensation as the court may allow. Rev. St. § 829; *The Conqueror*, 166 U. S. 135, 136, 17 Sup. Ct. 510, 41 L. Ed. 937. It would seem, then, that the compensation of a receiver in bankruptcy is in the sound discretion of the court, and is contemplated in law. This conclusion is inevitable upon other grounds,—rules in equity which govern bankruptcy proceedings, when applicable, and general principles governing the appointment of receivers; but it is here put upon the grounds which best answer the argument of the learned counsel in this cause. Having power in its discretion to appoint receivers, the court has power in its discretion, “in contemplation of law,” to pay such receiver such compensation as may be reasonable and just. To allow 50 cents per day would not be reasonable or just to a “good, reliable business man,” acting as a bonded officer of the court. Bankrupts’ exception to referee’s allowance is therefore overruled.

The lowest per diem allowed a marshal is \$2 per day for attending a commissioner’s court, but in taking care of property the allowance is not governed by the time employed, but by all the surrounding circumstances. The referee is a man of discretion, lives in the section where the stores are situated, has heard the testimony, looked into the eyes of the witnesses, and has never shown himself to be parsimonious in allowances. In short, living in that section, knowing all the surrounding circumstances, and there not being evidence to show error on his part, the allowance seems to be reasonable and just. Under the circumstances, I would not feel justified, in the exercise of a sound discretion, in disturbing the order of the referee allowing the receiver \$250 for his services. The compensation of receivers is largely discretionary. It should be reasonable and fair. *Stuart v. Boulware*, 133 U. S. 78, 10 Sup. Ct. 242, 33 L. Ed. 568; *Cake v. Mohun*, 164 U. S. 311, 17 Sup. Ct. 100, 41 L. Ed. 447; and numerous authorities to the same effect. The only compensation limited in the bankrupt act is that allowed the clerk, referee, and trustee. The general idea of the act seems to be that the law shall be administered economically, but it would be a violent presumption to conclude that congress intended to sacrifice efficiency of service to economy; that the offices where the compensation is not limited should be let to the lowest bidder, or incompetent men appointed because they could be secured at a low price. The order of the referee is affirmed.

The only other exception properly certified in the record is to the marshal's account for expenses, of which the referee says:

"The referee is informed by the marshal that the court has approved allowances of deputy marshals, while in charge of property under special warrant, at a rate of three dollars per day. He therefore incloses these accounts without recommendation."

As in allowances for receivers, so in expenses and allowances to the marshal, there is and can be no fixed rule. If the court has approved accounts in which deputy marshals were allowed \$3 per day and expenses, it was because all the circumstances justified such allowance. As stocks differ in value, so men differ in price. To take care of, inventory, and sell a stock of goods of one kind would require a man of more education, experience, and ability than to perform the same services where the stock was smaller and of a kind more easily handled. The entire stock of goods in this case inventoried about \$9,000, consisting of general merchandise such as is kept in general stores in towns. There was some talk at the time which warranted an instruction to the marshal to use special caution in caring for the three stores and preserving the property for the estate. This is aliunde the record, but within the knowledge of the court. The allowance contended for in the exception is the price of an uneducated day laborer. Such men are not appointed deputy marshals, or given charge of property in custodia legis. Possibly some of that class are more reliable than, and would perform the manual duties equally as well as, those who are designated; but there are duties required that they could not perform,—as taking inventory, making return, etc. For many obvious reasons, they are not selected, and what they could be hired for is no criterion by which to fix compensation for those who are. One item in the marshal's account is \$28 paid for guarding the store at Wallace 28 days. The marshal was responsible on his bond for the property, and it was proper that a competent man should be hired to guard the property by day and by night, if he had reason to even suspect that there was danger of fire or robbery. The court will not weigh in golden scales expense accounts incurred by its officers in preserving property in the custody of the court. The items all seem to be reasonable, are sworn to as provided by law, and will be taxed against the parties who have assumed the costs. There is no provision of law allowing board to deputy marshals. The statute allows deputy marshals \$2 per day when attending court. They are allowed mileage or actual expenses when serving or endeavoring to serve process. But nowhere have I been able to find any provision for paying board bills, except of the marshal and deputies when attending a regular term of court, not to exceed so much per day. The allowance of \$3 per day to the three deputy marshals, considering all the surrounding circumstances in this case, seems to be too liberal, keeping in view the fees allowed by law. It was regular employment for a month,—true, away from home; and, in my opinion, \$2.50 per day is reasonable and fair. All vouchers for board will be eliminated from the bill of costs, and the deputy marshals each allowed \$2.50 per day, and actual



expenses necessarily incurred, for which vouchers have been filed. The bill of costs will be reformed accordingly. Except as herein modified, the orders and rulings of the referee embodied in the report certified for review are affirmed.

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STROBEL & WILKEN CO. et al. v. KNOT et al.

(District Court, S. D. Ohio, W. D. January 20, 1900.)

No. 2,572.

**1. BANKRUPTCY—PREFERENCES—PAYMENT OF DEBT.**

Partial payment of a debt in money constitutes a transfer of property, within the meaning of Bankr. Act 1898, § 60a, providing that a debtor shall be deemed to have given a preference, if, being insolvent, he has "made a transfer of any of his property, and the effect of the enforcement of such transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

**2. SAME—PROOF OF DEBT—SURRENDER OF PREFERENCE.**

Bankr. Act 1898, § 57g, providing that "the claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences," applies to a partial payment made to a creditor by an insolvent debtor within four months prior to the filing of a petition in bankruptcy against the latter, irrespective of the intention of the debtor to give a preference or of the creditor's knowledge or belief that a preference was intended; and, if such creditor elects to retain the money so received, he will not be permitted to prove the balance of his claim against the estate of the bankrupt.

**In Bankruptcy.** On review of decision of referee in bankruptcy. The opinion of the referee (Morison R. Waite) was as follows:

"This matter comes before me on two motions,—the first by the trustee to disallow the claim of Henry Gleseking, Jr., administrator of Henry Gleseking, for \$1,741.19, on the ground that the said administrator received on December 24, 1898, and on January 4, 1899, preferences, to wit, payments of money, \$200 and \$1,000 on account; and the other a motion by said Gleseking filed after the other, to disallow the claims of 27 other creditors, all trade creditors, who at various dates after October 6, 1898, also received preferences, to wit, payments in money on account, and for an order directing the repayment of such payments.

"The bankrupt firm was engaged in the wholesale toy business in this city, and doing business entirely, or almost so, on borrowed capital. The business was sold to the bankrupts, February 1, 1896, by Langhorst, and the bankrupts, having no property of their own, paid for the business by their unsecured demand notes to Langhorst for \$8,032. Further capital was furnished to the business,—about \$3,000 by Henry Gleseking, and \$2,000 claimed to have been furnished by a sister of Knot. The firm was also large borrowers from the Western German Bank. On October 26, 1898, the stock of goods of the firm was largely destroyed by fire. The loss was adjusted with the insurance companies in between two and three weeks, who thereafter paid, in accordance with that adjustment, \$13,650. Mr. Langhorst thereupon demanded payment of the balance on his notes, which was paid during November and December, aggregating \$7,367.07, the last payment being December 10th. The Western German Bank's paper was also taken up, approximately \$6,500, the last payment being made to it December 7th. After the fire the stock was straightened up, and the firm went on with business in the ordinary course as quickly as they could. Goods were sold, but no new purchases of any consequence were made, and no new capital was put into the business. Payments to merchandise trade creditors were made in whole or in part from time to time, and

those who were paid in part, and have filed their claims for the balance, are included in Gleseking's motion. Other creditors, some of whose bills matured as early as in October, 1898, before or about the time of the fire, as shown by proofs on file, have not been paid. On January 6, 1899, the firm made an assignment for the benefit of its creditors under the state law. Within a day or two prior to the assignment \$2,000 was paid to the sister of Knost, \$1,000 to Gleseking, and about \$1,000 drawn out in money by Wilhelmy, and over \$1,500 by Knost. On February 23, 1899, a petition to have them adjudged bankrupts was filed, and on March 22, 1899, they were so adjudged. On the 13th day of April, 1899, the present trustee was elected. In the meanwhile the assignee had converted the stock into money, and collected most of the accounts, and he turned over to the trustee \$7,820.41. The good accounts remaining to be collected are estimated to be \$614.14. There are no other assets except doubtful accounts and worthless accounts. The liabilities are \$21,896.42. With the exception of \$2,500 withdrawn by the bankrupts, \$400 paid to the insolvent's attorney, and \$770.02 paid by the assignee for commissions and expenses, all the receipts of the firm have gone to pay debts of the firm, for as, confessedly, the months of November and December are the most profitable months of the year in their business, it is fair to disregard expenses of operating. As practically the debts existing at the failure were existing at the time of the fire, for thereafter they created no new liabilities, and those debts exceed assets over two for one, there seems no escape from the conclusion that the firm was actually insolvent, within the meaning of the bankrupt act, at all times after the fire, October 26, 1898. Mr. Wilhelmy, who was the financial man of the firm, testifies that the likelihood of not being able to pay came to him after they were in full possession of the property and opened up the goods that had been destroyed, and they found they were in bad shape; and that they realized they could not pay dollar for dollar when their business was over, about the middle of December, and they went through their stock. There is no claim of any losses after the fire and before this last date, and, as they were then creating no new indebtedness, the insolvent condition must have reached back to the fire. There is no proof as to their condition prior to the fire. This date is within 90 days of the assignment, and 4 months of the filing of petition in bankruptcy. There is no evidence to show that at the time any of the payments were made which are now sought to be reached by these motions the payees had reasonable cause to believe that it was intended thereby to give a preference. Neither is there any evidence to show that the bankrupts intended to give a preference by any of these payments, except the presumptions arising from the situation of the parties, and the knowledge of the bankrupts of their condition.

"In view of the decision of the judge of this court in the case of *Hicks v. Knost*, 94 Fed. 625, and of the circuit court of appeals of the Fifth circuit in *Bernheimer v. Bryan or Re Abraham*, 1 Nat. Bankr. N. 281, 35 C. O. A. 592, 93 Fed. 767. I do not consider that I have jurisdiction to order the repayment to the trustee of any payments made by the bankrupts on a summary application such as this, and shall treat both motions simply as motions for reconsideration and disallowance of claims.

"Section 60a of the present bankruptcy act defines a 'preference,' so far as applicable to the above facts, thus: 'A person shall be deemed to have given a preference, if, being insolvent, he has \* \* \* made a transfer of any of his property, and the effect of the enforcement of such \* \* \* transfer will be to enable any one of his creditors to obtain a greater percentage of his debts than any other of such creditors of the same class.' It is contended that the words, 'transfer of any of his property,' cannot mean a payment of money, and particularly a payment made in the usual course of business. The word 'transfer,' however, is defined by the act itself (section 1, subd. 25), and includes any disposing of property as a payment or otherwise. The word 'property,' as ordinarily used, is certainly broad enough to cover money, whether in currency or a bank credit assignable by check. Furthermore, the words of this act must be taken to have the same meaning as in the prior bankruptcy acts, unless the act itself provides otherwise. The word 'property' is not defined by this act, and it was used in the act of 1867. In section 39 of act of 1867, the words, 'transfer of money or other property,' are used, showing 'property' to

include 'money.' In section 35 of that act, 'payment, pledge, assignment, transfer or conveyance of any part of his property' are used unconnected with the word 'money,' and yet that section was held to apply to payments of money. *Campbell v. Bank*, 14 Wall. 87, 20 L. Ed. 832. These considerations outweigh such inference arising from the use of words in section 60d of the 1898 act, 'pay money or transfer property to an attorney,' etc., as was claimed in argument. It is not to be presumed that congress meant to interdict all fraudulent and preferential transfers of property except money, and permit all payments of money, no matter how fraudulent or preferential, unless made to attorneys.

"Is, then, the question whether or not these payments, made to trade creditors, were made in the usual course of business, relevant? Under the act of 1867, transfers not in the usual course of business were held *prima facie* evidence of fraud. Section 35 (Rev. St. § 5130). But this did not mean that all transfers or payments in the usual course of business were not preferences, and therefore valid. They might be either one or the other. The question under that act was the intent of the debtor in making the payment or transfer, and whether it was done in usual course of business or not was one circumstance to be considered in connection with all the other circumstances in ascertaining what was the intent. In *re George*, 1 Low. 409, Fed. Cas. No. 5,325; In *re Oregon Bulletin Printing & Publishing Co.*, 13 N. B. R. 508, Fed. Cas. No. 10,559. In the act of 1898, so far as section 60a is concerned, the intent of the debtor and the knowledge of the creditor are alike immaterial. If the bankrupts are insolvent,—and I have found they were at all times after October 26, 1898,—then any payments they made, either in full or on account of their indebtedness, and not in compromise of it, at less than its face value, must operate, if enforced, as a preference, i. e. to enable those creditors paid to obtain a greater percentage of their debts than others of the same class, and the question whether the payments were made in the usual course of business or not is immaterial so far as that section is concerned, because it can only bear on the questions of the intent and the knowledge of the parties. Under this construction of section 60a, all payments made after October 26, 1898, must be held to have created preferences.

"It remains to consider what is the effect of such preferences. Section 60b provides when they may be avoided by the trustee and recovered back, and it is essential, under that provision of the act, that, in addition to the fact of preference as above defined, it be shown that the person receiving the preference had reasonable cause to believe that it was intended thereby to give a preference. Section 3a, subd. 2, provides when the giving of a preference constitutes an act of bankruptcy. Under its terms, it is necessary to show that the debtor intended to give a preference, but it is not necessary to show that the creditor had reasonable cause to believe it was so intended. In other words, a preferential transfer may be sufficient to make the transferor a bankrupt, although not of such a character that the trustee may recover it back. The same distinction existed under the act of 1867. In *re Drummond*, 1 N. B. R. 231, 234, Fed. Cas. No. 4,008; In *re Oregon Bulletin Printing & Publishing Co.*, 13 N. B. R. 503, 514, Fed. Cas. No. 10,559; *Loveland, Bankr.* § 52.

"Neither of these two sections is, however, directly applicable to the question under consideration, and they are only useful as aids in ascertaining the correct construction of section 57g, which is the provision directly in point. It reads: 'The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.' Does this refer to 'preferences' as defined in section 60a, or does it refer to such preferences as may be recovered back by the trustee under section 60b, or such preferences under section 3a, subd. 2, as constitute the debtor a bankrupt? It seems to me that, independently of the arguments as to the policy of the act to be hereafter considered, the natural construction would be to consider the word 'preferences' in section 57g to mean those within the definition given in section 60a, for the latter contains the simple definition of a preference, while to the act of preference, as so defined, section 60b and section 3a, subd. 2, each add other and different circumstances to be proved to entitle one to the relief, respectively, provided by each. In section 57g no such other circumstance is added. This view is rendered conclusive, to my mind, when the provision of the act of 1867, analogous to section 57g of the act of 1898, is compared with it. Section

23 of the act of 1867, being section 5084, Rev. St., provided: 'Any person who \* \* \* shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor contrary to any provision of this act, shall not prove the debt or claim \* \* \* until he shall have first surrendered to the assignee all property, money, benefit, or advantage received by him under such preference.' That congress in 1898 should have omitted from section 57g the foregoing clause in reference to the cause for belief on the part of the creditor seems to me conclusive that the facts in section 60a, and not those in section 60b, were intended by the use of the word 'preferences' alone. Coll. Bankr. p. 285. A similar distinction is apparent in other parts of the act. Under the provisions of the act of 1867, the lien of a judgment obtained within four months was valid, unless brought within the terms of section 35 (section 5128, Rev. St.); that is, unless two facts concurred with the insolvency of the debtor—First, a reasonable ground of belief by the judgment creditor that the debtor was insolvent; and also, second, some active participation by the debtor in securing the judgment. *Wilson v. Bank*, 17 Wall. 478, 21 L. Ed. 723; *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568. Under the act of 1898, however, all liens obtained by legal proceedings against an insolvent within four months of the filing of a petition in bankruptcy against him shall be null and void if he is declared a bankrupt, and it is not made necessary to show the knowledge or cause for belief on the part of the judgment creditor. Section 67f. In other words the present act, unlike that of 1867, does not seek to protect the diligent creditor, except in the respect hereinafter pointed out, no matter how innocent of an intent to secure a preference he may be. The act rather aims to secure, as far as practicable, to all general creditors of actual insolvents an equal percentage of their assets, and to prohibit the obtaining by one or a few creditors of any preference in those assets, without reference to the intent with which such preference is given or obtained.

"It was very forcibly urged on argument that such a construction of the act would upset all business relations, and that no creditor would be safe in investing any payments he might receive from his debtors for a period of four months, for fear that his payors might become bankrupts within that time, and that no reliance could in consequence be put upon assets or credits. That objection is a forcible one, and should lead a court to hesitate to adopt a construction from which there is any escape to which it really applies. It seems to have been considered by congress, and so far led it to depart from the scheme of absolute equality of distribution as to protect the diligent creditor from being compelled to surrender any property or contractual lien which he has innocently received in payment or as security; for, under section 60b, to compel its return he must be shown to have had reasonable cause to believe that it was intended as a preference. It does not apply, however, with a like force to the provisions of either section 57g or section 67f,—not to the latter, because, naturally, no such great reliance in making arrangements for future business is placed on mere liens obtained by judicial proceedings within four months; not to the former, because the question of surrender under that section (57g) is entirely voluntary and optional with the creditor, who can determine whether it is worth his while, in view of future dividends, to surrender his preference or not. Nor can it be claimed that the value of the unpaid portion of the credit is unduly unsettled. The debtor being insolvent, the account is not properly entitled to reliance as an asset or basis for future activity. As frequently pointed out under the old act, from the moment of actual insolvency all creditors become entitled to share pro rata in the estate, because it represents the credit given the insolvent by his creditors, and in good morals belongs to them, and not to him. In *re Oregon Bulletin Printing & Publishing Co.*, 13 N. B. R. 503-515, Fed. Cas. No. 10,559; In *re Silverman*, 4 N. B. R. 522-527, Fed. Cas. No. 12,855. And it is certainly not inequitable to require one who has received an undue portion of that estate, no matter if innocently, from surrendering that advantage before participating in further distributions of it with those who have not received such preference. Coll. Bankr. p. 286.

"So, rather than detracting from the construction I have placed on section 57g, it seems to me that the argument now under consideration makes for it, as pointing out a reason for the distinction made by the different language employed in sections 60b, 57g.

"Counsel have furnished me with citations to a number of authorities arising under the act of 1867, holding that reasonable cause for belief, etc., on the part of the creditor, was necessary before the preference could be avoided,—a proposition which is undisputed under the terms of that act, or section 60b of this act,—and also that payments made in the usual course of business are not preferential and recoverable. In some of the cases cited this doctrine is merely expressed as a dictum. In others, and the case of *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568, is the strongest of this kind, the fact of being made in the ordinary course of business is but one circumstance, with others, to determine the intent of the debtor and the knowledge or cause for belief of the creditor. On examination of the *Clark Case*, it will be found at the time of the payment in course of business there was no evidence that the payee had knowledge of the insolvency of the bankrupt,—a fact that had to be proved under that law. Also citations to cases in other states, construing anti-preference laws of those states, are of little assistance in this inquiry, because of the wide variance in the language of the several acts, both from each other and from the federal laws. I have found nothing in any of the authorities cited that is in conflict with the views here expressed.

"Reliance is also placed by the trustee on the provisions of Act 1898, §§ 67e, 70e (which give him the same advantages in recovering property that the creditors might have under state laws); and also, in connection therewith, on the recent act of the Ohio legislature (93 Ohio Laws, p. 290), which took effect November 1, 1898, providing that every transfer, act, or device done by a debtor in contemplation of insolvency, or with a design to prefer one or more creditors, to the exclusion, in whole or in part, of others, shall be void at the suit of creditors, and that such transfer, act, or device, in the event of a deed of assignment being filed within 90 days thereafter, shall be conclusively deemed and held to be fraudulent, upon showing of actual insolvency at the time. I have not found any reason to disagree with the views presented on behalf of the trustee in this connection, but as it is the effect of the views already expressed that, under the terms of the bankruptcy act itself, the motions to disallow all claims in which payments were made subsequent to October 26, 1898, must be granted, and as this goes back further than the Ohio law, which did not go into effect until November 1st, I have not found it necessary to give careful attention to its provisions. If any creditors affected hereby deem themselves entitled to special consideration by virtue of section 60c, they will be given opportunity to present such evidence and arguments as they desire for that purpose. Creditors can then determine whether to surrender their preferences, and have their claims allowed in full or not. The claims of those not doing so, who received payments subsequently to October 26th, must be disallowed. Opportunity will also be given for presenting the questions here passed on for review by the district judge in such manner as counsel may deem best adapted to protect the interests of their clients."

W. A. Hicks, trustee in bankruptcy, pro se.

W. H. Jones, for creditors.

THOMPSON, District Judge. This matter is submitted to the court on a petition for the review of the findings and rulings of the referee in disallowing the claims of certain creditors. The able opinion of the referee in support of his rulings presents the true construction of the provisions of the bankrupt act covering the controversy. When insolvency overtakes the debtor, his creditors, as contributors to the estate in his possession, have an equitable right to have the proceeds of the estate distributed among them equally, in proportion to the amount of their respective claims; and if, pending the insolvency, one of the creditors receives partial payment of his claim from the debtor, and to the extent of the remainder of his claim is permitted to share equally in the distribution of the balance of the estate, he thereby obtains an inequitable advantage or preference

over the other creditors. And this is true, although no preference was intended by the debtor in making, or by the creditor in receiving, the partial payment. The construction, therefore, of paragraph "g" of section 57 and of paragraphs "a" and "b" of section 60 of the bankrupt act, which requires the creditor to surrender his preference as a condition precedent to participation in the distribution of the fund in the hands of the trustee, is not unreasonable. It permits the innocent creditor, at his option, to retain or surrender the preference. But the creditor who has reason to believe that a preference was intended has no such option, and, if made within four months before the adjudication in bankruptcy, the trustee may recover the amount of the payment. The findings of the referee are approved.

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NORCROSS v. NATHAN et al.

(District Court, D. Nevada. January 23, 1900.)

No. 908.

1. **BANKRUPTCY—CONSTRUCTION OF STATUTE.**

The national bankruptcy act establishes a uniform system of bankruptcy, and regulates, in all their details, the relations, rights, and duties of the debtor and creditor. It should be interpreted reasonably, and according to the fair import of its terms, with a view to effect its objects and to promote justice.

2. **SAME—JURISDICTION—SUITS BY TRUSTEES.**

A district court of the United States, as a court of bankruptcy, has jurisdiction of a suit by a trustee in bankruptcy against the bankrupt and another to set aside an alleged fraudulent transfer or conveyance of property by the bankrupt to his co-defendant, and to recover the property or its value, although the parties are all citizens of the same state.

3. **SAME—JURISDICTION OF STATE COURTS.**

State courts have jurisdiction, concurrent with that of the courts of bankruptcy, of actions by trustees in bankruptcy to set aside alleged fraudulent transfers or conveyances of property made by the bankrupts upon whose estates they are appointed to administer.

4. **SAME—REMEDIES OF TRUSTEE.**

A trustee in bankruptcy stands in the place of the creditors of the bankrupt, and has the same rights, and may pursue the same remedies, in their behalf, as they would have been entitled to if there had been no adjudication in bankruptcy. In a suit against the bankrupt and his transferees to set aside alleged fraudulent conveyances of property, the trustee has the right to include all such matters and causes of action as might have been included by the creditors in a creditors' bill against the defendants.

5. **SAME—TRUSTEE'S COMPLAINT—MULTIFARIOUSNESS.**

The complaint in an action by a trustee in bankruptcy against the bankrupt and two other defendants, alleging that one of such defendants had obtained possession of property of the bankrupt under a fraudulent chattel mortgage, and that the other claimed part of the property under a pretended and illegal purchase from his co-defendant, the mortgagee, and asking that the mortgage and the sale be declared void and canceled, and that the vendee of the property be required to surrender it to the plaintiff, or account to him for its value, is not demurrable for multifariousness, since the acts charged against the defendants, though distinct, constitute a connected series of acts all having relation to a common fraudulent purpose, in which all the defendants had a common interest.

**In Bankruptcy. On demurrer to complaint.**

**Torreyson & Summerfield (Joseph Kirk, of counsel), for plaintiff.  
Thomas Wren, for defendants.**

**HAWLEY, District Judge.** This action is instituted by the plaintiff, as trustee of M. Nathan, a bankrupt, to recover certain personal property from the defendant Hausmann, alleged to have been fraudulently obtained by him for the purpose of defrauding the creditors of Nathan; and for the purpose of setting aside a mortgage fraudulently given to defendant L. J. Cohn by M. Nathan. The facts with reference to these transactions, as alleged in the complaint, are substantially the same as were presented to this court in the petition for an injunction against L. J. Cohn. In re Nathan (D. C.) 92 Fed. 590. The prayer of the complaint is as follows:

"That the said promissory note and chattel mortgage from defendant M. Nathan to defendant L. J. Cohn be adjudged and decreed as against plaintiff to be fraudulent, void, and without effect, and that the same be canceled; that the seizure and possession of the personal property described in the said chattel mortgage by defendant L. J. Cohn be adjudged and decreed to have been fraudulent, without authority of law, and without effect; that the said pretended sale and delivery from defendant L. J. Cohn to defendant Joseph Hausmann be annulled, and set aside; that defendant Joseph Hausmann be required by decree of this honorable court to immediately deliver to plaintiff all of the said personal property detained by him as aforesaid, or that, in the event that said sale thereof from defendant L. J. Cohn to defendant Joseph Hausmann should be held to be valid; that the said defendant Joseph Hausmann be required to pay to plaintiff the sum of \$865, remaining unpaid therefor; that plaintiff have such other or further relief as may seem meet and equitable in the premises; that he have judgment against defendant Joseph Hausmann for \$500 as damages, and that he have judgment against defendants for his costs of suit herein."

To this complaint the defendants have interposed a demurrer upon the following grounds, viz.:

"(1) That the court has no jurisdiction to entertain or try said causes of action, the plaintiffs and defendants each and all being residents and citizens of the same state, to wit, of the state of Nevada. (2) That there is a misjoinder of parties defendant in said cause, Joseph Hausmann being improperly joined as a defendant with L. J. Cohn and M. Nathan. (3) That there is a misjoinder of causes of action, a cause of action in favor of the plaintiff and Joseph Hausmann being joined with a cause of action against L. J. Cohn and M. Nathan in favor of the plaintiff; and a cause of action to declare a mortgage and promissory note made by M. Nathan to L. J. Cohn to be void, fraudulent, and without effect, and that the same be canceled, with a cause of action in favor of plaintiff and against defendant Joseph Hausmann for the return or delivery of goods, wares, and merchandise, together with damages for the detention thereof."

1. The question as to the jurisdiction of this court to entertain this action depends to some extent upon the construction to be given to section 23b of the bankruptcy act of 1898, relating to the jurisdiction of the United States and state courts. The entire section reads as follows:

"Sec. 23 (a) The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted

and such controversies had been between the bankrupts and such adverse claimants. (b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant. (c) The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act." 30 Stat. 552.

With reference to this question there have been several decisions in the different district courts of the United States, and a decided conflict of opinion has been expressed by the various judges in regard thereto. Some of the judges have held that the district courts have no jurisdiction of an action like the present (*Burnett v. Mercantile Co.*, 91 Fed. 365; *Mitchell v. McClure*, Id. 621; *Heath v. Shaffer*, 93 Fed. 647, 651; *Hicks v. Knost* (D. C.) 94 Fed. 625; *Perkins v. McCauley* (D. C.) 98 Fed. 286); while others have held directly to the contrary (*In re Sievers*, 91 Fed. 366, 370; *Carter v. Hobbs*, 92 Fed. 594, 598; *In re Newberry*, 97 Fed. 24; *Robinson v. White*, Id. 33; *Murray v. Beal*, Id. 567). See, also, *Loveland*, Bankr. pp. 67-73, § 20; Id. pp. 581, 582, § 263. The reasoning of the judges proceeds in each line of cases upon somewhat different grounds. As no authoritative decision has been rendered by the circuit court of appeals or by the supreme court of the United States, the various district judges will continually be called upon to wrestle with the disputed question, and pass judgment thereon in accordance with their own individual views. It is doubtless true that the bankruptcy act is, in some respects, imperfect. Some of its provisions are not entirely clear, and others are difficult of a construction which would be in entire harmony with other sections of the act. Its general tendency in this respect is to bring trouble to the courts, and create opposition to the act, which ought not, and otherwise would not, exist. But, whatever its defects may be, the act as a whole was intended to be beneficial, fair, and just to creditors and debtors alike. It is founded in the right spirit, based upon equitable principles, and, if the machinery provided for carrying it into effect is obscure or uncertain, it ought not to be set in motion in such a manner as to make it a snare and delusion, instead of maintaining its justice and upholding its beneficial purposes. In order to determine the true interpretation of the provisions of the bankruptcy act, courts ought to look beyond the pale of the words used in any particular section (which are of themselves doubtful, and to some extent uncertain), and examine the policy of the entire act, its character, object, and purpose, in order to ascertain whether or not there are any other sections which have any tendency to shed light upon what was meant or intended by congress by the use of the language under the particular section or subdivision thereof under consideration. The national bankruptcy act establishes a uniform system, and regulates in all their details the relations, rights, and duties of the debtor and creditor. It should be interpreted reasonably and according to a fair import of its terms, with a view to effect its objects and to promote justice. *Blake, Moffitt & Towne v. Francis-Valentine Co.* (D. C.) 89 Fed. 691, 693, and authorities there cited. *In Re Nathan* (D. C.) 92 Fed. 590, 593, this court said that:



"In the disposition of property among creditors equality is equity. It is the genius and purpose of the act of 1898 to secure this result as far as possible from the moment its aid is invoked, whether by the debtor or by his creditors. Its exercise is vital to the ends of justice, and is necessary in order to enable the courts to enforce and make effective the various provisions of the act. The policy of the bankrupt act is to secure an equal distribution of the assets of the bankrupt among all his creditors, and a court of bankruptcy in which the bankrupt proceedings are pending, in order to preserve the property and protect the rights of all the creditors, has the unquestioned jurisdiction and power to enjoin any disposition thereof which would be in violation of the spirit, intent, and purpose of the act."

See, also, authorities there cited. And in the same case the court further said that the filing of the petition by the creditors was, as is said in *Bank v. Sherman*, 101 U. S. 403, 406, 25 L. Ed. 866, "a caveat to all the world. It was, in effect, an attachment and injunction. Thereafter all the property rights of the debtor were ipso facto in abeyance until the final adjudication. \* \* \* Those who dealt with his property in the interval between the filing of the petition and the final adjudication did so at their peril." See, also, authorities there cited. The act, among other things, provides, in section 2, for courts of bankruptcy, and invests them with jurisdiction, and declares that the district courts of the United States "are hereby made courts of bankruptcy, and are hereby invested within their respective territorial limits \* \* \* with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms"; to bring in and substitute persons, whenever necessary for the complete determination of any matter in controversy; to "appoint receivers \* \* \* for the preservation of estates, to take charge of the property of bankrupts" (subdivision 3); to "cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided" (subdivision 7); to "make such orders, issue such process, and enter such judgments in addition to those specially provided for as may be necessary for the enforcement of the provisions of this act" (subdivision 15); and the section closes with the following provision: "Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated." By section 70 the trustee is, upon his appointment and qualification, vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, as to property transferred by the bankrupt in fraud of his creditors. In the light of the general object of the act and of the provisions above cited, it seems to me clear that the jurisdiction of this court should be upheld and maintained, even if it should be conceded that section 23b, standing alone, might be susceptible of a different construction. This court certainly ought not to be deprived of jurisdiction in the premises unless the act in clear and direct language vests it elsewhere.

On the other hand, conceding, as we must, on account of the conflicting opinions, that section 23b is susceptible of two different interpretations, it should be construed, if possible, so as to harmonize;

in spirit as well as in letter, with the other provisions of the act. In my opinion, the language of section 23b, when considered in connection with the other provisions of the act, does not deprive this court of jurisdiction of a case like the present. It certainly does not do so in direct or clear terms. Did congress mean, when it passed the act, that the district courts, as courts of bankruptcy,—which are invested in direct terms with the absolute power to cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto,—should have no jurisdiction over a suit brought by the trustee of the bankrupt against an adverse claimant to the property which it is claimed belongs to the bankrupt estate? Did congress mean that the district court, as a court of bankruptcy,—which is by the act invested with the jurisdiction, power, and authority to issue an injunction to restrain adverse claimants from selling or disposing of the property claimed by creditors to belong to the bankrupt estate,—should not have any jurisdiction, power, or authority to hear or determine the question whether the adverse claimant obtained the property, by the connivance and fraud of the bankrupt, for the purpose of defrauding the creditors of the bankrupt, in a suit brought by the trustee against the adverse claimant, to determine that question? Is there such a glaring and manifest inconsistency, either in the provisions cited or in the construction of the act as an entirety, which necessarily leads to such incongruous or absurd results? The language of the court of appeals in *Davis v. Bohle*, 34 C. C. A. 372, 375, 92 Fed. 325, 328, in determining the effect of an assignment and the right of the court of bankruptcy to issue an injunction to enjoin the assignee, is pertinent to the question under consideration as to the construction which should be given to the act. The court, among other things, said:

"If it be held that the assignee named in a deed of general assignment is entitled to hold the property committed to his charge, and administer the same pursuant to local laws, although the assignor is adjudicated a bankrupt, then the singular, not to say absurd, result will follow that the creditors of the assignor will be deprived of the benefit of all the provisions of the national bankrupt act which relate to the disposition, control, and management of bankrupt estates. In other words, a law which was intended, in part, at least, for the benefit of creditors, will be rendered practically valueless as to them in those cases where the debtor makes a general assignment. It is one of the fundamental rules for the construction of statutes that they should receive a sensible interpretation, and that a construction should always be avoided which, in its practical operation, tends to defeat any of the purposes of the statute, or which leads to an absurd consequence. Exceptions may be presumed, or words omitted or supplied, when it is necessary to accomplish the obvious intent of the lawmaker, and to prevent injustice or oppression. *U. S. v. Kirby*, 7 Wall. 482, 19 L. Ed. 278; *Heydenfeldt v. Mining Co.*, 93 U. S. 634, 23 L. Ed. 995; *Church of Holy Trinity v. U. S.*, 143 U. S. 457, 460, 461, 12 Sup. Ct. 511, 36 L. Ed. 226; *Scott v. Latimer*, 33 C. C. A. 1, 89 Fed. 843; *Thurber v. Miller*, 32 U. S. App. 209, 14 C. C. A. 432, 67 Fed. 371. We feel confident that congress did not intend by the recent bankrupt act to commit the administration of an insolvent estate to an assignee chosen by the bankrupt, who should be free from the control of the bankruptcy court having jurisdiction over the person of the bankrupt, or to deprive the creditors of a bankrupt in any case of those rights and remedies that have been carefully provided by congress to secure a faithful, economical, and uniform management of bankrupt estates. It follows, therefore, that a con-

struction of the act which would lead to the aforesaid results should be rejected. It is proper to add that the question at issue in this case, besides having been carefully considered by the trial court (In re Sievers [D. C.] 91 Fed. 366), has been recently considered, in an elaborate opinion, by Judge Brown, of the Southern district of New York, in *Re Gutwillig* (D. C.) 90 Fed. 475, 480. In the latter case it was held (and we find no occasion to question the soundness of that view) that the provisions of section 70 of the recent bankruptcy act are in themselves sufficient to vest the trustee in bankruptcy, when appointed, with the title to property of the bankrupt held by an assignee under a general assignment for the benefit of creditors, executed, as in this case, prior to proceedings in bankruptcy, if an adjudication subsequently follows within the statutory period of four months. That section declares, in substance, that the trustee shall be vested by operation of law with the title of the bankrupt to 'property transferred by him in fraud of his creditors'; and, as Judge Brown well observes, the fraud therein referred to is not limited to frauds arising, as at common law, from the intent of the bankrupt, but comprehends as well those constructive frauds which consist in making conveyances like a general assignment, which, if suffered to stand, will impair substantial rights conferred on creditors by the bankrupt law,—such as the right to have the estate administered by a trustee of the creditors' own choice, and under and subject to the provisions of the act and the control of the proper bankruptcy court."

Section 23 of the bankruptcy act in its entirety deals with the jurisdiction of the United States circuit courts. It is reasonable to assume that it was inserted for the purpose of avoiding, instead of creating, doubt and uncertainty that might otherwise exist if no limitation had been made as to their general jurisdiction. Subdivision "a" makes it clear that the circuit court is prohibited from entertaining jurisdiction of suits between the trustee and an adverse claimant to property which the creditors claim belongs to the estate of the bankrupt, unless the bankrupt himself could have resorted to the circuit court for the assertion of such claim against the adverse claimant. Then comes subdivision "b," which simply prohibits the trustee from bringing such suits in the circuit court.

In *Re Sievers*, supra, Judge Adams, after citing certain provisions of the act, said:

"In addition to this, it must be observed that the act itself is an administrative measure, enacted under a constitutional grant of power for the enforcing and collecting of the assets of an insolvent debtor and distributing them pro rata among his creditors; and the district court of the United States, as a court of bankruptcy, is the jurisdiction created for its administration. From this general consideration of the purposes of the act, and the jurisdiction generally and specifically conferred upon this court as a court of bankruptcy, as already pointed out, it appears that congress has directly, in terms, and by necessary implication conferred the requisite jurisdiction upon this court to entertain and determine any suits, at the instance of the trustee or otherwise, necessary for collecting, reducing to money, and distributing the estates of bankrupts, and for determining controversies in relation thereto, except such as are in this act otherwise provided for."

—And then discusses the meaning of the words "otherwise provided for," and expresses the opinion that, when full and comprehensive jurisdiction is first clearly conferred upon a court to do certain acts for certain purposes, any of such acts so generally comprehended cannot be withdrawn from such jurisdiction, under the exception referred to, unless it comes clearly and necessarily within the terms of the exception, and that the exception ought not to be so con-

strued as to absolutely nullify the rule; and then points out numerous cases where the trustee, in the discharge of his duties, might be required to bring suits in the state courts, and proceeds:

"But it is claimed, and the serious contention is, that section 23, subd. 'b,' creates an exception of such magnitude as deprives this court of jurisdiction to hear and determine any suit at the instance of a trustee, for any purpose connected with or necessary to the collecting of assets of the bankrupt's estate, or determining controversies in relation thereto. This view of the law, if correct, practically emasculates the entire scheme, renders nugatory the general and comprehensive jurisdiction apparently conferred by the preceding sections, and, it must be conceded, ought not to prevail, unless the intent of congress to that effect is perfectly clear. \* \* \* It is contended that, because the district courts of the United States have never afforded, and do not now afford, a jurisdiction available to a creditor to collect his debts, the trustee under the bankrupt act, by virtue of the terms employed, is precluded from resorting to this court, and must institute all suits for the recovery of assets and assertion of the rights of the bankrupt in the courts only in which the bankrupt could have so done if there were no proceedings in bankruptcy, and, therefore, of necessity in the courts of the state, or in such circuit court of the United States to which the bankrupt, in case of diverse citizenship between him and the debtor, could have resorted. To arrive at the true interpretation of this subdivision 'b,' attention should be given to the entire section, with a view of ascertaining if other provisions throw light upon it."

—And arrived at the conclusion that section 23, taken as a whole, amounts only to a curtailment of the jurisdiction of the circuit courts, and is not applicable to district courts or their jurisdiction, as is elsewhere in the act conferred upon them, and proceeds to give good and sufficient reasons in support of this conclusion.

In *Carter v. Hobbs*, Judge Baker said:

"The language of clause 'b' must be strictly construed to avoid repugnancy between it and a plenary grant of jurisdiction conferred by section 2. The application of these settled rules of construction leaves no doubt that the clause of section 23 under consideration does not divest courts of bankruptcy of jurisdiction over suits brought by the trustee to set aside fraudulent transfers of the bankrupt. The clause in question requires suits which the bankrupt might have brought or prosecuted to be brought in the courts in which the bankrupt must have brought them if bankruptcy had not supervened. It seems to me to be clear that, where the trustee brings a suit to enforce a right of action which never existed in the bankrupt, the district court has ample jurisdiction to maintain it. The trustee's right of action in such a case is not a derivative one, growing out of a prior right possessed by the bankrupt, but his right is original, created by law, and in the enforcement of it he represents the creditors, and his suit is, in effect, the exact equivalent of a creditors' bill to reach property fraudulently transferred. Such a suit could never have been brought or prosecuted by the bankrupt against himself and his fraudulent transferees. No state court could entertain jurisdiction over such a suit when attempted to be brought or prosecuted by the bankrupt, and no such construction of clause 'b' is admissible. When suits which the bankrupt could have brought or prosecuted in the courts of the state are spoken of, evidently real suits upon existing causes of action belonging to the bankrupt are meant, and not suits for the pretended enforcement of causes of action, which never existed in favor of the bankrupt."

The conclusion reached is wholly independent of the question whether or not the state courts have jurisdiction over a cause of action like the present. It must be conceded that the trustee might bring a suit in the state court, and, where the parties or property involved are situate in a county remote from the place where this court is held, it would, perhaps, be advisable for him to do so in order

to save expense or great inconvenience to the respective parties. All that is decided is that the state courts do not have the exclusive jurisdiction, and that this court, as a court of bankruptcy, has concurrent jurisdiction with the state courts to hear and determine controversies of this character. See *Robinson v. White*, supra. The first ground of the demurrer cannot be sustained.

2. The other points of the demurrer, to the effect that the complaint is multifarious, both as to parties defendant and as to the objects to be reached, are not, in my opinion, well taken. This conclusion, it seems to me, is virtually a necessary sequence from the views expressed in regard to the various sections of the act heretofore cited. See, also, section 70e and section 47a, cl. 2. In the discussion of these questions, as well as of the question of jurisdiction, a broad, liberal, and comprehensive view should be taken of the general purpose of the bankruptcy act, its intended scope and effect, the remedies provided for, the delays and expense to be avoided, and the objects sought to be accomplished thereby. It must be remembered that whatever jurisdiction this court has in this case is derived exclusively from the provisions of the act itself, and that the distinction which exists between actions at law and suits in equity under the general provisions of the acts of congress defining the jurisdiction of the United States courts has no application to the points raised by the demurrer. One of the most prominent features to be found in the bankruptcy act is that which requires all the proceedings to be instituted and determined at the least possible expense. In that respect it is designed and intended to be beneficial to the bankrupt, as well as to the creditors, and it is difficult to see why either of the parties should insist upon having, or being allowed, a divided jurisdiction in actions at law and suits in equity, which, if granted, would simply result in a multiplicity of causes of action, and create an unnecessary expense. The trustee in bankruptcy stands in the place of the creditors of the bankrupt, and has the same rights and may pursue the same remedies in their behalf as they could or would have been entitled to if there had been no adjudication in bankruptcy. He has, in my opinion, the right to embrace in one suit all such matters and causes of action as might be included by the creditors in a creditors' bill against the defendants. The real matter here involved is in the fraud alleged in regard to the disposition of the property of M. Nathan, the bankrupt. The fraud charged is, in brief, that the defendant Cohn obtained certain personal property belonging to the bankrupt in fraud of the rights of the creditors under the provisions of the bankruptcy act, and that Hausmann, by a pretended, fictitious, and illegal purchase, acquired possession of a portion of the personal property in fraud of their rights, which he refuses to surrender to the trustee, or to pay its value. Although the defendants are charged with different acts of fraud, affecting different portions of the estate of the bankrupt, it appears on the face of the complaint that their acts are charged to have been committed for a common fraudulent purpose; and the object of this suit is simply to wipe out the fraud, clear the title, and recover the property, or its value, for the cred-

itors. The ground or cause of action is the obstruction thrown in the way of recovery by the defendants, and the object is to remove the impediment. The fraud alleged relates to the same general subject. Each defendant has a common interest, centering in the real point in issue. The object of the suit is, therefore, single; but the defendants have, or claim to have, separate and distinct interests in the property, and to be interested in independent and separate questions, which are, however, all connected with and arising out of the single object of the suit. If equitable principles are to prevail, it is evident that complainant may bring such different persons before the court as defendants in order that the whole object of the bill may be obtained in one suit, and further litigation concerning the same issues be prevented. If the trustee should be required to sue each defendant separately, it would bring the same question of fraud into discussion in each suit, and thereby reduce the funds of the estate, and be productive in its results of all the mischief and oppression attending a multiplicity of suits, which should always, if possible, be avoided. The averments in the complaint in relation to the fraud show that the defendants performed different parts in the same drama; but it is one play,—one entire performance,—marked by different schemes or transactions towards a common end. The several matters charged in the complaint are not so distinct and unconnected as to render the joining of them in the complaint multifarious. The law in relation to a creditors' bill is well settled. As was held by Chancellor Kent in *Brinkerhoff v. Brown*, 6 Johns. Ch. 139, a bill may be filed against several persons relative to matters of the same nature, forming a connected series of acts, all tending to defraud and injure the plaintiffs, and in which all the defendants were more or less concerned, though not jointly, in each act. The general principles herein announced are supported by the following authorities: *Pullman v. Stebbins* (C. C.) 51 Fed. 10, 15; *Carter v. Hobbs* (D. C.) 92 Fed. 594, 596; *Spaulding v. McGovern*, 10 N. B. R. 188, Fed. Cas. No. 13,217; *Fellows v. Fellows*, 4 Cow. 682, 697, 702; *Boyd v. Hoyt*, 5 Paige, Ch. 65, 71, 77; *Way v. Bragaw*, 16 N. J. Eq. 213, 215; *Hamlin v. Wright*, 23 Wis. 491; *Chase v. Searles*, 45 N. H. 511, 519; *Reed v. Stryker*, 12 Abb. Prac. 47; 5 Enc. Pl. & Prac. 546, 558, and authorities there cited. Independent of these general principles, there is another reason why the points raised by the demurrer should not be sustained. It is evident that the complaint states a good cause of action against the defendant Hausmann, and the other matters alleged in the complaint may be treated as the mere inducement to the bringing of the action by setting forth a full and complete statement of all the fraudulent acts of the bankrupt, Nathan, and of the defendant Cohn, which, if proven to be true as alleged, would establish a clear case in favor of the trustee against the defendant Hausmann. If it should, therefore, be conceded that the prayer of the complaint is, as claimed by defendants' counsel, too broad,—if it asks for greater relief than upon the trial of the case the court thinks the trustee is entitled to,—it will not be granted. The demurrer is overruled.

WIMER et al. v. UNITED STATES.

(Circuit Court, S. D. New York. January 18, 1900.)

No. 2,391.

**CUSTOMS DUTIES—BOTTLE GLASSWARE.**

An importation of bottles and bottle-shaped receptacles holding less than a pint, used by chemists for their operations, are dutiable under Act 1894, par. 88, as "bottle glassware, not specially provided for," at three-fourths of a cent a pound.

Howard T. Walden, for importers.

H. P. Disbecker, Asst. U. S. Atty.

WHEELER, District Judge. Paragraph 88 of the act of 1894 provides for duties on "green and colored, molded, or pressed, and flint and lime glass bottles holding more than one pint, and demi-johns and carboys, and other bottle glassware of the same material not specially provided for, at  $\frac{3}{4}$  of a cent a pound; on vials, and on all other glassware of the same sorts 40 per cent. ad valorem." Except as to a test tube, about which no question is made, this importation is of bottles and bottle-shaped receptacles holding less than a pint, used by chemists for their operations, and not as mere containers. They have been assessed as "other glassware" at 40 per cent., against a claim that they are bottle glassware. The expression "bottle glassware" is broader than "glass bottles," and seems intended to cover something different from mere bottles used as containers. These bottle-shaped receptacles come within that description, and seem to be included by it. Decision reversed.

DOWNING v. UNITED STATES.

(Circuit Court, S. D. New York. January 16, 1900.)

No. 2,534.

**CUSTOMS DUTIES—STEEL TUBES.**

Tubes of wrought steel for holding gas under pressure are dutiable under Act 1894, par. 130, as tubes of steel for "boiler or other tubes," and not as manufactures of steel not otherwise provided for, under paragraph 177.

Comstock & Brown, for complainant.

H. P. Disbecker, Asst. U. S. Atty.

WHEELER, District Judge. These are tubes of wrought steel for holding gas under pressure. They seem to be specially provided for as tubes of steel under paragraph 130 of the act of 1894, for "boiler or other tubes" of steel, and consequently not to be manufactures of steel not otherwise provided for, under paragraph 177, as they were assessed. Decision reversed.

**McBRATNEY v. UNITED STATES.**

(Circuit Court, S. D. New York. January 18, 1900.)

No. 2,954.

**CUSTOMS DUTIES—LINEN DOILIES.**

Linen doilies and tray cloths, under  $4\frac{1}{2}$  ounces to the square yard, and containing more than 100 threads to the square inch, are woven fabrics of flax, dutiable under Act 1897, par. 346, last clause.

Curie & Smith, for complainant.

Charles D. Baker, Asst. U. S. Atty.

**WHEELER**, District Judge. The articles now in question are linen doilies and tray cloths, weighing under  $4\frac{1}{2}$  ounces to the square yard, and containing more than 100 threads to the square inch, and have been classified as "manufactures of flax" not specially provided for, under paragraph 347 of the act of 1897, against a protest that they are "woven fabrics of flax," under the last clause of paragraph 346. They are woven, and the question is whether they are "fabrics," in tariff speech. In the piece they are fabrics. They are none the less so by being cut apart. The word is amply broad enough to include them. *Junge v. Hedden*, 146 U. S. 233, 13 Sup. Ct. 88, 36 L. Ed. 953, and the cases there referred to, seem to support, rather than to be contrary to, this view. Decision reversed.

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**CALHOUN, ROBBINS & CO. v. UNITED STATES.**

(Circuit Court, S. D. New York. January 22, 1900.)

No. 2,974.

**CUSTOMS DUTIES—DARNING COTTON.**

Under Act 1897, par. 303, providing for a duty on "spool thread of cotton, including crochet, darning, and embroidery cottons on spools or reels" by the 100 yards of thread; "if otherwise than on spools or reels, one-half of one cent for each hundred yards or fractional part thereof,"—darning cotton of four strands, slightly twisted, in balls, is dutiable by the yards in length of darning cotton, and not the yards in length of the several strands of which it is composed.

Curie & Smith, for importers.

D. Frank Lloyd, Asst. U. S. Atty.

**WHEELER**, District Judge. This is darning cotton of four strands slightly twisted, in balls. Paragraph 303 of the act of 1897 provides for a duty on "spool thread of cotton, including crochet, darning, and embroidery cottons on spools or reels," by the hundred yards of thread; "if otherwise than on spools or reels, one-half of one cent for each hundred yards or fractional part thereof." A duty has been assessed for four times the length of the material, once for the length of each strand. The reference to and inclusion of darning cotton as a material of length by the 100 yards, would seem to refer to and include it by the length of that material as it is formed and known by that name. The yards in length meant



must be the yards in length of darning cotton, and not the yards in length of the several strands of which it is composed, which are not done up separately as darning cotton, but are put together and done up to constitute that article. Thread in length, including darning cotton in length, includes darning cotton as such in length, and not darning cotton in length of strands that by themselves are not darning cotton. Decision reversed.

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## HILLS v. UNITED STATES.

(Circuit Court, S. D. New York. January 16, 1900.)

No. 2,827.

## CUSTOMS—BOUNTY OF FOREIGN COUNTRY.

Where, under Act 1897, § 5, providing that, when any country shall pay any bounty on exportation of merchandise dutiable in this country, there shall be levied an additional duty equal to the bounty, Holland gives a bounty for the production of sugar, and provides that such bounty shall be deducted from the excise thereon, but that the excise shall be remitted on exportation, the duty is not a grant on the exportation, but on the production, and should not be added to the regular duty on the importation of sugar from that country.

Everit Brown, for complainant.  
D. Frank Lloyd, Asst. U. S. Atty.

WHEELER, District Judge. Section 5 of the act of 1897 provides that whenever any country "shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country" dutiable here, upon the importation thereof there shall be levied and paid "an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed." Holland lays an excise on sugar imported or raised for consumption, and gives a bounty for production. The producer is charged with the excise, and credited with the bounty by way of reduction. The bounty has been added to the regular duty upon this importation of sugar from that country, because the excise was remitted upon the exportation of it from that country, and so the bounty is said to be paid indirectly upon that exportation. The law of that country on this subject, after providing for deducting the bounty from the excise, provides further (chapter 8, art. 67, § 7): "If that deduction should cause the credit to exceed the debit, the difference shall be paid to the manufacturer or refiner from the revenue from the excise of the year from which the deduction takes place." This shows that, although the producer is not charged with the excise upon sugar exported, he is credited with the bounty upon all sugar produced, whether it is exported or not. The bounty is a bounty upon production, and not a bounty upon exportation, of the sugar, directly or indirectly. The excise only, and not the bounty, is affected by the exportation. Decision reversed.

**LEGGETT v. UNITED STATES.**

(Circuit Court, S. D. New York. January 22, 1900.)

No. 2,607.

**CUSTOMS DUTIES—ANCHOVIES.**

Anchovies packed in cylindrical tin boxes, of full half and quarter sizes, are taxable at 40 per cent. ad valorem, under Act 1894, par. 208, which, after prescribing the specific duty on anchovies in rectangular boxes, adds, "When imported in any other form, 40 per centum ad valorem."

Curie &amp; Smith, for complainant.

D. Frank Lloyd, Asst. U. S. Atty.

**WHEELER**, District Judge. These are anchovies packed in cylindrical tin boxes, of full, half, and quarter sizes. They have been assessed at the corresponding rates of full, half, and quarter sizes of the rectangular tin boxes of anchovies and sardines of paragraph 208 of the act of 1894. The capacity of the whole, half, and quarter rectangular boxes is of each, respectively, 70,  $32\frac{1}{2}$ , and  $20\frac{9}{16}$  cubic inches; that of these round boxes, as understood, 62, 42, 30.06, and 13. Paragraph 208, after prescribing the specific duty on the anchovies and sardines in rectangular boxes of not more than the particular lengths, widths, and depths, in exact inches, half inches, quarter, and eighth inches, adds, "When imported in any other form, forty per centum ad valorem." The form can refer only to that of the boxes, and these anchovies were imported in a distinctively "other form"; for these boxes do not have rectangular forms of any length or breadth, but have cylindrical forms, with only diameters and depths. In *La Manna v. U. S.*, 14 C. C. A. 381, 67 Fed. 233, "eighth" rectangular boxes, of the same general shape, and of about half the size of "quarter" boxes, were held to be in "other form" than the quarter boxes, and to be dutiable at the ad valorem rate. Decision reversed.

**UNITED STATES v. ONE CASE PAINTINGS, ENGRAVINGS, AND  
MANUFACTURES OF METAL.**

(Circuit Court of Appeals, Second Circuit. January 5, 1900.)

No. 65.

**1. CUSTOMS DUTIES—FORFEITURE FOR UNDERVALUATION—RECOVERY OF DUTIES PAID.**

The forfeiture and sale by the United States of imported goods for undervaluation, under the provisions of section 7 of the customs administrative act of 1890, as amended by section 32 of the tariff act of 1897, does not relieve the importer from liability for the duty thereon, so as to entitle him to a return of the duty paid. The obligation to pay the duty is incurred by the act of importation, and the importer is not relieved from such obligation by the violation of a different provision of the customs law, although he thereby incurs as a penalty a forfeiture of the entire importation.

**2. SAME—ABANDONMENT OF GOODS.**

Section 23 of the customs administrative act of 1890, which permits an importer to abandon to the United States all or any portion of the goods

included in any invoice, not less than 10 per cent. of the total value or quantity of the invoice, and be relieved from the payment of duties on the portion so abandoned, applies only to an invoice of goods imported in such condition as would have entitled the importer, under Rev. St. § 2927, for which said section 23 is a substitute, to claim an allowance for damaged goods; and an importer of goods not damaged cannot, by an abandonment of such goods, after they have been seized by the government for an attempted violation of the customs law, relieve himself from liability for the duty thereon, or recover the duty paid.

Appeal from the District Court of the United States for the Southern District of New York.

This was a proceeding to condemn certain imported merchandise as forfeited to the United States, according to section 32 of the tariff act of July 24, 1897, and section 9 of the customs administrative act of June 10, 1890. The facts appear in the opinion.

Arthur M. King, for the United States.

Max J. Kohler, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Fishel, Adler & Schwartz imported into the port of New York per steamship *La Normandie*, January 3, 1898, one case of paintings and engravings. The goods were subject to duty at 25 per centum ad valorem, under paragraph 403, Tariff Act 1897. Upon entry the estimated duties (\$70.50) were paid. The declared value in the invoice and entry of the particular items was 547.50 francs. They were duly appraised and returned by the appraising officer at 1,650 francs (\$316.50), an advance of over 200 per cent. In justice to the importers it should be stated that the valuation given in the entry was the price they actually paid for the goods, which they claim to have bought far below the market price, and that they failed to add an additional sum on the entry to make market value through the oversight of a clerk during a busy season. In section 7 of the customs administrative act of 1890, as amended by section 32 of the tariff act of 1897, are found the following provisions:

"If the appraised value of any merchandise shall exceed the value declared in the entry by more than fifty per centum, except when arising from a manifest clerical error, such entry shall be held to be presumptively fraudulent, and the collector of customs shall seize such merchandise and proceed as in case of forfeiture for violation of the customs laws, and in any legal proceeding that may result from such seizure, the undervaluation as shown by the appraisal shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same and forfeiture shall be adjudged unless he shall rebut such presumption of fraudulent intent by sufficient evidence. The forfeiture provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued."

In conformity to these provisions and to the practice in such cases, information was duly filed, and monition issued March 15, 1898. The goods were attached the next day by the marshal in the hands of the collector. On April 5th, the marshal's return, with proof of due publication of notice, having been filed, a writ of venditioni exponas was issued. The goods were sold April 28, 1898, for \$207.28

net, and that amount paid to the clerk of the court. The importers did not appear, nor did they contest the proceedings, nor did they dispute the right of the United States to a decree of forfeiture. Subsequently the court, upon motion of the attorneys for the importers, amended the decree of condemnation and sale so as to provide that the clerk of the court pay over to the United States the net proceeds of the sale only on condition the United States pay over to the importers the sum of \$70.52, being the amount of estimated duties deposited with the collector upon the entry of the undervalued merchandise. This was neither more nor less than a decree that the importers should be paid that sum out of the proceeds of the sale. In other words, persons who had not appeared nor claimed such merchandise, nor any part thereof, nor had in any way contested the case, were afterwards awarded a part of the proceeds, because they were, as the court found, creditors of the United States. This appeal might be disposed of upon a discussion of the procedure, but, inasmuch as the representative of the government has asked for a ruling upon the merits as a guide to the treasury department in future proceedings, the point of practice need not be considered. Section 1 of the customs administrative act of June 10, 1890, provides that all merchandise imported into the United States shall, for the purpose of this act, be held to be the property of the person to whom the merchandise may be consigned. Fishel, Adler & Schwartz were the consignees, and it is not disputed that they were the owners. The tariff act provides that there shall be levied, collected, and paid upon all articles imported from foreign countries the duties prescribed in the schedules. Fishel, Adler & Schwartz were the persons who imported the merchandise in question, and "by that act of importing an obligation to pay the duties is incurred. The obligation springs out of the statutes which impose duties." *Stockwell v. U. S.*, 13 Wall. 531, 20 L. Ed. 491. It is not disputed that the \$70.52 which the importers paid on account of duties was less than the 25 per cent. ad valorem which the tariff act required. When the importers paid the \$70.25, therefore, they paid it as a debt owing from them to the United States. What subsequent occurrence has relieved them from the obligation to pay the debt they incurred when they caused these foreign goods to be imported? Certainly not the undervaluation, or proceedings thereon under section 32 of the act of 1897, quoted supra. That provides only for a penalty to be exacted when the importer fraudulently undervalues his goods. The fact that such penalty involves a forfeiture of the whole package undervalued is in no way inconsistent with the other provision of statute which requires the importer to pay duty. "Importation" and "fraudulent undervaluation" are two distinct acts. The doing of the one act makes the importer a debtor to the government for the amount of duties, the doing of the other act makes him lose his goods; but there is nothing in the language of section 32 which can be construed as a remission of the obligation to pay duties in any event. We find nothing in the numerous authorities cited by both sides which conflicts with this interpretation of the sections now before us. No question is presented here as to whether the

government can exact duty on articles whose importation it has prohibited, nor whether, under the statutes, it can exact two penalties for the same offense, can collect an additional or penal duty under one section, and forfeit the goods under another for the same act of undervaluation. On the contrary, we have the one section requiring payment of duties as an incident of importation, and the other imposing forfeiture as the penalty for undervaluation. The district judge was evidently misled by an opinion of the attorney general, as will be apparent from the following excerpt from the brief memorandum of opinion filed upon amendment of the decree:

"The government gets the benefit of the duties presumably in the price received on the sale of them; so that there is no presumptive loss of duties. After such a decree, I do not think the duties could be liquidated or collected of the importer, who, by not claiming them, virtually abandoned them as allowed to do under the act of June 10, 1890. 21 Op. Attys. Gen. 326."

There is no doubt as to the soundness of this conclusion if the premises are correctly stated. If the statute allows the importer to abandon his goods, and thereupon relieves him from the payment of duty thereon, of course the government cannot collect duty; and, if the customs officers have collected it, the importer may by proper proceedings secure its return. But the difficulty is that there seems to be no such provision in the statutes. The opinion of the attorney general, under date of April 10, 1896, addressed to the secretary of the treasury, is as follows:

"You ask me whether an importer of goods, no part of which is damaged, may be relieved from the payment of the duties on any portion (not less than 10% in value or quantity) of his invoice by abandoning it to the United States. In my opinion, the operation of this section is not confined to damaged goods, and it is not the intent of congress that the United States should in any case exact as duties an amount greater than the values of the property imported. Your question is, therefore, answered in the affirmative." 21 Op. Attys. Gen. 326.

The section referred to is section 23 of the customs administrative act of 1890. It has been amended by the act of May 17, 1898 (30 Stat. 417), so as to add a clause providing that abandoned merchandise shall be delivered by the importer in compliance with the direction of the chief officer of customs, but in all other respects it remains unchanged. The section reads as follows:

"That no allowance for damage to goods, wares and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon, but the importer thereof may within ten days after entry abandon to the United States all or any portion of goods, wares and merchandise included in any invoice and be relieved from the payment of the duties on the portion so abandoned. Provided, that the portion so abandoned shall amount to ten per cent. or over of the total value or quantity of the invoice."

This section takes the place of the old provision of the Revised Statutes as to damage allowance (section 2927), which by the act of 1890 is expressly repealed; and it is apparent on the face of the act that the only importer to whom the privilege of abandonment and relief from payment of duties is accorded is the "importer thereof"; i. e. of goods, wares, and merchandise imported in such condition as would have entitled him, under the repealed section, to claim an

allowance for damages. The opinion of the attorney general refers to no authority, and presents no argument in support of his construction, which seems not warranted by the language of the section referred to. We do not find in it sufficient authority for the conclusion embodied in the decree of the district court, which is, therefore, reversed, with costs of this appeal, and cause remanded, with instructions to decree in conformity to this opinion.

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**WM. J. MATHESON & CO., Limited, v. UNITED STATES.**

(Circuit Court, S. D. New York. December 19, 1899.)

No. 1,520.

**CUSTOMS DUTIES—ALIZARINE BLACK.**

Alizarine black is properly classified under Act 1890, par. 478, of the free list, and not under paragraph 18, as a coal-tar color not specially provided for.

Everit Brown, for complainant.

Charles D. Baker, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The merchandise in question, "Alizarine Black," was classified for duty, under paragraph 18 of the act of 1890, at 35 per cent. ad valorem, as a "coal-tar color or dye, \* \* \* not specially provided for in this act," and claimed as free, under paragraph 478 of the same act, as a "dye commercially known as 'Alizarine Black.'" This merchandise is of the same character as that considered in No. 1,201, between the same parties, reported in 90 Fed. 276, and the testimony in that case has been stipulated into this case. I am satisfied that the additional evidence taken herein is not such as to justify a modification of the views expressed in the opinion in No. 1,201, concurred in in the subsequent cases of *U. S. v. Sehlbach*, 33 C. C. A. 277, 90 Fed. 798, and *Klipstein v. U. S. (C. C.)* 91 Fed. 520. The decision of the board of general appraisers is reversed, for the reasons stated in said opinion.

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**KAUFFMANN BROS. v. UNITED STATES.**

(Circuit Court, S. D. New York. December 19, 1899.)

No. 2,993.

**CUSTOMS DUTIES—FISH IN TINS.**

Fish in tins, pickled with vinegar, and known as "Bismarck herrings," are dutiable under Act 1897, par. 258, under the provision for "all other fish except shellfish, in tin packages," at 30 per cent. ad valorem, and not as "pickled herrings," at one-half of one cent per pound.

Appeal by the importers from a decision of the board of general appraisers, which affirmed the assessment of duty by the collector upon the importations in question.

Hatch & Wickes, for importers.

D. Frank Lloyd, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The board of general appraisers have correctly found that the goods in question are fish in tins, pickled with vinegar, and known as "Bismarck herrings." They were classified for duty under paragraph 258 of the act of 1897, under the provision for "all other fish (except shellfish), in tin packages," at 30 per cent. ad valorem. The importers protested, claiming that they were dutiable as "pickled herrings," at one-half of one cent per pound. The board of general appraisers cited the decision of Judge Lacombe in *Re Johnson* (C. C.) 56 Fed. 822, and affirmed the decision of the collector. I think congress intended, by the provision for a duty of 30 per cent. on "all other fish, in tin packages," to provide that any fish imported in such packages should pay the duty of 30 per cent., irrespective of the kind of fish therein. As Judge Lacombe says in the *Johnson Case*, "the apparent intention is not so much to lay the duty on fish, but to lay the duty upon the tin cans that brought the fish in." The decision of the board of general appraisers is affirmed.

## WELLS, FARGO &amp; CO. v. UNITED STATES.

(Circuit Court, S. D. New York. December 23, 1899.)

No. 2,720.

## CUSTOMS DUTIES—NAPKINS.

Where napkins and tablecloths are substantially embroidered, they are properly assessed for duty under Act 1894, par. 276, as articles embroidered by hand or machinery, at 50 per cent. ad valorem.

Appeal by Wells, Fargo & Co. from a decision of the board of general appraisers which affirmed the action of the collector in assessing duty upon the importations in question.

Hatch & Wickes, for importers.

Henry C. Platt, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The merchandise in question comprises certain napkins and tablecloths, assessed for duty under the provisions of paragraph 276 of the act of 1894, as "articles embroidered by hand or machinery, composed of flax," n. s. p. f., at 50 per cent. ad valorem. The importers protested, claiming that they were dutiable at 35 per cent. ad valorem, under paragraph 277 of said act, as "manufactures of flax" n. s. p. f. The contention of counsel for the importers that the embroidery is insignificant is not sustained by the proof. The articles are substantially embroidered,—in some cases with a monogram; in others, with a crest and initial. The decision of the board of general appraisers is affirmed.

**CLEARY & CO. v. UNITED STATES.**

(Circuit Court, S. D. New York. December 28, 1899.)

No. 2,669.

**CUSTOMS DUTIES—ROSES.**

Where merchandise comprised certain roses claimed as free under Act 1894, par. 587, as plants known as "nursery stock," they were properly assessed under paragraph 234½ of said act as plants used for forcing under glass as cut flowers.

Appeal by Cleary & Co. from a decision of the board of appraisers affirming the classification by the collector of the merchandise in question.

W. Wickham Smith, for importers.

Henry C. Platt, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The merchandise herein comprises certain roses claimed as free under paragraph 587 of the act of 1894 as "plants, trees, shrubs, etc., commonly known as 'nursery stock,'" and assessed for duty under the provisions of paragraph 234½ of said act as "plants used for forcing under glass for cut flowers or decorative purposes" at 10 per cent. ad valorem. The appraiser reported the merchandise as "forcing plants." The single witness produced on behalf of the importers admitted that he knew nothing about this specific importation. Upon the report of the appraiser the board overruled the protest. The decision of the board of general appraisers is affirmed.

**MERCK v. UNITED STATES.**

(Circuit Court, S. D. New York. December 23, 1899.)

No. 2,533.

**1. CUSTOMS DUTIES—BOTTLES.**

Bottles holding not more than one pint of free goods, and those subject to a specific duty, are free.

**2. SAME.**

Bottles holding more than one pint of merchandise subject to an ad valorem duty are not themselves subject to duty.

Appeal by one Merck from a decision of the board of general appraisers which affirmed the action of the collector in assessing duty upon the importations in question.

Everit Brown, for importer.

Charles D. Baker, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The articles in question are bottles holding, respectively, more and not more than one pint, and holding various kinds of merchandise, some free, some subject to a specific duty, and some subject to an ad valorem duty. The importer admits that, as to the bottles holding not more than one pint, the duty assessed under paragraph 88 of the act of 1894 is



correct. All the questions herein as to bottles holding not more than one pint have been disposed of by the courts. That the bottles holding free goods and those subject to a specific duty are free is decided in *U. S. v. Leggett*, 13 C. C. A. 448, 66 Fed. 300, and the cases below cited; that the bottles holding merchandise subject to an ad valorem duty are not themselves subject to duty is decided in *U. S. v. Dickson*, 19 C. C. A. 428, 73 Fed. 195, and *U. S. v. Ross*, 33 C. C. A. 361, 91 Fed. 108. The decision of the board of general appraisers is affirmed as to the bottles holding more than one pint, and reversed as to those holding not more than one pint.

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UNITED STATES v. DANA et al.

(Circuit Court of Appeals, Second Circuit. January 5, 1900.)

No. 69.

1. CUSTOMS DUTIES—CLASSIFICATION—SIMILARITY OF USE.

To constitute similarity in use, within the meaning of the similitude clause of the tariff act of 1894 (section 4), which will require a nonenumerated article to be classified with one enumerated, the uses of the two need not be identical or interchangeable.

2. SAME—FERROCHROME.

Ferrochrome, which is a product obtained by smelting chromic ore, is dutiable under paragraph 110 of the tariff act of 1894, by reason of its similarity in use to ferromanganese, covered by such paragraph, and not under section 3, as a manufactured article not enumerated or provided for, both articles being used in the manufacture of steel, to produce a tough, hard quality, the former when the iron ore contains an excess of phosphorus, and the latter when it shows an excess of sulphur.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Chas. D. Baker, for the United States.

Wm. Wickham Smith, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This appeal involves the dutiable classification, under the tariff act of 1894, of "ferrochrome," a product obtained by smelting chromic ore, and used in the manufacture of steel.

The importations were classified by the collector under section 3 of the act, as "manufactured articles not enumerated or provided for," and subjected to duty at 20 per centum ad valorem. Upon an appeal by the importers, the board of general appraisers affirmed the action of the collector, and the circuit court reversed that decision. 91 Fed. 522. The circuit court held that the articles should have been classified under paragraph 110, which imposes duty upon ferromanganese at the rate of four dollars per ton; the ground of the decision being that ferrochrome and ferromanganese are similar articles in the uses to which they are applied, and, as the former was unenumerated, it was, by force of section 4, by similitude, subject to the duty imposed on ferromanganese. As the importers have not appealed from the

decision of the circuit court, and as it is not disputed that ferrochrome is a manufactured article, not specifically enumerated or provided for in the act, the single question is whether there is a similitude between the articles ferrochrome and ferromanganese, within the meaning of section 4, which prescribes that any nonenumerated article "which is similar either in material, quality or texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned."

Upon the appeal from the decision of the board of general appraisers no further evidence was taken, and the case was heard upon the evidence which was adduced before the board. There is no conflict in that evidence, but the court below differed from the board in the conclusion to be deduced from the undisputed facts.

It appears that both articles are used in the process of producing extra tough, hard metal, their distinct use being as an admixture with the iron ore which is to be converted into steel. In one sense, they are used interchangeably; that is, both articles are used side by side, the one being selected when the iron ore has an excess of phosphorus, and the other when it has an excess of sulphur. According to the testimony, when the analysis of the base shows an excess of phosphorus the ferrochrome is used, because it neutralizes the action of the phosphorus; and when it shows an excess of sulphur the manganese is used, because it eliminates the sulphur. The testimony suggests, also, that the two articles are sometimes used interchangeably in another sense. They come in different grades, ranging from 20 to 80 per cent. in the quantity of pure chromium or manganese contained in the article. The testimony suggests that a low grade of ferrochrome is sometimes used as a substitute for ferromanganese. The board of general appraisers apparently did not so understand the testimony, and we are not able to satisfy ourselves that it should be so understood. The question, then, is, no similarity in other respects being shown, whether the similarity in use, notwithstanding the differences in the mode of use of the two articles, establishes their similarity in the sense of action.

The terms of the section are satisfied if the use to which the two articles are adapted is similar, although in other particulars there may be no similarity between them. The use referred to is the "employment or effect in producing results." *Murphy v. Arnson*, 96 U. S. 133, 24 L. Ed. 773. In *Pickhardt v. Merritt*, 132 U. S. 258, 10 Sup. Ct. 80, 33 L. Ed. 353, where one of the questions was as to the similitude between certain imported dyes and "aniline dyes," the court instructed the jury that the mere application of the two articles "to the dyeing of fabrics does not create the similitude, but, if there was a similitude in the mode of use, a similitude in the same kind of dyeing, producing the same colors in substantially the same way, so as to take the place of aniline dyes in use, there would be a similitude in use." The supreme court approved that instruction. In the present case the two articles are used in the treatment of iron ore to produce a steel of peculiar properties. It would seem that similitude between two

articles is established when the predominant use of both is to effect in a particular art or process the same concrete result. However that may be, there is in the present case a closer criterion of similarity. The use of both is to effect in the smelting of iron ore the elimination of objectionable properties, and in accomplishing this result one is the equivalent of the other. Moreover, the subordinate result effected by each resembles that of the other. The result accomplished by the ferrochrome in counteracting the phosphorus in the ore is analogous to that of the ferromanganese in counteracting the sulphur. The uses of the two articles, though not identical, are affiliated. The section does not require identity, but is satisfied by similarity in uses.

We conclude that similitude, within the meaning of the section, is established by the evidence, and that the decision of the circuit court was correct.

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MASTIN v. MASTIN.

(Circuit Court, W. D. Missouri, W. D. February 1, 1900.)

No. 1,988.

INTERNAL REVENUE—INSTRUMENTS REQUIRING STAMP—DEED OF RELEASE BY RECEIVER.

A deed of release, executed by a receiver appointed for a partnership to the partners, on the termination of the receivership, pursuant to an order of the court, made on final decree, winding up the administration of the estate, is but a formal evidence of the transfer which results by operation of law, and is not a conveyance, which requires a stamp, under the war revenue act of 1898.

On Application by Receiver for Instructions.

Karnes, Hagerman & Krauthoff, for complainant.

T. L. Frank Jones, for defendant.

PHILIPS, District Judge. The receiver, Hugh C. Ward, heretofore appointed by the court in the above-entitled cause, on the final decree of the court winding up the administration of said estate, being required to execute a deed of release back to the above-named parties, has submitted to this court for its ruling the question as to whether or not, under the internal revenue laws of the United States, he is required to place upon such deed of release revenue stamps, and, if so, to what extent. The provision of the revenue law is as follows:

"Conveyance: Deed, instrument, or writing, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value exceeds one hundred dollars and does not exceed five hundred dollars, fifty cents; and for each additional five hundred dollars or fractional part thereof in excess of five hundred dollars, fifty cents."

Whatever may be said in respect of the controlling words in said section, it clearly enough applies alone to the instance of a sale and transfer of property to a purchaser between whom something of

value invested in and belonging to the grantor passes to the grantee, whereby the grantee receives a benefit capable of estimation in money value. In this case, upon the petition of one of the partners, for the purpose of winding up the co-partnership, the partnership estate was placed in custodia legis, and a receiver was appointed solely for the purpose of administration. By the decree of the court granting the injunction and appointing the receiver, the co-partners were required to place their title to the property in the receiver. This was merely for the purpose and convenience of judicial administration. No valuable consideration passed from the receiver to the grantors. Without such order of court, and without such conveyance, by operation of law, under the decree of the court appointing the receiver, the right, title, and interest of the parties passed to, and vested in, the receiver pendente lite, which would have enabled the receiver, under the order and direction of the court, to make sales and conveyances of the property. Such deeds by the receiver unquestionably would have required the requisite revenue stamp. The conveyances made by the parties to the receiver, in compliance with the order of the court, were essentially conveyances in invitum on the part of the grantors, and were essentially conveyances made by operation of law, solely for the better convenience and purposes of administration pendente lite. It is unlike the instance of a conveyance by the owner of property to a designated trustee to hold in trust for the security of a beneficiary, under which a deed terminating such trust, and revesting the title, "should be stamped according to the amount required on the trust deed that is released or terminated." But in the case under consideration the transfer of the title to the receiver was but supplemental and ancillary to the transfer by operation of law under the decree, and was not made for the better security of any designated debt or claim. Therefore, on the final decree of the court, after the purposes of the judicial proceeding were accomplished, the court could have decreed the title thus vested in the receiver back to the co-partners, and the title would have reverted by simple operation of the decree in them. In such case, there could be no pretense that such reinvestiture constituted a conveyance, within the meaning of the revenue law. The fact that the court, in addition to the decree itself, made the further provision or requirement that the receiver should remise and release to the parties this title taken in custodia legis, ought not to produce a different result, in so far as the revenue laws are concerned. In such case no consideration passes from the grantees to the grantor. The receiver receives nothing, and the grantees pay nothing. And, in the judgment of the court, it is not within either the letter or the spirit of said provision of the revenue law that such transfers come within the purview of sales and purchases contemplated by the act. In such case the receiver has no discretion but to obey the decree of the court. And, as he is but the "right arm" of the court, he but acts in the retransfer as the instrument of the court; and when the deed is executed the grantees but receive what, in law and equity, is their own, and it would be unconscionable to exact of either a tax upon such deed.

## UNITED STATES v. HADLEY.

(Circuit Court, D. Washington, N. D. January 30, 1900.)

## 1. CRIMINAL LAW—JURISDICTION.

An offense committed upon an Indian reservation within a state is not cognizable in a federal court, under Act Cong. March 3, 1885 (1 Supp. Rev. St. U. S. [2d Ed.] 482), unless the offender is an Indian.

## 2. INDIANS—HALF-BREEDS.

Half-breeds who never receive recognition from their white parents, but are left to be nurtured during childhood by Indian relatives, and live as savages, and are subjects of governmental care, have the status of Indians.

## 3. SAME—CITIZENSHIP—JURISDICTION.

Children born in lawful wedlock within the United States, the father being a white man and a citizen of the United States, and the mother an Indian woman who has adopted the habits of civilized life and lives apart from her tribe, are by virtue of Const. Amend. art. 14, and Rev. St. § 1992, citizens of the United States, and their status is not changed by residence upon an Indian reservation and receiving allotments of Indian land. Half-breeds, who are citizens by birth, cannot be brought to trial in the federal courts, under a statute which limits the jurisdiction to offenses committed by Indians.

Indictment for larceny upon an Indian reservation. Heard on demurrer to indictment. Demurrer sustained.

Charles E. Claypool, Asst. U. S. Atty.

Edward Whitson, for defendant.

HANFORD, District Judge. The demurrer raises the question whether this case is cognizable in this court. The ninth section of the act of congress making appropriations for the current and contingent expenses of the Indian department, etc., approved March 3, 1885 (1 Supp. Rev. St. U. S. [2d Ed.] p. 482), provides that:

"All Indians committing upon the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction of all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundary of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

The indictment charges that the defendant is an Indian, and this allegation is material and necessary to bring the case within the purview of the statute, and therefore essential to the jurisdiction of the court. The defendant denies that he is an Indian, and on that ground disputes the jurisdiction of the court to deal with him for the offense charged; and for the purpose of submitting the real question in the case, as a question of law, for the court to decide, it has been stipulated as follows:

"It is agreed that the parents of the defendant were married under the laws of the territory of Washington in 1873; that the father is a white man, and a naturalized citizen of the United States, and that the mother is an Indian, and a member of the Yakima tribe of Indians; that the defendant was born off the reservation, in the county of Yakima, and went there with the parents to reside in 1881, where he now resides; that he has received land as an allotment under the act of congress of 1887, has his patent therefor, and is now holding said land."

To interpret and apply the act of 1885, above quoted, correctly, according to the intent of congress, when dealing with persons of mixed blood charged with the commission of any of the offenses enumerated, within a state, it is necessary to consider all the facts and conditions affecting the status of the accused person, as well as the facts in regard to the blood of his parents. It is a matter of common knowledge, and therefore within the judicial knowledge of the court, that in some instances the half-breed children of unmarried Indian mothers never do have recognition, support, or care from their fathers, but are left to be nurtured during childhood by the mothers and their people only. They grow up among Indians, and live as Indians, and are as much the subject of governmental concern as Indians of full blood. Another class of Indian half-breeds are born under the sanction of marriage, the father being a white man and a citizen, and maintaining an independent home; and the mother, although an Indian, is by her marriage, and adoption of the habits of civilized life, entirely separated from her Indian tribal relatives. The half-breed children of such parents, born within the United States, reared and educated as other children of citizens, are by the provisions of the fourteenth amendment to the constitution, and by section 1992, Rev. St., made citizens of the United States, and are, in the eyes of the law, entitled to all the rights, privileges, and immunities of other citizens; and they are as distinct from the other class of half-breeds which I have described as any other civilized people are distinct from savages. It is not compatible with their rights and dignity as citizens that they should be amenable to laws applicable to Indians only. I hold that the statute of 1885 must be understood as having reference to the actual legal status of the offender, and that the facts as to the blood of their parents are not to be considered in the determination of the question whether they are Indians, within the meaning of the statute, except in so far as blood fixes their legal status. According to the admitted facts, the defendant in this case is by law given the legal status of his father, and is by birth a citizen of the United States; and I hold that he is not subject to indictment and trial in this court for an offense which is cognizable in this court only when committed by an Indian. The status of the defendant was fixed by the circumstances of his birth, and could not be changed by his subsequent residence upon an Indian reservation, and receiving and holding an allotment of Indian lands. Whether the allotment was lawful or otherwise is a question which cannot be determined in this proceeding, and I consider that it is immaterial, because the action of the officers of the Indian department in

making the allotment to him could not have the effect to deprive him of his birthright as the son of a white man, and a citizen of the United States. Demurrer sustained, and defendant discharged.

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FULLER v. HUFF et al.

(Circuit Court, S. D. New York. December 27, 1899.)

TRADE-NAMES—INFRINGEMENT.

One dealing in prepared foods in the name of "Health Food Company" cannot enjoin the use by another, dealing in similar products, of the name "Sanitarium Health Food Co.," on the ground that the use thereof is calculated to divert plaintiff's business to defendant; the products being known as "health foods" to some extent, and to that extent the words being merely descriptive, and the prefix "Sanitarium" being sufficient to distinguish the names in trade.

In Equity.

Charles G. Coe, for plaintiff.

Kerr, Page & Cooper, for defendants.

WHEELER, District Judge. The plaintiff, a citizen of New Jersey, has for many years dealt in cereal products and prepared foods, in the name of "Health Food Company," adopted by him for that purpose, at New York and elsewhere; and the defendant, the Health Reform Institute, a corporation of Michigan, by the defendant Huff, as manager, in the name of the "Battle Creek Sanitarium Health Food Co.," and "Sanitarium Health Food Co.," adopted since, deals in similar products and foods. The plaintiff does not, and, upon the case, well could not, claim that the defendants adopted the words "Health Food" into their business name for the purpose of appropriating the plaintiff's trade, nor that such use has had that effect to any appreciable or known extent, but would sustain the bill for that such use of these words is calculated to divert the plaintiff's business to the defendants. Such special products and preparations are known as "health foods" to some extent, at least, and to that extent the words would be merely descriptive of the articles; and any one would seem to have a right to use them upon those articles, in any name or mark that would not otherwise signify another's business. *Goodyear India-Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535. And in this case the words "Battle Creek Sanitarium," or the word "Sanitarium," prefixed to the plaintiff's business name, to constitute the defendant's, would seem to as well distinguish the names in trade as a different given name to the same surname of different persons would. They seem clearly distinguishable, and would not necessarily, nor be likely to, create damaging business confusion. So the defendants do not appear to have unlawfully appropriated the plaintiff's business name in making up their own. Bill dismissed.

## PFENNINGER v. HEUBNER.

(Circuit Court, E. D. Missouri. January 26, 1900.)

No. 4,160.

## 1. PATENTS—REISSUE—LACHES AND FRAUD.

Complainant, after twice amending his application to meet objections of the patent office, accepted a patent limited by such amendments to a device of a particular construction, in connection with other old and well-known elements. Nineteen months afterwards, and after he had examined a device constructed and successfully operated by defendant, he applied for and obtained a reissue on the ground that through "inadvertence, accident, or mistake" he had not correctly stated his claim in his original application, and in such reissue he broadened his claim so as to cover the device of the defendant. *Held*, that after a delay for such a length of time, and under the circumstances shown, the application for reissue could not be considered as having been made in good faith, and the reissue was void.

## 2. SAME—IMPROVED BAKERS' OVENS.

The Pfenninger reissue, No. 11,439 (original patent No. 437,018), for an improvement in bakers' ovens, *held* void for laches and fraud in applying for reissue.

This was a suit in equity for infringement of a patent. On final hearing.

Chas. F. Kellar, John J. O'Donohue, and James P. Kerr, for complainant.

Geo. H. Knight, for defendant.

ADAMS, District Judge. This suit is brought to restrain an alleged infringement of reissued letters patent of the United States No. 11,439, granted to complainant September 4, 1894. The patent is for an improvement in bakers' ovens. The first claim, which alone is charged to be infringed by the defendant, is as follows:

(1) A bake oven comprising a suitable fire box, a horizontal combustion flue leading therefrom, take-up flues communicating with the rear of said horizontal flue, a second horizontal flue leading from said take-up flues to the front of the oven, an exit and take-up flue leading from said second horizontal flue, a baking compartment passing entirely through the oven, and open at both ends, interposed between the walls of the horizontal flues, and having its corners contiguous to the taking-up flues, and suitable means for guiding and suspending the materials to be baked above the floor of the baking compartment, substantially as set forth.

This claim, when analyzed, discloses a combination of the following distinct elements: (1) A fire box; (2) a horizontal flue leading from the fire box; (3) uptake flues communicating with the rear end of the horizontal flue; (4) a second horizontal flue leading from the uptake flues to the front of the oven; (5) an uptake flue leading from the last-mentioned horizontal flue; (6) a baking chamber located between the horizontal flues, and which extends the full length of the oven, and is open at both ends, with its corners contiguous to the uptake flues; and (7) means for guiding and suspending the material to be baked over the floor of the baking chamber. The defenses are want of novelty, laches and fraud in applying for and securing the reissue, abandonment, and noninfringement. Briefly described, complainant's oven consists of a baking chamber extend-



ing the full length of the oven, and open at both ends. Beneath the baking chamber is a horizontal flue extending from the fire box at one end of the oven to vertical flues at the other end of the oven. The vertical flues extend upward on each side of the baking chamber to another horizontal flue located over the baking chamber. This latter flue extends back to the fire box end of the oven, and there communicates with other vertical flues through which the products of combustion are delivered either to a chamber at the fire-box end of the oven, or through a third horizontal flue to a chamber at the other end of the oven. Vertically adjustable ridges are arranged in the baking oven, upon which the pans are supported and guided through the chamber. A true interpretation of this reissue necessarily involves a consideration of the original patent, No. 437,018. This was granted to complainant April 19, 1892, on an application filed October 21, 1891. The history of this original patent, as disclosed by the file wrapper, shows that, as originally applied for, the patentee undertook to secure a patent on the arrangement of flues, hot-air passages, and oven, substantially as shown in the first six elements of the reissued patent. Upon certain references made by the patent office, the original and first amended claims were disallowed, and the patent was ultimately granted upon a claim for a particular construction of a device, in connection with the flues and air passages referred to in the disallowed claims, for elevating or lowering the track ridges which support the baking pans in their progress through the oven in the process of baking. The specification of the original patent shows that the importance of this device arose out of the necessity of frequently elevating the pans above the floor of the oven to decrease the temperature of the pans, and also of frequently lowering them again for the purpose of increasing the temperature when required. To accomplish this object, quite an elaborate mechanism, consisting of tracks, levers, cams, chain wheels, and endless chain, are described, and made the essence of the first claim. It is sufficient for the present purpose to say that a particular device was described, claimed, and allowed in the original patent to accomplish the important purpose of raising and lowering the pans in the process of baking. This specific device does not cover the defendant's device, which is now claimed to infringe the first claim of the reissue. The proof shows that in the summer of the year 1893 the defendant constructed and commenced to use the oven he is now using, and that he applied for a patent thereon on September 28, 1893. In August, 1893, the complainant saw defendant's oven, and observed its mode of operation. As already said, this oven of the defendant's did not infringe the claims of the complainant's original patent. It showed a mechanism for suspending the pans above the floor of the oven essentially different from the particular device of complainant's original patent for that purpose. On November 28, 1893, complainant filed an application for a reissue of his original patent under the provisions of section 4916 of the Revised Statutes, claiming that through "inadvertence, accident, or mistake" he did not correctly state or claim the invention in his original application. After defendant, in September, 1893, applied

for a patent on his oven as his own invention, the complainant filed an application for the same, claiming that he was the original inventor thereof. An interference was declared in the patent office, which resulted, in 1896, in sustaining the defendant's pretensions, and a patent (No. 552,838) was issued to him covering the device now alleged by complainant to be an infringement of his reissue patent.

It thus appears that complainant waited 19 months after the grant of his original patent before he so discovered his "inadvertence, accident, or mistake" as to apply for a correction in the shape of a reissue, and that during this time the defendant devised the oven now claimed to be an infringement of the reissue, and put it into successful operation. It also appears that the complainant saw and observed the operation of defendant's device before he became aware of his "inadvertence, accident, or mistake." The reissue, as applied for and as granted, claimed (instead of the particular construction as found in the original patent) broadly "any suitable means for guiding and suspending the materials to be baked above the floor of the baking compartment." This broad claim, unless held invalid for want of novelty, would probably cover the defendant's device. The question now is whether the reissue granted under these circumstances, and with this effect, is valid. The claim of complainant's original patent, as already seen, was limited to a special and particular form of carrier in a combination with a then well-known oven. After observing defendant's oven, and realizing, as he must have done, that his own patent, by reason of its limitation, did not cover defendant's construction, the complainant applied for a reissue of his original patent on claims broad enough probably to cover the same. The file wrapper of the original patent showing the original claims, amendments, and subsequent acceptance of the patent with a limitation to a particular form of carrier, in my opinion, shows careful, discriminating, and intelligent action on the part of the patentee, the complainant in this case, quite inconsistent with his present contention. He voluntarily accepted a grant so narrowed and limited by the action of the patent office as conclusively estopped him from subsequently claiming to the contrary. I believe his original patent fairly shows his actual invention, and certainly all of it, which, by his own voluntary action in accepting limitations, he did not abandon to the public. I am satisfied from the proof in this case that complainant's alleged "inadvertence, accident, or mistake" is an afterthought, inspired, 16 months after his original patent was issued, by observing defendant's successfully operating device, consisting of an endless carrier in a rotary oven constructed so as to occupy a medium position in the oven above its floor, and specially inspired by a cupidity to appropriate the same to his own exclusive use. Between the date of the issue of complainant's original patent and the date of his application for a reissue 19 months expired, during which time defendant's rights supervened. This was too long a time, under the circumstances of the case, to permit him to consume in discovering that he had made a mistake. I am satisfied that complainant's proceedings to secure a reissue were not made in good faith to correct an error, but in bad faith to overreach

a competitor. Under such circumstances the reissue, amounting, so far as the claim in question is concerned, to nothing more than a broadening of the claim of the original patent for the palpable purpose of monopolizing the device of the defendant, cannot be valid. *Soda-Fountain Co. v. Zwietusch* (C. C.) 75 Fed. 573; *Id.*, 29 C. C. A. 506, 85 Fed. 968; *Coon v. Wilson*, 113 U. S. 268, 5 Sup. Ct. 537, 28 L. Ed. 963; *Miller v. Brass Co.*, 104 U. S. 350, 26 L. Ed. 783; *James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786; *Mahn v. Harwood*, 112 U. S. 354, 5 Sup. Ct. 174, and 6 Sup. Ct. 451, 28 L. Ed. 665; *Parker & Whipple Co. v. Yale Clock Co.*, 123 U. S. 87, 8 Sup. Ct. 38, 31 L. Ed. 100; *Yale Lock Mfg. Co. v. Berkshire Nat. Bank*, 135 U. S. 342, 10 Sup. Ct. 884, 34 L. Ed. 168; *Topliff v. Topliff*, 145 U. S. 156-169, 12 Sup. Ct. 825, 36 L. Ed. 658; *Freeman v. Asmus*, 145 U. S. 226, 12 Sup. Ct. 939, 36 L. Ed. 685.

The view already taken with respect to the validity of the reissue supersedes the necessity of considering the other defenses made in the case. The bill must be dismissed.

### WILGUS v. VAN SICKLE.

(Circuit Court, S. D. California. January 15, 1900.)

No. 900.

#### PATENTS—SUIT FOR INFRINGEMENT—TEMPORARY INJUNCTION.

Where the validity of complainant's patent has been successfully assailed in prior suits, although upheld in others, a preliminary injunction against infringement will not be granted.

This is a suit in equity for infringement of a patent. On motion for preliminary injunction.

Cornelius Cole and Willoughby Cole, for complainant.  
Diehl & Chambers, for defendant.

WELLBORN, District Judge. Application for temporary injunction against alleged infringements of patent. While the validity of complainant's patent has been upheld in several suits, it has been successfully assailed in two. Under these circumstances, a temporary injunction ought not to be granted, and the application therefor will be denied.

### THE KENTIGERN.

(District Court, E. D. New York. January 20, 1900.)

#### 1. SEAMEN—ASSAULTS BY OFFICERS—SEVERANCE OF CONTRACT—WAIVER.

Seamen on a British vessel, by making no complaint of assaults on them by their officers, and failing to announce a severance of their contracts of hire at the first port thereafter touched, at which there is a British consul,—making such announcement only after the vessel had been some time at the next port,—are deemed to have condoned the wrongful acts, so far as they affect continuance of such contracts.

**2. SAME—ACTION FOR SERVICES—JURISDICTION.**

An action for services of a seaman, based on his contract, broken by assault on him by the master of his vessel, a British ship, within the police limits of the United States, may be entertained by the federal court within whose jurisdiction the assault was made.

Hyland & Zabriskie, for libelants.

Convers & Kirlin, for claimants.

THOMAS, District Judge. Four foreign seamen filed the libel herein for services rendered the British ship *Kentigern* under a contract made in December, 1898, which required such services for the entire term of two years. While the ship was at the port of New York, these libelants applied to the British consul for release from the service on account of the alleged brutality of the officers of the vessel; but that officer, after investigation, denied the application, directed the libelants to return to the ship, and requested this court to decline jurisdiction of the matter. Each libelant has testified fully to occasions when he was subject to an unmerited assault or assaults on the part of the captain or other officer of the ship. These instances, save one, preceded the arrival of the ship at Philadelphia, where she loaded, whence she sailed to New York and went on the dry dock. She reached the last-named port on July 20, 1899, and sailed therefrom August 9th, after seizure on August 8th. None of the libelants announced a severance of the stipulated relation at Philadelphia, nor even at New York, until the ship had been some days in port; and none of them left the ship, as the evidence is understood, until after the 1st of August.

It is considered that a seaman who conceives that his contract for service is abrogated by the tortious act of the master or other officer of a ship should act on such conception of his rights at the earliest reasonable opportunity, and, if he suffer a suitable occasion to lapse, he should be deemed to have condoned the wrongful act, so far as the same affected the continuance of the contract. In other words, his conduct is inconsistent with the assertion of a breach. This doctrine may be subject to the modification that a seaman may continue aboard until the ship reaches the home port, or a port of the jurisdiction to which the ship belongs. But if a British ship touches at a foreign port where there is a British consul, to whom protest of the officers' behavior may be made, the seaman should declare at that port his option to avoid the contract. He may not hold in abeyance the exercise of this right until at a later time a port shall be reached which he prefers, as a more convenient port for the purpose of severing his connection with the ship. Why did not the libelants accuse the officers at the port of Philadelphia? Why did they not seek release at that port? Why did they not leave the ship at that port? The wrongs, save in a single instance, had been done. The contract had been vitiated, at their election. Their continuance on the ship, after full opportunity to leave it, was an election to regard the contract as unbroken. Even after arrival at New York they enjoyed the leisure incident to the dry-docking of the ship, and were unmindful of past wrongs

for some days. Such conduct does not accord with the promptitude that should be required of a person who would annul a contract for personal services on account of physical harm tortiously received from the master in the course of the service.

The libelant Von Diesen states that the master assaulted him in the port of New York. This was within the police limits of the United States and the jurisdiction of this court. If the present action were for the purpose of recovering damages for such assault, it would be entertained justly, and an action for services based upon a contract broken by the same wrongful act may be entertained with propriety, notwithstanding the protest of the British consul. The alleged violation of the police laws would give the offended seaman full right to leave the ship, and demand enforcement of his rights in the local tribunal. It is true that he waited in the port some days before availing himself of the right to avoid the contract. But the evidence on this point is meager. Hence the question whether such delay condoned the alleged assault is left for determination after trial on the merits.

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#### THE CATHERINE WHITING.

(Circuit Court of Appeals, Second Circuit. January 24, 1900.)

No. 67.

**1. MARITIME LIENS—STATE STATUTE—NOTICE OF LIEN.**

Under the New York statute (Laws 1879, c. 334), giving a lien on a vessel for repairs made under a contract with the master, owner, charterer, builder, or consignee, or with an agent of either of them, but providing that the debt shall cease to be a lien unless the lienor shall, within 30 days, file a notice of lien containing, among other things, "the particulars of the debt, and a statement of the account claimed to be due from such vessel," a notice does not contain a sufficient statement of the debt which merely states that a certain amount is due from a vessel "for work done upon the same, materials furnished, and labor and services performed," under instructions from the owner.

**2. SAME—LABOR AND MATERIALS FOR REPAIRING SHIP.**

Such statute does not give a lien for repairs furnished to a vessel under instructions from one who was neither owner, master, charterer, consignee, nor agent, and who had no interest in her, except under a contract with the owner, by which he agreed, at his own expense, to make certain repairs necessary to fit her for a different service, after which he was to employ her for a specified time as charterer, repaying himself for his expenditure, and dividing her earnings with the owner, of which facts the lien claimants were fully advised by the owner, and notified that they could not look to the vessel for payment.

Appeal from the District Court of the United States for the Southern District of New York.

This was a suit in admiralty to establish a lien on the steamer Catherine Whiting for labor performed and materials furnished in making certain repairs thereon. In the district court the following opinion was rendered by Brown, district judge:

"All the work, labor and materials for which the above suits are brought were procured upon contracts and employment by Metcalf alone. He was neither master of the vessel, nor owner, nor charterer, nor builder, nor consignee

of the vessel, nor the agent of either of them; nor was he in the possession or control of the vessel, nor had he any right thereto. His sole actual relation to the vessel was that arising from his contract with Flaherty, the sole owner, under which contract he would have a right to obtain possession and control for the purpose of making a voyage to the Pacific coast and Alaska and there trading with her on condition that he made certain improvements in the vessel necessary to fit her for that service. The expense of making these improvements was to be primarily at the sole charge of Metcalf, without any responsibility of Flaherty or the vessel therefor. Every person who dealt with the vessel found Flaherty in possession, and was notified that neither he nor the vessel would be liable, and as I have said all the work and materials were procured upon Metcalf's contracts alone. Metcalf never had the least authority from Flaherty to act as his agent, and Flaherty certainly never did anything, so far as shown by the evidence, to lead any of the libelants to suppose that Metcalf was his agent or the agent of the vessel. For these reasons no statutory lien, or direct liability on the part of Flaherty as principal, can be maintained. In *The John Farron*, 14 Blatchf. 24, Fed. Cas. No. 7,841, the employers were in possession and control of the vessel with apparent authority to bind her. That was not the case here.

"The claims of McGregor and others cannot be sustained on the ground that they were seamen, because I cannot find upon the evidence that they were employed as seamen or were understood to be so employed. The case of *The Artisan*, 9 Ben. 108, Fed. Cas. No. 568, is essentially different. There the owner had executed an actual charter of the vessel and the charterers had appointed a master who was in possession and command of the vessel, pursuant to the charter; the libelants were shipped as seamen for the voyage specified in the charter; and they were shipped by the master; they were held entitled to their wages as seamen, according to the terms of the shipment, because shipped for the voyage by the master, in pursuance of his actual authority. Here there was no charter from the owner, nor any master of the ship; nor was there any authority from the owner to ship a crew; the men were not hired as seamen, or shipped at all; they were mostly longshoremen and their claim of payment is mostly by the day at stevedores' rates.

"Reid and Duff fully understood that their employment was by Metcalf alone and on his responsibility. They were so notified by Flaherty and were not allowed to go to work until Flaherty by personal inquiries of the sellers of the boilers had been assured by them that the boilers had been paid for by Metcalf. It was in consequence of the express notice from Flaherty that Reid and Duff required from Metcalf additional security. If their claim had been good in other respects, moreover, their lien upon the vessel would have been lost through failure to file a proper notice of claim. The notice filed in July was more than 30 days after the completion of the work. The notice filed on June 15th, though in time, did not contain a statement of the 'particulars' of their claim as required by the state law of 1879. The notice was only a general statement of a debt to the amount of \$2,400, 'due from said vessel for work done upon the same and for material furnished and labor and services performed under instructions from J. C. Metcalf, owner.' A part of the work to the amount of \$400, as the evidence shows, was done by contract; the rest was claimed to be extra work. The notice of lien contains no specification of either, nor distinguishes one from the other.

"Baker, Carver & Morrell dealt with Metcalf alone, and made no inquiries whatever of Flaherty, and never saw him until after their work was done. They took an assignment of the advanced freights on a charter of the steamer which Metcalf negotiated wholly without authority. As they made no inquiry of Flaherty, the true owner, their dealings were at the risk of Metcalf's authority; and it is plain that he had no authority to represent or bind Flaherty or the vessel.

"I have further considered the case carefully to see if there were any equitable grounds upon which the vessel or Flaherty could be held to respond for any increased value of the vessel through the libelants' work, labor and material. The only ground of any equitable claim would be some inequitable conduct on the part of Flaherty in inducing the improvements by the libelants and tending to mislead them. Repeated reading of the stenographer's notes

satisfies me that no such ground can be maintained upon the evidence. The pleadings were not framed in order to present such a claim, nor is adequate evidence presented to reach a proper conclusion. Flaherty testifies that the steamer before his arrangement with Metcalf was in good condition for his employment of her in connection with the lighthouse business. He agreed to let Metcalf have her for trade on the Western coast on condition that he would make her fit therefor at his own sole cost and expense. I do not find that Flaherty ever did anything whatsoever inconsistent with this position. He relied upon Metcalf's representations that he had means for this purpose, and was evidently deceived in that regard. Metcalf plainly had no available means adequate to enter into such a contract, and the enterprise broke down from that cause. The project was not broken up by Flaherty, but fell through because Metcalf had not the means to carry out his undertaking to fit up the vessel, which was the condition of his acquiring any right to use her. The charter of the vessel, which Metcalf wrongfully made for the purpose of raising funds without Flaherty's knowledge, fell through, not by any act of Flaherty's, but because necessary changes in the vessel were not completed within the necessary time; and Metcalf's lack of funds, which by that time had become evident, made the further prosecution of the enterprise impracticable and it was therefore abandoned. Flaherty was evidently deceived by Metcalf's visionary schemes and imaginary resources. He was reassured to some extent by the supposed payment for the boilers by Metcalf, and on that understanding Flaherty signed the contract with him. When some weeks afterwards Metcalf's lack of money became painfully apparent, and it appeared probable that the men at work on the ship might not get their pay, he was naturally restive and impatient, both for his own protection and to avoid further sacrifices by the men themselves. He put no obstacles, however, in the way of Metcalf's complying with his contract, had he been able to do so; nor can I find that he offered any false allurements in the least to any of the men who contributed labor or materials.

"I must, therefore, dismiss the libels, without costs."

John A. Quintard, for appellants.

Leo Everett, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Inasmuch as a material man furnishing repairs to a vessel in her home port does not thereby acquire any maritime lien upon the vessel, this action can only be sustained upon the theory that the lien sought to be enforced was created pursuant to the state law, which gives a lien for such repairs, "if such debt is contracted by the master, owner, charterer, builder, or consignee of such ship or vessel, or by the agent of either of them, within this state," and provides that the debt shall cease to be a lien unless the lienor shall within 30 days after it was contracted file a notice of lien containing, among other things, "the particulars of the debt, and a statement of the account claimed to be due from such vessel," duly verified in the office of the clerk of the county in which such debt shall have been contracted. Laws 1879, c. 334. The repairs in controversy were begun on April 20 or 21, 1898, and were completed July 15th. The only notice of lien filed within 30 days after the debt was contracted is one stating a claim of lien for \$2,400, "the said amount (\$2,400) being due from said vessel for work done upon the same, materials furnished, and labor and services performed under instructions from J. C. Metcalf." We agree with the court below that this notice did not contain a statement of the "particulars of the debt," as required by the statute.

Aside from the technical defense, the facts of the case present a good defense upon the merits. The repairs were furnished to the vessel under instructions from one Metcalf. At the time one Flaherty was the sole owner of the vessel, and Metcalf was neither master, charterer, consignee, nor agent. Metcalf had entered upon a contract with Flaherty, by the terms of which he had agreed, at his own expense, to put boilers into the vessel, and make repairs to her machinery and hull necessary to fit her for a voyage to the Pacific coast, and by which Flaherty agreed that, upon the completion of the repairs, Metcalf could take possession of the vessel, and employ her as a charterer for a specified period, repaying himself the cost of the repairs, and dividing the earnings with Flaherty. When the repairs were begun, Flaherty, by his ship keeper, was in possession of the vessel; and while they were being made, although Flaherty was frequently present, the appellant was aware of the contract between Flaherty and Metcalf, and that Flaherty did not propose to permit Metcalf to have them made upon the credit of the vessel. The appellant was distinctly notified by Flaherty that he must not look to the vessel for his indemnity, but must rely exclusively upon Metcalf, and appellant took security from Metcalf by a mortgage on real estate and otherwise. Notwithstanding this, the appellant seems to have supposed that he could subject the vessel to a lien in invitum. Undoubtedly, if Flaherty had held out Metcalf as a part owner, or charterer, or agent, the vessel would have been liable, although he was not such in fact. But the appellant knew that Metcalf's only relation to the vessel was that of a prospective charterer. The decree of the court below dismissing the libel was correct, and is affirmed, with costs.

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#### THE MARION.

(District Court, D. New Jersey. January 15, 1900.)

#### SALVAGE—SEIZURE—CARGO IN HANDS OF COLLECTOR OF CUSTOMS.

For salvage services in rescuing a vessel and cargo the latter cannot be libeled and seized so as to dispossess a customs officer holding the same under the customs laws.

Alexander & Ash, for libelants.

Black & Kneeland, for underwriters.

Carpenter & Park, for claimant barge Marion.

J. Kearny Rice, U. S. Atty.

KIRKPATRICK, District Judge. On the 7th day of September, 1899, a fire broke out at pier 47, Erie Basin, in Brooklyn, which endangered the safety of the barge Marion and her cargo. The tug Willie went to the assistance of the barge, towed her out of danger, and extinguished the fire which had communicated to her and her cargo. On the 8th day of September—that is to say, the following day—a libel was filed in this court on behalf of the said tug against the barge Marion and her cargo for salvage, and on the same day the marshal of the district, as appears by his return made into court, at-



tached the lighter and cargo by taking them into possession, placed a keeper in charge, and gave notice to all persons claiming the same that this court would, on the 26th day of September, 1899, proceed to the trial and condemnation should no claim be interposed for the same. On the 22d day of September, 1899, application was made to the court by the collector of customs of the port of New York that the seizure of the said goods by the marshal be vacated and set aside, and that the possession of same be restored to him under and by virtue of the customs laws of the United States. It appearing upon examination of the facts that the goods were in the possession of the collector of customs under and by virtue of the customs laws of the United States at the time of the seizure by the said marshal, this court made an order on said day vacating the seizure of said cargo, and restoring the same to the custody and possession of the collector of customs of the port of New York, and to be forwarded by him in accordance with the provisions of the bonds entered into, and with the form of the act of congress in such cases made and provided. Subsequently, on the 30th day of October, upon the application of the proctors for the libelants, this court granted a rule to show cause requiring the collector of customs of the port of New York to show cause before this court why the order heretofore made on September 22, 1899, quashing the levy and seizure made by the United States marshal of this district upon the 1,313 packages of tea and 88 cases of dessicated cocoanut—being the cargo of the above-mentioned barge—should not be vacated and set aside, and the said levy and seizure of the said marshal reinstated. On the 3d day of November, 1899, the collector of customs of the port of New York filed his answer in this court to said rule to show cause, which answer set forth that the barge Marion was a bonded lighter; that her cargo was composed of imported goods, which were subject to the payment of customs duties to the United States, and upon which said duties had not been paid; that the goods composing the said cargo were held by the collector of customs for the purpose of being forwarded in bond to a foreign port under the provisions of law. These allegations are not denied. It is alleged in the answer that the person appointed by the collector of customs to the care and custody of the goods was actually and forcibly removed from his possession of them, though this is denied. It is, however, immaterial, for by his seizure and levy and placing a keeper in charge the marshal took the actual possession of the property and thereby ousted the collector, since there could be no concurrent possession of marshal and collector. It is now sought to vacate the order of September 22, 1899, setting aside the attachment and directing the marshal to restore said cargo to the possession of the collector of customs.

I have examined the authorities cited in the briefs of counsel, and find no case where in a suit between private parties the customs authorities of the United States have been deprived of their lawfully acquired possession of property which was held by them under the customs laws of the United States. That property in the possession of the United States cannot be levied on by private citizens to enforce private claims, and that United States officers cannot, except

as provided by statute, be made parties to private litigation, and compelled to defend the rights of the United States in such suits, has been accepted doctrine since *Harris v. Dennie*, 3 Pet. 292, 7 L. Ed. 683, and *Taylor v. Carryl*, 20 How. 596, 15 L. Ed. 1028. It is true that in these cases the writ to be served was issued out of the state court, but the right of possession is the same whether it be attacked by process from state or federal courts. This view of the law is taken by the attorney general of the United States in an opinion to be found in 19 Op. Attys. Gen. 101. In *Fischer v. Daudistal* (C. C.) 9 Fed. 145, a writ of attachment was issued out of the state court and served on the collector of customs of the port of Philadelphia against goods in his possession, the property of a nonresident debtor. Notwithstanding the fact that a tender of the duties was made by the attaching creditor, the collector refused to surrender the goods. The case was removed to the United States circuit court, where a motion was made to remand the case. The circuit court retained jurisdiction, and, after consideration, entered a decree vacating and setting aside the attachment. No opinion was filed in the above cause, but the result would no doubt have been the same had the attachment originally issued out of the United States circuit court. The question involved was that of the right of the collector of customs to retain possession of goods imported and liable to customs duty as against one having a claim against the owner, and therein it differed from the case of the yacht *Conqueror* in *Re Fassett*, 142 U. S. 479, 12 Sup. Ct. 295, 35 L. Ed. 1087, where the dispute related to the liability of the yacht for the payment of duty, and whether, pending the determination of that question, the collector of customs or the owner was entitled to possession. It was claimed that the yacht had been seized by the collector illegally, and detained without warrant of law. It was necessary for the owner to invoke the aid of the courts for the determination of his rights, and, the suit having been properly begun in the only tribunal before which it could be tried, the court held that the possession of the yacht was a matter subject to its orders and decrees. In the case at bar this court merely restored to the collector of customs that custody and possession of the seized goods to which he was by law entitled, and of which he was improperly deprived. The court is always ready upon proper representations to make orders for the protection of private interests, but it cannot recognize any right whereby individuals in suits between themselves, except as specially provided by statute, may, under the form of legal process, deprive the customs officers of the United States of the possession of goods which they hold subject to the customs laws of the United States. It is apparent that, should such practice prevail, it would result in endless litigation, and render the customs laws practically impossible of enforcement. The rule to show cause will be discharged.

## WOODS V. OLSEN.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1900.)

No. 847.

## SHIPPING—GENERAL AVERAGE—SEIZURE OF SHIP AS PRIZE—EXPENSE OF OBTAINING DISCHARGE.

Libellant chartered a steamship by a time charter, and afterwards subchartered her to a third person, by whom she was employed in trade with Cuba. While so employed, she was seized, with her cargo, by the United States as prize, during the war with Spain, but on trial was released. The owner, libellant, and the subcharterer each refused to pay the expense incurred in obtaining her discharge, for which she was detained, but subsequently, at request of the owner, libellant paid a draft drawn by the master for the amount. *Held*, that such expense was a subject for general average, to be apportioned between the ship, cargo, and freight, and that libellant, having neglected to proceed for that purpose until the contributing interests had been separated, could not recover the amount of the draft in a suit in personam against the owner.<sup>1</sup>

## Appeal from the District Court of the United States for the Eastern District of Louisiana.

On December 23, 1897, John G. Woods chartered from the owners the steamship Franklin for a period of six months, with option to renew for period of three months; the charter party containing, among others, the following stipulations: "Between safe port and ports in Canada (and) (or) other British possessions, not north of River St. Lawrence (steamer to leave the St. Lawrence by the 31st of October), (and) (or) the United States of America (and) (or) West Indies and Gulf of Mexico, (and) (or) Caribbean Sea, (and) (or) Central of Mexico, (and) (or) South America (Magdalena river excluded), not south of the river Platte, as the charterers or their agents shall direct, on the following conditions: (1) That the owners shall provide and pay for all provisions, wages, and consular shipping and discharging fees of captain, officers, engineers, firemen, and crew; shall pay for the insurance of the vessel; also for all engine room and deck stores; and maintain her in a thoroughly efficient state, in hull and machinery, for and during the services, guarantying to maintain the boilers in a condition to bear a working pressure of at least 60 pounds (and this pressure to be carried continuously) during the whole term of this charter, and to victual and provide for all passengers in the best manner according to their class, charterers paying at the rate of 4s. sterling per day for each first-class passenger. (2) That the charterers shall pay and provide for all the coal, port charges, pilotages, agencies, and commissions, and the charterers shall accept and pay for all coal in the steamer's bunkers on delivery, at the rate of \$—— per ton; and the owners shall, on expiration of this charter, pay for all coal left in the bunkers, at the current market price, at the respective port where she is delivered to them. It is understood that the steamer must have sufficient coal in bunkers, on delivery, to take her to New Orleans, La. (3) That the charterers shall pay for the use of said vessel (£475) four hundred and seventy-five pounds British sterling, lump sum, per calendar month, commencing from the time the vessel is entered at the custom house and placed with clear holds at charterers' disposal, and at and after the same rates for any part of the month, hire to continue, from the time specified for terminating the charter, until her delivery to owners (unless lost) at a port in the United States. (4) Payment of said hire to be made in cash in New Orleans, La., at the rate of \$4.85 per £ sterling, half monthly in advance, from the date of delivery of steamer; and, in default of such payment, the owners shall have the faculty of withdrawing the said steamer from the service of the charterers without prejudice to any claim they (the owners) may otherwise have on charterers

<sup>1</sup> As to general average, see note to *Pacific Mail S. S. Co. v. New York, H. & R. Min. Co.*, 20 C. C. A. 357.

in pursuance of this charter. \* \* \* (9) That the captain, although appointed by the owners, shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading, or otherwise complying with their orders and directions. (10) That, if the charterers shall have reason to be dissatisfied with the conduct of the captain, officers, or engineers, they shall make such complaint in writing to an agent in New Orleans, La., specially appointed by owners, who shall have full power to act on their behalf, and, if necessary, dismiss any of the officers, should they find the complaints made by the charterers are justified and proven. \* \* \* (14) That in the event of loss of time from deficiency of men or stores, or break down of machinery, or damage preventing the working of the steamer for more than twenty-four hours at sea, the payment of hire shall cease until she be again in an efficient state to resume her service; and should she, in consequence, put into any port other than that to which she is bound to, the port charges and pilotages at such port shall be borne by steamer's owners; but should the vessel be driven into port or to anchorage by stress of weather, or from any accident to the cargo, such detention or loss of time shall be at the charterers' risk and expense; also, if any loss of time from crew or stores not being on board in time, or from repairs to hull and machinery, which are for owners' account, not being complete after cargo and coals are on board, and hour of sailing has been fixed by charterers, and notice given to captain, the time lost is for the steamer's account. \* \* \* (17) That the owners shall have a lien upon all cargoes and all sub-freights for any amounts due under this charter, and the charterers shall have a lien upon the ship for all moneys paid in advance, and not earned. (18) Ship bottom to be kept properly cleaned, and steamer to be docked whenever captain and charterers may think it necessary, but at least once in every six months, and payment of the hire to be suspended until she is again in proper state for the service."

After Woods obtained possession of the steamship, he, styling himself "John G. Woods, chartered owner of the good iron screw steamship Franklin," sub-chartered her to one McManus, of Mexico; the terms of this second charter party being similar to the first in all material matters. Thereafter the Franklin was used by McManus as a general ship between Mexican and Cuban ports. About this time a state of war existed between the United States of America and the kingdom of Spain, and the master of the ship became uneasy, fearing capture in running to Cuban ports. When first ordered to sail from Vera Cruz to Cuba, the master declined to load or proceed. He waited some weeks before deciding to take cargo, and in the meantime communicated with his owner in Norway, and the owner's agents in New York. Under their advice, he took cargo and proceeded to Cuba. On this trip he was overhauled by an American man-of-war, but, after an examination of his papers, he was allowed to proceed. This voyage was successfully made, and a second one followed. Having received a cablegram from the agent of the owner in New Orleans, warning him against carrying contraband of war to Cuban ports, he again took the advice of owner's agent, but, on receiving instructions not to carry contraband nor run blockade but proceed, he loaded, and made a successful voyage to the port of Cayberrien, in Cuba. August 2, 1898, while unloading in that port, and before cargo was discharged, the Franklin was seized by the United States gunboat Syren, and, with the balance of her cargo, about one-fifth, was taken to Key West, with a prize crew on board, and then proceeded against in the United States district court as a prize of war. On the 17th of the same month, after various proceedings and expenses incurred for the purpose, the ship was discharged. The expenses in procuring her release, counsel fees, costs, and other matters amounted to about \$1,200. Before the ship could leave Key West, it was necessary that these expenses should be paid. Then followed a call upon Woods to pay, and his refusal. Woods called upon the owners' agents, and they refused, and a call was made upon the subcharterer, McManus, and he refused, and demanded to have his ship. After some telegraphic correspondence between owners' agents, charterers, and master, the owners' agents in New York wired agent at New Orleans as follows: "In order save time, have Woods wire captain money. Notify him proceed New

Orleans after Havana." Upon that dispatch, the New Orleans agent, on suggestion and with consent of Woods, sent the following:

"New Orleans, La., August 23rd, 1898.

"Captain Sassummussen, Norwegian Stmr. Franklin, Ogre [Care] Taylor, Norwegian Consul, Key West, Fla.: Your draft on Woods for twelve hundred dollars will be honored at sight. I guaranty same to cover disbursements. Proceed Havana; thence New Orleans. Do not deliver cargo to Ybanez, Alvare & Co., unless they pay Key West disbursements. Advise sailing.

"[Signed]

Geo. W. Kelley."

The master then drew draft, of which the following is a copy:

"Exchange for \$1,200.

"Key West, Fla., Aug. 24th, 1898.

"At sight pay this first of exchange (second unpaid) to the order of Mess. Taylor & Co., twelve hundred dollars, a/c necessary expenses Nor. S. S. Franklin, at this port, value received, and charge the same to account of said stmr.

"[Canceled Internal Revenue Stamp.]

D. Rasmussen, Master.

"To John G. Woods, New Orleans, La."

Woods paid this draft. From its proceeds the master paid off his obligations in Key West, and thence, according to orders, proceeded to Cuba to deliver the balance of his cargo, then returned, and reported to charterer Woods, and, thereafter, under a renewal of the charter party, proceeded to run in Woods' interest, making frequent trips to New Orleans and Central America, until December, 1898, when the charter expired, and the ship was returned to her owner.

The first attempt to collect the money advanced by Woods to release the ship at Key West was from the consignees of cargo in Cuba. The master was ordered not to deliver cargo unless the payment was made, but, on the refusal of consignees to pay, that order was countermanded. Woods also made unavailing efforts to collect the amount from the subcharterer, McManus. As the owner of the ship refused to pay, he then thought of retaining the amount from the advance payments of the ship's hire, but abandoned this mode of collection for fear that perishable cargo aboard the Franklin would be seized. Finally, in January, 1899, the steamship Franklin then being in this port, Woods instituted this suit in personam, coupled with a foreign attachment, wherein the ship Franklin was seized. The district court rejected the libellant's demand, and he now prosecutes this appeal, assigning as error that the court erred in holding that the expenses in releasing the steamship Franklin from seizure in the port of Key West, and in defending the suit against her for forfeiture, were expenses for which the libellant was liable, and that the court erred in refusing to allow the recovery by libellant for the amount herein sued for, and dismissing the libel.

Hewes T. Gurley, for appellant.

Richard De Gray, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PARDEE, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The libellant contends that he was not liable for expenses incurred in releasing the ship from capture, and had no interest in the matter as to whether she was released or not, except that he desired to avail himself of an option to extend the time of the charter, and that he paid the money at the request of the owner, for his account, and understood he would be reimbursed. The claimant, on the other hand, denying that he ever recognized the subcharter or was bound thereby, contends that, under the terms of the first charter party, there was a demise of the ship to the charterer, Woods, as owner pro

iac vice, who, as such owner, was responsible for the obligations of the ship; and particularly, as it was through Woods' fault that the vessel was engaged in the Cuban trade, where there was danger of her capture, the claimant contends that the ninth clause of the charter party, to the following effect: "And the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading or otherwise complying with their orders and directions,"—rendered the charterer liable for these particular expenses, because the capture resulted from the employment the charterer gave the ship. Each party supports his contention by elaborate argument and citations of many authorities, but we are unable to agree with either. The expenses necessary to release the ship from the capture which involved the ship, cargo, and freight was a subject for general average. *Douglass v. Moody*, 9 Mass. 548; *Sansom v. Ball*, 4 Dall. 459, 1 L. Ed. 908; *Jumel v. Insurance Co.*, 7 Johns. 412; *Spafford v. Dodge*, 14 Mass. 66. This last-cited case is very interesting, and we quote from it at some length. Under the charter party in that case the charterers had more control than in the present instance, for they were required to victual and man the vessel, as well as pay all port charges, pilotage, etc. The vessel, on a voyage from St. Ubes to Boston, was forcibly taken by a British cruiser as a prize of war on the 6th of January, 1843, and detained until the 10th of May following. The main issue in the suit was as to whether the charterers were liable for hire of the ship during the time lost by the capture. The court held that the charterers were liable for the hire. In regard to this the court said:

"The defendants, by virtue of this charter party, became the owners of the ship for the voyage, or for the time stipulated in the contract. They might load her themselves, or take freight for others on such terms as they should think proper. The whole earnings of the ship, in either case, were for their use. If she should perform her voyage in a short time, the gain would be theirs. They would have the same benefit, whether as freight on their own goods or on the goods of others, as if the voyage had been unusually prolonged, while the expenses of wages and provisions which were to be paid by them would be reduced. On the other hand, if the voyage should be delayed by adverse winds, or by any other of the common casualties or occurrences, the defendants would sustain the whole loss arising from that circumstance. They would be held to pay the increased hire and expenses of the ship and the crew, while their freight or profits from the voyage would remain the same. The plaintiffs had sold their ship for the time to the defendants, to be used in any manner not inconsistent with the contract, and, as they could gain nothing, so ought they not to lose, in consequence of the particular manner in which they should be employed by the defendants. If the plaintiffs had not thus parted with their ship, they might have taken freight, or employed her in some voyage on their own account; and, if it be said that the voyage might still have been prolonged by the same or the like accidents that have now occurred, the answer is that the owners in that case would have had the chance of a short and profitable voyage to compensate the risk of such a delay or detention. Suppose the owners had let their ship for a certain term of years, without designating any voyage or voyages in which she should be employed; they would certainly be entitled to the hire for the whole time, although the ship should remain in port the whole time, in consequence of an embargo, from not finding suitable employment, from fear of capture by an enemy, or any other similar cause. The application of these principles has never been doubted when the ship has been driven out of her course by a tempest, or delayed by adverse winds, and they have been applied, as before mentioned, when

she has been detained by an embargo. We can perceive no difference, as it regards this question, between a delay arising from any of those causes and that which has occurred in the present case. Here was a hostile seizure of the ship. This might have been followed by a condemnation as prize, which would undoubtedly have dissolved the contract of affreightment, but, in the events which have happened, it produced only a prolongation of the voyage. The ship was restored by the sovereign under whose authority she was seized. The captors, therefore, admit that they had no right to condemn the property or to deal with it as captured. It makes no difference that the ship was carried into a port of the captors for examination before she was restored. If this seizure produced a dissolution of the charter party, the same consequence would follow, however short might be the period of the detention, and whether she were restored by the captors upon examination of her papers at sea, or upon a like examination in port, or in a court of admiralty. \* \* \* The necessary costs and charges, incurred and paid by the defendants in reclaiming and procuring the restoration of the ship and cargo, are undoubtedly to be allowed as a general average, and, when the amount is ascertained in the manner agreed by the parties, it must be apportioned, as usual, on the ship, cargo, and freight. The sum which may thus be found due from the plaintiffs will be deducted from that which is due to them on the charter party." Pages 71-74.

In the instant case, the record shows that the hire of the vessel was promptly paid for all the time lost during her detention under capture, and, if proceedings had been promptly instituted under general average adjustment, we are reasonably clear that the amount advanced by Woods to the master could have been lawfully apportioned between the ship, cargo, and freight. The adjustment should have been made at first port of detention, certainly before there was a separation of the contributory interests. 1 Pars. Shipp. & Adm. 486. As no such proceedings, however, were instituted before the three interests involved were separated, and the liens on them lost, we are inclined to the opinion that Woods' remedy to recover from any one of them is lost, because of his delay in asserting his rights; but we do not so decide in the present case, and, if Woods still has the right to have an adjustment and apportionment, he may assert it in a proper suit. In this case, there is no proof upon which to base a decree in favor of libellant for any amount. Under the circumstances, the decree of the district court dismissing the libel is amended by adding the words, "without prejudice to another action as counsel may advise," and as so amended is affirmed.

## THE SAEHELM.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1900.)

No. 870.

## PILOTAGE—UNNAVIGABLE VESSEL—STATUTES.

A helpless and un navigable vessel, which has sprung a leak, so as to require the use of two steam pumps, and is without master, commander, or crew, having but a dozen laborers aboard, working the pumps, and has only a temporary rudder, and is in tow of a steam tug, is not within Pol. Code Ga. 1895, § 1656, providing that "any person, master, or commander" of a vessel "bearing towards any of the ports, rivers, or harbors of this state" shall be liable to pay the first pilot offering his services, and exhibiting his license, "if demanded by the master," though section 1664 requires the pilot to offer his services to a "vessel in distress," these sections, with section 1657, securing to the pilot bringing the vessel in the right to take her out "unless the master of such vessel shall prove \* \* \* that such pilot misbehaved while in charge of the vessel"; section 1658 providing that the pilot shall moor or dock the vessel, if required by the master on arrival, and section 1666 providing that "the master of a vessel in readiness to leave must, if practicable, give notice to the pilot entitled to conduct the vessel out" showing that a navigable vessel with a master on board, and not one in need of salvage service, is contemplated.

Appeal from the District Court of the United States for the Southern District of Georgia.

Joseph A. Cronk (Gignilliat & Stubbs, on the brief), for appellant.  
T. P. Ravenel (Lester & Ravenel, on the brief), for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is a case of pilotage in which a decree was rendered in favor of the libellant. The claimant appeals to this court, and the decree is assigned as error. The material facts may be briefly stated. In 1898 the Norwegian bark Saehelm, while navigating the harbor of Sapelo, Ga., lost her rudder, sprung a leak, and became water-logged. She went aground there "on the mud bank." In this condition she was disposed of at public sale, with her cargo, and James Foley became the purchaser of both. Foley contracted with the Propeller Towboat Company to deliver the bark and cargo at Savannah, Ga. A temporary rudder was put up, and two steam pumps were used to clear her of water. But the pumps would not keep her clear of water. To run the pumps, Foley put "a dozen negroes and a watchman in charge." Only one of the men was a seaman, and he was employed as a laborer. No man on board had a captain's or a master's license. She was towed out, with her cargo aboard, from Sapelo, by a tug. The tug "had United States license," and her captain in charge was authorized to navigate her without paying pilotage. When she was about two miles outside of Tybee bar, John H. Craig, the libellant, approached her on the J. H. Estill. She was then in tow of one steam tugboat. Craig offered his services as pilot, and was not accepted. The Saehelm continued in tow of the tug till she was over halfway between the bar and Tybee Light-house, and then the tugboat Cynthia went to her assistance, and took hold of her. At the time Craig spoke her, she was drawing 22 feet



of water. After she got to the lighthouse, they stopped pumping, and she went to her decks, 25 feet. The Saehelm was not entered or cleared from the custom house at Savannah. The deputy collector testified that: "The vessel was a wreck. She was coming in to be repaired. Under these circumstances, not required to enter or clear." The amount of pilotage fixed by the regulations for a vessel drawing 22 feet is \$160, and the decree was rendered in favor of the libellant for that sum.

This case turns on the proper construction of the statutes of Georgia relating to pilots and pilotage. The statutes are contained in sections 1656-1658, 1664, and 1666 of the Political Code of Georgia of 1895, which, for convenience, are printed in full in the foot-note.<sup>1</sup> The purpose of the statutes is to require a ship or vessel, with certain named exceptions, bearing towards any of the ports of the state, to accept the services of a pilot, and to require that the first pilot who offers his services shall be paid, whether his services are accepted or not. The question in this case is whether or not the Saehelm, when the libellant offered his services, was in a condition to make her subject to these statutes. The ship or vessel must be one "bearing towards a river or harbor of this state." Section 1656. The first lines of this section refer to "any person, master, or commander," etc., who refuses to receive a pilot; but the last lines provide that the pilot shall exhibit his license, "if demanded by the master." The following section (1657) is to secure to the pilot who brought the vessel in the right to take her out, "unless the master of such vessel shall prove to the satisfaction of the commissioners that such pilot misbehaved while in charge of the vessel." Section 1658 provides that the pilot shall moor or dock the vessel if required by the master on arrival. Section 1666 provides that "the master of a vessel in readiness to leave must, if practicable, give notice to the pilot entitled to conduct the vessel out." Clearly, these four sections refer to a navigating vessel, bearing towards a port or harbor, with a master on board. There are words in each of the four sections to indicate that the legislature meant a vessel or ship with a master aboard. In the first section the master may demand the exhibition of the pilot's license; in the second, he may make proof of the pilot's misconduct; in the third, he may require the pilot to moor or dock the vessel; and, in the fourth, he must give notice of readiness to leave. A ship or vessel with a master, or with some person in command, was meant. This view was taken by libellant's proctors when the libel was filed, for we find it alleged in the libel that "libellant tendered his services to the master thereof, or person in command thereof." The language of the act shows indisputably that a vessel with a master is meant, or, at least, with some person in command. It is, we think, implied that a crew would be aboard to manage or control the vessel. This leads to the conclusion that a vessel that is navigable, and with master and crew in charge, is meant. When the libellant offered his services as pilot, the Saehelm, though she had a cargo aboard, had only a temporary rudder, had sprung a leak so as to require the use of two steam

<sup>1</sup> See note at end of case.

pumps, was without master, commander, or crew, having but a dozen laborers aboard, and was in tow of a steam tug. To quote the evidence of Capt. Avery, an experienced sailor, "She was more a raft of timber than a navigable vessel."

In *Hobart v. Drogan*, 10 Pet. 117, 123, 9 L. Ed. 366, 368, Mr. Justice Story, after defining a pilot as "a person taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port," said:

"His duty, therefore, is properly the duty to navigate the ship over and through his pilotage limits, or, as it is commonly called, his 'pilotage ground.' The case, therefore, necessarily presupposes that the ship is in a condition capable of being navigated; distressed, if you please, and laboring under difficulties, but still capable, in point of crew, equipments, and situation, of being navigated."

The case of *Flanders v. Tripp*, 2 Low. 15, Fed. Cas. No. 4,854, decided by Judge Lowell, is in point. The ship in that case was not fit to be navigated, and the master was on shore, seeking a tugboat. The libellant was the first pilot to offer his services, which were declined. The Massachusetts statute (St. 1862, c. 176, sched. 5), like the Georgia statute, gave a fee to the first pilot offering his services. The court decided against the libellant, holding, in effect, that there is in the statute an implied exception in the case of vessels which cannot be navigated by the pilot without further assistance in the nature of salvage or quasi salvage service. The point of the decision is that a vessel which stands in need of salvage service is not required by the statute to accept the offer of pilotage. It is true, as pointed out by the learned proctors for the libellant in the present case, that Judge Lowell observed that he found nothing in the statute law of Massachusetts that required pilots to assist vessels in distress. He said, therefore, that the general rule holds good that they are not required to be salvors without salvage compensation. There is nothing in the Georgia statutes which makes this case inapplicable. Section 1664 requires the pilot to offer his services to a "vessel in distress," but, construing that section in connection with the other sections cited, we do not think it includes an unnavigable vessel. The language is used by the legislature in its ordinary meaning. A vessel is in distress when in a state of danger or necessity, "as from want of provisions or water," etc. (Webst. Dict.); or "in a situation of misfortune or calamity, as a steamer in distress" (Stand. Dict.). A vessel, of course, is also in distress when wrecked, and needing salvage service; but this section must be construed in connection with the others on the same subject. The legislature, looking at all these statutes, did not mean to force pilotage on a vessel needing only salvage. To come within the meaning of the statutes, the vessel must be navigable, and then, if in distress, the pilot is required to first offer his services to the vessel so in distress. An unnavigable derelict, for illustration, in charge of salvors, cannot be within the meaning of these statutes. If the vessel is so damaged or so situated as to need salvage services, and not pilotage, the statute does not prevent the pilot, whose services are not accepted or rendered as

such, from becoming a salvor, and receiving salvage compensation. It should not be presumed from the language of the statute that the legislature intended to impose on pilots the often more onerous and dangerous duties of salvors, and allow them only the less remunerative compensation of pilots. The conclusion of Judge Lowell, therefore, becomes pertinent to this case:

"I am of opinion that the rule is reciprocal, and that, as a pilot is not bound to take upon himself the duty of a salvor of a disabled vessel, without the advantages of that position, so a ship which stands in need of a salvage service is not bound to accept the offer of pilotage, if her need is for something more, which the pilot cannot supply."

The Saehelm was in tow, receiving service in the nature of salvage, when hailed by the libellant. She was not propelled by her own power. Alone, she was helpless and unnavigable. "These acts of pilotage," as was remarked by Blandford, J., in *Wright v. Lake*, 75 Ga. 220, "are founded on public necessity for the security of commerce and the protection of life." The policy and purpose of the statutes would not be promoted by forcing vessels in charge of salvors to accept unnecessary pilots, and by refusing salvage compensation to pilots for salvage services. We hold that a vessel, without master or crew, and without the power to navigate on account of damage sustained, and in tow of a steam tug into port, is not required, by the statutes of Georgia, to accept the services of a pilot, and is not made subject to his fees on refusal to accept his services. The decree of the district court is reversed, and the cause remanded, with instructions to dismiss the libel.

#### NOTE.

##### Political Code of Georgia of 1895:

"Sec. 1656. Any person, master or commander of a ship or vessel, except vessels exempt by United States laws and vessels while licensed under the provisions of this article and vessels of less than one hundred tons burden, bearing towards any of the ports, rivers, or harbors of this state, and who refuse to receive a pilot on board, shall be liable, on his arrival in such port, river, or harbor in this state, to pay the first pilot who may have offered his services outside the bar, and exhibited his license as a pilot if demanded by the master, the full rates of pilotage, inward and outward, established by law for such vessel.

"Sec. 1657. The pilot who brings in a vessel into port, or one attached to his pilot-boat, shall have the exclusive right to take her out, unless the master of such vessel shall prove to the satisfaction of the commissioners that such pilot misbehaved himself while in charge of the vessel or was in the meantime deprived of his license, or that such pilot had obtained the inward pilotage against the right of some other pilot first offering his services, and in any of these cases another pilot shall be employed, and in that event the outward pilotage fees shall belong to the pilot who takes her out.

"Sec. 1658. Every pilot in any of the ports, rivers, or harbors aforesaid, bringing any vessel to anchor in any of said ports, rivers, or harbors, shall moor such vessel, or give proper directions for the mooring of the same and the safe-riding thereof, or shall dock such vessel if required by the master on arrival, and said pilot shall not be entitled to compensation in addition to his pilotage for so doing."

"Sec. 1664. Every pilot-boat cruising, or standing out to sea, must offer the services of a pilot to the vessel nearest the bar, unless a vessel more distant be in distress, under penalty of fifty dollars for each and every neglect or refusal, either to approach the nearest vessel, or to aid her if required, or to

aid any vessel in sight showing signals of distress; and the commissioners, or a majority of them, may, for such neglect or refusal, deprive the pilot of his license."

"Sec. 1666. The master of a vessel in readiness to leave must, if practicable, give notice to the pilot entitled to conduct the vessel out, of his intention to leave, or to some other pilot belonging to the same boat: provided, such pilot be at the place of departure of such vessel or near thereto."

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### THE NATHAN HALE.

(Circuit Court of Appeals, Second Circuit. January 9, 1900.)

No. 81.

#### TUGS—INJURY TO TOW—NEGLIGENCE.

A barge in tow drawing 24 feet of water, proceeding along and a little to the west of the middle of a passage  $1\frac{1}{4}$  miles long and  $\frac{3}{4}$  of a mile wide, when about halfway through struck on the most easterly boulder, 19 feet below the surface, in a shoal commencing 750 yards from the easterly side of the channel, at a point where it was 1,300 yards wide. The shoal was not known to navigators. The government charts showed at this point, midway between the shores, a channel one-quarter of a mile, in which the water was nowhere less than 26 feet deep; and the Atlantic Coast Pilot described the channel as well buoyed, and therefore particularly safe, and directed that it be entered "about midway" between the shores. At the time of the accident the masters of the vessels supposed they were about the middle of the channel. The shoal contained a number of rocks less than 21 feet below the surface, which were surrounded by, and had between them, water 27 feet deep. *Held* that, in the absence of evidence that the tug went out of the channel usually pursued by navigators, it was not liable.

Appeal from the District Court of the United States for the Southern District of New York.

Samuel Park, for appellant.

H. Galbraith Ward, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. While the steam tug Nathan Hale was towing the barge Felix from New Bedford to Vineyard Haven, in August, 1897, she proceeded through Quick's Hole, a channel between Nashawena Island on the west, and Pasque Island on the east, leading from Buzzard's Bay to Vineyard Sound. The barge was on a hawser of about 900 feet, was loaded with coal, and drew about 22 feet of water. In passing through the channel, the barge was so badly injured by striking upon a rock that she shortly afterwards sank. The action was brought to recover of the tug the damages arising from the disaster, upon the theory that the tug was negligent in performing the towage service. Of the specific allegations of negligence set forth, two only are now material—First, that the tug was negligent in towing a barge drawing so much water through Quick's Hole, instead of taking a route to the westward of Cuttyhunk Island; second, that the tug was negligent in not keeping the barge in the channel.

The court below found that Quick's Hole had been the usual and customary passage for many years for coal barges drawing as much as 24 feet of water, and that no fault was to be imputed to the tug for proceeding with the barge through that channel; but also found that the tug was negligent in taking her tow too far on the westerly side of the channel, instead of keeping to the middle, or the easterly side of the middle, and on that ground condemned the tug for the loss. 91 Fed. 682.

Quick's Hole is about one and one-quarter miles from mouth to mouth, and varies in width from about three-quarters of a mile to about a mile. Its course is approximately north and south. About midway between the north and south entrances, and on the easterly side of the channel, about one-third of the distance from shore to shore, is buoy No. 2. About 500 yards northwesterly from this buoy is a shoal which extends towards the westerly shore, and upon the easterly ledge of this shoal are rocks which are less than 22 feet below water. This shoal was not denoted on the government charts, and, according to the last chart published before the disaster to the *Felix*, the water there was from 27 to 44 feet deep. About 600 or 700 yards to the southwesterly of this buoy is a shoal of rock known in the case as "21." It is so far out from the western shore, and approaches so near the middle of the channel, that the proper navigation for vessels passing through Quick's Hole from the northward requires a change of course to the easterly after passing buoy No. 2. The sailing directions in the Atlantic Coast Pilot, in proceeding from Buzzard's Bay to Vineyard Sound, are as follows:

"Passing through from the northward, when Quick's Hole is opened so that Gay Head can be seen, steer to the southward so as to enter the passage about midway between Pasque and Nashawena Islands; thence steer for Gay Head, taking a course to leave red buoy No. 2 on the port bow. Leave this buoy on the port hand, and steer S. S. E. into Vineyard Sound, leaving black buoy No. 1 upon the starboard hand."

The Atlantic Coast Pilot describes Quick's Hole as "a passage three-quarters of a mile wide, from five to eight fathoms of water separating the islands, and well buoyed, and therefore perfectly safe for strangers." In 1887 the United States government caused a hydrographic survey of Quick's Hole to be made, the work occupying 10 days or a fortnight, and the maps which had been published prior to the disaster correctly expressed the results of that survey. The officer who had charge of the survey testifies that the east shore is a particularly rocky and dangerous shore, but the west shore is sandy, with bold water close up to the beach in places, and is not a dangerous shore, apparently, to approach. According to the government charts, from the northerly mouth of the passage to the southwesterly shoal, there was, midway between the shores of the two islands, a channel a quarter of a mile in width, in which the water was 26 feet deep at the shallowest point.

As the vessels were about to enter the mouth of the channel, a squall, with fog, came up, and they turned about under a port helm. When the fog lifted, and this maneuver was completed, they were headed somewhat to the westerly of their original heading, and

thus they entered the channel somewhat to the westerly of the middle. They had proceeded about three-fourths of a mile, the tug having passed buoy No. 2 about 600 feet on the port hand, when the barge signaled for help, and it was discovered that she was making water very fast. None of those in charge of the navigation of either vessel were aware that the barge had struck a rock, and, upon an examination of the government chart, it was assumed by both masters that she must have struck a sunken wreck or some unknown obstruction. The master of the tug was an experienced pilot, and was familiar with the passage, having taken both tows and sailing vessels through it many times. The master of the barge had been through it on one occasion before, with a vessel drawing 22 feet of water. The existence of the northwesterly shoal was not known to navigators, as appears by the unanimous testimony of the many pilots living in the vicinity of Quick's Hole, or accustomed to take vessels to and from Vineyard Sound; and, so far as it appears, it was known to only two persons living in that vicinity, men resorting there to fish, and who for selfish reasons had not disclosed its existence to any one else. The evidence makes it entirely clear that the barge struck a rock upon that shoal, and the court below so found. By surveys subsequently made, it appears that the shoal is a ledge of boulders commencing at a point about 750 yards distant from the easterly shore of the channel, running in a northwesterly direction a distance of approximately 500 feet, having a width of about 200 feet, and containing a number of rocks less than 21 feet below the water. It is surrounded by water of a depth of about 27 feet, and between the rocks there is water of that depth. At the eastern extremity of the shoal are three boulders having only about 19 feet of water over them, the most easterly being about 10 yards westerly from the eastern extremity of the shoal, and the other two being about 40 yards further west. The channel at that point, from shore to shore, is about 1,300 yards wide. According to the testimony of her master, the course of the vessel through the channel was not far to the westward of the middle of the channel from shore to shore. It is fair to assume, therefore, that the barge struck upon the most easterly boulder.

In performing the towage service, the tug was not an insurer, nor bound to exercise the highest degree of skill and prudence, but it was her duty to exercise the degree which would have been exercised by prudent and experienced navigators familiar with the conditions incident to that particular voyage. Navigators are ordinarily justified in relying upon the charts provided for their information by the government, and ought not to be deemed negligent in doing so, in the absence of circumstances known, or which ought to be known, discrediting the accuracy of the charts. Negligence ought not to be imputed to the tug upon this occasion merely because she did not go exactly in the middle of the channel. A deviation of 330 feet from midway in a passage three-quarters of a mile wide is an inconsiderable one. Distances over water, when there are no artificial or natural monuments to assist in estimating them, especially when considerable, can only be estimated approximately, and

the varying judgments of nautical men of equal experience and opportunity for observation in respect to them is illustrated daily in collision causes.

According to the testimony of the master of the tug, and also of the master of the barge, the vessels were supposed to be in about the middle of the passage, and, had it not been proved otherwise by the result, it could not be found upon proofs that there was any observable deviation. If the tug entered the passage "about midway," or approximately, she conformed to the sailing directions of the Atlantic Coast Pilot. Those directions are intended as a guide to navigators by night as well as by day, and do not mean to lay down any rigid rule, but are to be interpreted as intending to allow a reasonable margin for differing judgments. They are to be read in connection with the charts, which are supposed to inform navigators more particularly in respect to the nature of the channel and its facilities for navigation. According to these charts, a deviation of double the distance actually made could have been made with perfect safety.

The case resolves itself into the question whether the tug went out of the channel usually pursued by navigators. If she departed from the customary course of navigation, undoubtedly she did so at her own risk. The master of a tug is not at liberty to disregard the customary course of navigation upon the waterway over which he is to perform a towage service. It must be assumed that such a course has been adopted upon some foundation of reason and experience showing it to be a safe and expedient one, and, if it is ignored or violated, the presumption is against the prudence of the act. We have searched the record in vain for any testimony that it was contrary to the customary course of navigation for vessels to proceed over that part of the channel where the disaster occurred. No witness in the case has testified that that part of the channel was not customarily traversed by vessels, or that the usual channel of navigation was to the eastward of the course taken by the tug. Of the 20 pilots who were examined as witnesses, not one testified that a distance of 300 feet from the middle of the passage would be outside the usually navigated channel; and, indeed, the question was not asked of any of them whether it would or would not, nor was it asked what part of the passage at that part of Quick's Hole would be regarded as the usual channel of navigation. There was testimony in the cause tending to show that, after leaving buoy No. 2 going to the southward, the usual course was to the eastward of mid-channel. There was a perfectly good reason for this in the existence of the southwesterly shoal, and it was conformable to the sailing directions of the Atlantic Coast Pilot, which required a change of course to eastward after passing buoy No. 2. It is quite probable that the court below was led into a misapprehension upon this question of fact by the course of the trial. When the action was brought, the libellant was unaware that the barge had struck the boulder on the northwesterly shoal, and he brought the suit on the chance of recovering upon the

theory that Quick's Hole was not a safe channel for coal barges drawing 22 feet of water, or upon some other theory that might be developed during the trial. All the testimony for the libelant was introduced for the purpose of showing that fact. The owner of the tug had become informed of the existence of the northwesterly shoal, but was obviously content to litigate the cause upon the libelant's own theory until the last moment, when it would be too late for the libelant to make any change of front. When nearly all the evidence offered for both parties had been introduced, evidence was introduced for the tug showing the existence of the northwesterly shoal, and describing its character. If this evidence had not been introduced, the case would have been a clear one for dismissing the libel; but when it was introduced, in view of the nature of the injuries which the proofs showed had been sustained by the barge, the conclusion was irresistible that the barge had struck one of the boulders of that shoal, and consequently that the barge had been towed upon a course as far from the middle of the passage as the location of the boulder. The course pursued by the defense was not altogether a commendable one, but perhaps was justified by the speculative nature of the libelant's action.

It is a circumstance in support of the theory that the course of the tug and tow was out of the usual channel, that, until the disaster to the barge, no vessel had ever struck the boulder in question; thus suggesting an argument of some force that vessels previously had not been accustomed to proceed as far to the westerly side of the channel. But the proofs show that, notwithstanding the channel was regarded almost unanimously by the pilots who were witnesses as entirely safe for vessels of 22 feet and over, it was very seldom that vessels of that draught or vessels of the draught of 20 feet had occasion to use it. Nearly all the vessels having occasion to use Quick's Hole are vessels of from 14 to 18 feet draught. Of course, such vessels would have passed the boulders safely. Vessels drawing 20 feet of water could have passed between the three boulders with safety, and could have proceeded safely on the westerly side of the shoal, where the water was from 27 to 30 feet deep. It appears, also, that the average rise and fall of the tide in Quick's Hole is four feet, and, except at low tide, a barge having the draught of the Felix could have passed over the shoal in safety. And, going at low tide, vessels of the draught of the Felix, many in number, might have passed very close to the boulder on the eastward without touching it. In view of these facts, it is not strange that no accident ever happened before to a vessel using Quick's Hole at the northwesterly shoal.

We conclude that the proofs do not establish culpability on the part of the tug, and therefore that there should have been a decree dismissing the libel.

The decree is reversed, with costs, and with instructions to the court below to dismiss the libel.



SKINNER v. FT. WAYNE, T. H. & S. W. R. CO. (ROHM et al., Interveners).

(Circuit Court, D. Indiana. February 9, 1900.)

Nos. 8,766, 9,093.

**FIXTURES—NATURE OF USE—RAILROAD TRACKS.**

Rails, ties, fish plates, etc., constituting the track of a railroad, laid down by a railroad company solely for use as a part of its entire line in its business as a common carrier, on land over which it has obtained an easement of right of way by grant from the owner of the fee, do not become annexed to the freehold, but remain personal property of the company after its easement has been extinguished by a sale of the land under a prior mortgage.

This is a suit in equity for the foreclosure of a railroad mortgage. Heard on demurrer to the answer to an intervening petition.

Puett & McFadden, for intervenor.

W. P. Kappes, for receiver.

BAKER, District Judge. This is an intervening petition by E. H. Calvin Rohm and others against Frank L. Winsor, as receiver, who is in possession of the railroad and other property of the above-named railroad company under and by virtue of a decree of this court. This intervention is brought to determine the title and right of possession of certain steel rails, fish plates, frogs, and targets. The question is raised by a demurrer to the answer.

The facts material to the decision of the question are the following: The railroad company was duly organized under the general laws of this state prior to the year 1891 for the construction of a railroad between certain specified termini. The proposed line of said railroad passed over a certain parcel of land belonging to the petitioners. The railroad company failed to agree with them for the acquisition of a right of way over their land. In January, 1891, the Rohms conveyed the land to one George D. Cook, trustee, for \$18,000, of which sum \$9,000 was paid in hand, and the remaining \$9,000 was secured by a note and mortgage on the granted premises. Shortly thereafter Cook granted to the railroad company a right of way over and across the premises, and the railroad company, by its contractors, entered upon said right of way, and threw up a grade, laid down its ties, and spiked the steel rails firmly to the ties, and put the frogs, fish plates, and targets on said right of way in connection with the track so laid down. Cook having defaulted in paying the note secured by the mortgage, the petitioners brought suit in the circuit court of Parke county, Ind., for the foreclosure of the mortgage against the mortgagor, Cook, and the Ft. Wayne, Terre Haute & Southwestern Railroad Company and others, and service of process was duly had upon them. At the November term, 1891, of said court, a decree was duly entered foreclosing said mortgage, and ordering the premises described therein to be sold. In March, 1892, the land was duly sold, and bid in by the petitioners, and, not having been redeemed, a proper deed of conveyance of said premises was executed to them by the sheriff of Parke county, Ind. The railroad company remained in possession of its railroad and right of way until November, 1893, when this court took possession of the same through a receiver duly

appointed therefor. The contention of the petitioners is that the steel rails, fish plates, frogs, and targets, having been annexed to the right of way granted by Cook after the execution of the mortgage, became fixtures; and that by the foreclosure of the mortgage, and by the purchase and conveyance of the premises to them under said decree, the petitioners have become the owners of the right of way and of the steel rails and other articles annexed to the soil.

The general rule of the common law certainly is that whatever is annexed and fixed to the soil becomes a part of it, and cannot be removed except by him who is entitled to the inheritance. But this general rule is subject to certain exceptions as firmly settled as the rule itself. Trade fixtures have been held by the earliest cases in which the question arose to be an exception. No matter how strongly attached to the soil, nor how firmly imbedded therein, such fixtures are regarded as personal property, and as such removable by the party erecting them. In the leading case of *Elwes v. Mawe*, 3 East, 38, the earlier and more important cases on this subject were carefully reviewed by Lord Ellenborough, and his conclusion from them that trade buildings and fixtures have always been recognized as an exception to the general rule has been acquiesced in, and uniformly followed as a correct statement of the law. Another exception, or rather an enlargement of the foregoing exception, is that of structures upon the land of another, which have been erected by the builder at his own cost, and for his own exclusive use, as disconnected with the use of the land. If so erected with the knowledge and acquiescence of the owner of the land, the title remains in the builder, and the property is held by him as a personal chattel. The purpose of the annexation and the relation of the parties to the property before and after annexation are important, but not always controlling, considerations. An article annexed to the land may, for some purposes, and between certain parties, be regarded as realty, while, as respects other parties and objects, a similar article may be regarded as retaining its character as personalty. The mode of annexation alone will not determine the character of the property annexed. The general principle to be constantly kept in view, which underlies all questions of this kind, is the distinction between the business which is carried on in or upon the premises and the premises or the locus in quo where it is carried on. The business is personal in its nature, and articles that are merely accessory to the business, and are put upon the premises solely for this purpose, and not as accessories to the freehold, retain the personal character of the principal to which they appropriately belong, and to which they are subservient. Annexations to the soil as accessories to it, and which are not annexed for the benefit of any particular business, become fixtures annexed to the freehold, and are not removable by the party erecting them. The difficulty in any given case is in determining on which side of the dividing line to assign any given article annexed to the soil. In the present case the railroad company entered upon the land under a grant of a right of way by the owner of the fee. The mortgage of the petitioners gave them simply a lien

on the land, and conveyed to them no title or estate therein. The railroad company rightfully entered upon the land under a grant of a right of way from the only person who possessed the right to make such grant. By this grant the railroad company acquired an easement for the construction of a railroad solely for personal use in carrying on the business of a common carrier of goods and passengers. The ties and rails and other articles laid or placed in or upon this easement of way were so laid and placed for the sole purpose of constructing a continuous railroad track to enable the railroad company to carry on its business as a common carrier. The superstructures on the right of way were annexed to the right of way for personal use, with no intention to annex them to the freehold. It would be absurd to suppose such superstructures were placed in or upon an isolated part of a continuous right of way for the betterment of the inheritance. If the rails and other property did not become annexed to the freehold as fixtures at the time they were placed on the right of way, they certainly have never lost their character as personal property; and, if they have always retained their character as personality, then neither the real-estate mortgage of the petitioners nor the foreclosure and sale thereunder have wrought any change in their character or title.

The case of *Graham v. Railroad Co.*, 36 Ind. 463, holds that, where a railroad company has, without the consent of the owner, entered upon land, and has built a depot and hotel thereon for railroad purposes, such structures become fixtures annexed to the freehold, and that in condemnation proceedings by the railroad company to acquire a right of way over the land it must pay for those structures as a part of the realty of the landowner. If this case were conceded to be a correct exposition of the law, it would not be controlling. But the case is unsound in principle, and is in conflict with the great weight of authority. A review of a few of these cases may not be unprofitable.

*Corwin v. Cowan*, 12 Ohio St. 629, was a case where a canal company had acquired an easement over certain land for the construction of its canal. It had imbedded in the soil of its right of way materials used in building locks. Subsequently, by abandonment, the easement terminated. It was held that the materials so used remained personality, and that the reversion of the easement to the owner of the inheritance did not carry with it the ownership of the materials used in the construction of the locks, and that they were never intended as annexations to the freehold, and, having been rightfully used in building the locks, they were removable as personal property.

*Wagner v. Railroad Co.*, 22 Ohio St. 563, was a case where a railroad company had acquired a right of way for its road over a certain parcel of land, and had built stone piers firmly imbedded in the soil of its right of way. The railroad company subsequently abandoned its purpose of completing its railroad. It was decided that these stone piers remained personal property, and that, as between the railroad company and the owner of the freehold, the company had the right of removal.

**Railroad Co. v. Morgan**, 42 Kan. 23, 21 Pac. 809, 4 L. R. A. 284, was a case where a railroad company by mistake, and without the knowledge or consent of the landowner, dug a well, and put in a pump and boiler, which were attached to the soil of the landowner. After some years the railroad company discovered the mistake, and took steps to remove the pump and boiler. The owner of the land sought to enjoin such removal, on the ground that the pump and boiler were fixtures annexed to the soil. It was held that these articles were personalty, and that the railroad company had the right of removal without paying for them to the owner of the land.

The case of **Northern Cent. Ry. Co. v. Canton Co. of Baltimore**, 30 Md. 352, was replevin to recover the possession of a lot of iron rails, frogs, spikes, and bolts brought by the railway company against the Canton Company. The railroad had been laid under a parol license on the land of the Canton Company. The latter company had recovered the right of way in an action of ejectment, and, under a writ of *habere facias possessionem*, possession of the right of way had been delivered to it by the sheriff. The court held that the rails and other articles remained personal property, and belonged to the railway company. The supreme court of Michigan had the same question before it in **Railway Co. v. Dunlap**, 47 Mich. 456, 11 N. W. 271. The court said:

"The railroad company, whether rightfully or wrongfully, laid its track while in possession, and with purpose entirely distinct from any use of the land as an isolated parcel. It would be absurd to apply to land so used, and to a railroad track laid on it, the technical rules which apply in some other cases to structures attached to the freehold. Whatever rule might apply in the case of abandonment, it is clear that the superstructure was never designed to be incorporated with the soil except for the purpose attending the possession, and in proceeding to obtain legal and permanent right to occupy the land for this very purpose."

The court further said that there would be no sense in compelling the railway company to buy its own property.

The case of **Railway Co. v. Le Blanc**, 74 Miss. 626, 21 South. 748, shortly stated, was this: A right of way on which a railroad track was wrongfully laid was sold at a tax sale, and the title so acquired was duly confirmed in the purchaser by appropriate judicial proceedings. The purchaser claimed that he became the owner of the rails laid down on the right of way as fixtures annexed to the soil. The court held that the rails were personalty, and did not pass by the sale of the right of way on which they had been wrongfully laid, nor by the judicial confirmation of the tax title. It was declared that the general rule that things annexed to the soil by trespassers belong to the owner of the freehold was not applicable as against a corporation having the right of eminent domain, where such corporation had wrongfully entered and made improvements for the public purpose for which it was created and given the right.

Reason as well as the great weight of authority support the foregoing views. It follows that the steel rails and other articles in controversy have always remained personal property, and belong to the railroad company, to be disposed of by the receiver for the benefit of its creditors. The demurrer to the answer is overruled.

## MURPHY v. SOUTHERN RY. CO.

(Circuit Court, N. D. Georgia. January 19, 1900.)

No. 904.

## 1. REFERENCE—CONCLUSIVENESS OF REPORT.

A finding by a master in chancery as to a question of boundaries, based on an examination of deeds and upon conflicting oral testimony, should not be lightly interfered with.

## 2. SAME.

A finding by a master in chancery as to the amount of damages will not be interfered with unless it is so inadequate or excessive as to be unreasonable.

In Equity.

Simmons & Corrigan, for plaintiff.

Dorsey, Brewster & Howell, for defendant.

NEWMAN, District Judge. This case is now heard on exceptions by both parties to the report of the special master. The usual rule as to the weight to be attached to the report of a master in chancery is that it is presumed to be correct, and that it will not be set aside unless clearly and manifestly erroneous. Additional weight is given such a report when the reference is by consent of parties. In this case, while the order of reference recites that it is by consent of parties, it is claimed (and such is probably the fact) that the consent was with reference to the person selected as special master, and that it was not strictly an agreement to refer. However this may be, it is true that, after it was determined that the case should be referred, counsel were given the opportunity to agree upon a suitable person to act as special master, and selected the Honorable Howard Van Epps, a lawyer of ability and high standing in the profession, and with lengthy experience on the bench. Judge Van Epps heard the evidence in the case, and the record and his report shows great care and painstaking on his part. His findings should not be lightly interfered with. See *Walters v. Railroad Co.* (C. C.) 69 Fed. 706; *Farrar v. Bernheim*, 21 C. C. A. 264, 75 Fed. 136; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289.

The first question for consideration is as to what part of what is called the "D'Alvigny Strip" in the evidence and in the special master's report is owned by Mr. Murphy. He claims that the railroad company has taken part of it, and has laid tracks thereon, while the railway company contends that he had no interest whatever in the part taken. In determining this question, it became necessary for the special master to examine deeds running back for some 30 years, and investigate plats, and hear a large amount of oral evidence. He finally decided the case on his construction of the different deeds bearing on this question, and the descriptions contained therein, and determined that the part of the D'Alvigny strip owned by Mr. Murphy did not embrace any of the land upon which the railway company had entered. After going carefully over the special master's report

on this subject, I am unable to see any good reason why it should not be sustained. There was evidence locating Mr. Murphy's part of this strip further east, so that the tracks of the railroad company would encroach on the same, but the question is peculiarly of the kind where the services of a master in chancery are valuable. He not only had all the documentary evidence before him, but he has seen the witnesses, and has heard them examined and cross-examined; and, having reached a conclusion upon disputed facts, and conflicting evidence, his conclusion should stand.

The other feature of the case, as to which there are exceptions by the complainant, relates to the complainant's right to an easement in what is called the "East Extension of Gray Street." In determining this question, it became necessary for the special master to investigate the matter in several aspects. First, there was a question of law, as to whether a certain stipulation in the deed from Ella Loyd to the Schofield Rolling-Mill Company should be construed as a covenant running with the land, or whether it was a dedication of the strip which is called the "East Extension of Gray Street" to public uses as a street. The special master gave it the former construction, but it will not be necessary to determine whether this legal view of the matter was correct or not, in view of what will be hereafter stated. It became necessary for him also to determine whether there had been any use of this strip as a street by the public. He held that there had not been. On this subject he says:

"The overwhelming evidence in this case establishes that he had no private way legally established to any such road across the tracks, or that any public road or street existed across those tracks. The evidence conclusively establishes that the north extension of Gray street, north of D'Alvigny street, had never been made a public street, nor had the east extension of Gray street to the right of way of the railroad company. It is entirely manifest that nothing but a village or settlement road existed across the railroad tracks at North avenue before it was formally extended, or between North avenue and the east extension of Gray street. The land here was no more than a common, outlying and uninclosed, and existing in a state of nature. The villagers did, indeed, struggle for an outlet across the railroad, and did from time to time pursue first one course then another across this common, but no street or private way was outlined or exclusively used. First one part of the common would be used, and then another; the question of gulleys or other superficial obstacles regulating the choice of those who attempted to cross over this common, or to find an outlet across the railroad tracks. In support of this view I need only cite, without extending this opinion to formally set it forth, the testimony of McColgan (9, 10, and 12), Donaldson (16 and 17), Hansell (28), Stewart (38, 40, and 42), James Loyd (53 and 55), Hall (60, 61, 62, 64, and 65), Jones (65 and 69), Morrow (71, 72, 73, and 75), Holden (12, 80, and 81), McAfee (129), Queen (152), Murphy (137, 139, 159, 339, 343, 349, and 352), Hendricks (187 and 189), Bryant (208, 287, 289, 290, 291, 292, and 293), Hankins (231), Vest (401), Harrison (436 and 442), Roberts (463 and 465), Bell (476), and Smith (477). This evidence establishes that many years ago, before the grading of North avenue, and its extension across the railroad tracks to Marietta street, persons were in the habit of crossing the right of way at some point, not at all definitely located, between where North avenue now crosses, and the land lot line between land lots 81 and 82. No particular place is shown to have been used for any definite time, or kept in repair by anybody. The evidence wholly fails to show any private way or public road or street across the Western & Atlantic right of way. This evidence fails to satisfy the demands of the law. Where a prescriptive right to a private way over land is asserted, it is necessary to show the uninterrupted use of a per-

manent way, not over 15 feet wide, kept open and in repair for 7 years. It is not sufficient to show that those claiming the prescription have been accustomed for more than 7 years to pass over the land, changing the way as they saw fit, to avoid obstructions or for convenience."

Then two other questions on this branch of the case arose, which, it seems to me, will control in its determination. In the complainant's original petition to the superior court of the state, from which the case was removed to this court, he claimed that this east extension of Gray street was used in connection with an outlet over a strip of land between the Schofield Rolling-Mill property and the right of way of the Western & Atlantic Railroad. By a subsequent amendment he claimed that he had an outlet across the railroad into Marietta street, opposite East Gray street. Mr. Murphy sold the strip of land known as the "Schofield Rolling-Mill Tract" to John W. Johnston, under whom, it is admitted, the present railway company claims, and in his deed he conveyed all the land to the right of way of the Western & Atlantic Railroad; thereby parting with all his interest, by a fee-simple conveyance, in and to the part over which, in his original petition, he claimed an outlet from East Gray street. The special master holds him estopped from setting up any claim to an outlet over land which he had thus conveyed. The special master further finds that there was no outlet whatever across the Western & Atlantic Railroad into Marietta street, opposite to East Gray street, as claimed in complainant's amendment, and concludes that Mr. Murphy had no outlet whatever through East Gray street, and that the most that could be claimed for it was that it ran up to and abutted against the railroad right of way, and there ended. He further finds and concludes, as a consequence of this, that Mr. Murphy has not been damaged at all by the laying of the railroad tracks across this strip which is called "East Gray Street." On this subject the special master says:

"In what way is Mr. Murphy damaged by this occupancy upon the part of the railroad of this east extension of Gray street? He had no property abutting upon it. It led only through the property of the railway company. It led only to the property of the railway company. I cannot understand how he was in any wise damaged by the act of the company in taking exclusive possession and control of it, and I therefore will report a finding that he is not in any wise damaged by the act of the railway company in laying their tracks across the east extension of Gray street."

This conclusion of the special master (which will be confirmed by the court) that Mr. Murphy has sustained no damage whatever on account of the occupancy by the railway company of what is called the "East Extension of Gray Street" renders unnecessary the decision of the questions heretofore mentioned. This outlet is of no benefit whatever to Mr. Murphy unless it leads in some way across the railroad tracks into Marietta street. The special master finds that it does not, and there is ample evidence to support his finding.

Another finding of the special master is excepted to by both parties, and this is the allowance of \$500 to Mr. Murphy for the actual invasion of the corner of one of the lots, which he undoubtedly owns, by the railway company, and digging down and carrying away his soil. The special master might have found something more, or

he might have found something less, possibly; but the amount he did find is not unreasonable to either party, and it will not be interfered with.

The railway company excepts to the special master's conclusion that the complainant is entitled to an injunction to restrain it from using what is called the "North Extension of Gray Street." The special master held that Mr. Murphy had an easement in this street, as appurtenant to the property which it is conceded he owns, and that the laying of its tracks along and upon the same by the railway company infringed his rights. The special master says that he arrives at this conclusion in favor of Mr. Murphy by the same process of reasoning by which he found against him as to the east extension. In this instance the easement was appurtenant to his property, and was valuable to him, and in the other it was not. His conclusion seems to be fully sustained by the evidence, and it must stand.

In conclusion, it may be stated that the report of the special master in this case is not only satisfactory, but it is an admirable statement and exposition of the rights of the parties in this case. While it is true that there was conflicting evidence, his conclusions seem to be, in every instance, the result of a careful study of the facts, and to be in all respects well supported by the evidence. My main perplexity about this case has been due to the fact of the apparent familiarity of the complainant, Mr. Murphy, with the locality in controversy, and his evident sincerity as to the location of his part of the D'Alvigny strip, as well as the testimony of witnesses before the master who were also apparently familiar with the surroundings, and who located the boundaries of different parts of this strip by physical objects. But after a thorough examination, and careful reflection about it, I am satisfied that all this is not sufficient to overturn the special master's report on this subject. All the exceptions of both parties will be overruled, and a decree entered confirming the report of the special master.

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INTERSTATE STOCK-YARDS CO. v. INDIANAPOLIS U. RY. CO. et al  
(Circuit Court, D. Indiana. January 27, 1900.)

No. 9,789.

**1. CARRIERS—INTERSTATE COMMERCE ACT—ROADS SUBJECT TO PROVISIONS.**

A terminal or belt railroad company, whose line is in and around a city, and entirely within one state, which receives interstate freight for shipment from or delivery to points on its line on through bills of lading issued by other companies on whose lines the shipment begins or ends, submits its road to a common control for continuous shipment, within section 1 of the interstate commerce act, and is subject to the provisions of such act.

**2. SAME.**

The right of a shipper to invoke the provisions of the interstate commerce law against discrimination on interstate shipments against a railroad company on whose line he is located is not affected by the fact that the duty of such company to receive and handle all freight consigned over its line without discrimination arises from a state statute, rather than from a voluntary arrangement with connecting lines.



**2. SAME—SUIT FOR DISCRIMINATION—JURISDICTION—PARTIES.**

A terminal or belt railroad company, which owns and leases tracks and switches in and around a city, and entirely within one state, and which has entered into a contract with the several roads entering the city, under which its property is entirely managed and operated by a board of managers composed of a member selected by each of such roads, who pay a fixed rental therefor, is a proper, but not a necessary, party to a suit against such roads for violating the interstate commerce act by discriminating against a business establishment located on its lines, and its joinder in such suit does not deprive a federal court of jurisdiction.

**4. SAME—SWITCH SERVICE—DISCRIMINATION.**

Under the interstate commerce act a common carrier of interstate freight cannot lawfully deny switch connections or service to one person, place, locality, or kind of traffic which it affords to others similarly situated; and one who has built a switch connection with the track of a railroad, with the consent of the company, has an implied right to service at such switch, and, unless such service is limited, either expressly or by implication, he may lawfully insist that the carrier shall there receive and deliver all such freight as it customarily carries, and for the receipt and delivery of which the switch is suitable and convenient.

**5. SAME.**

The Union Railroad Transfer & Stock-Yards Company (which afterwards became the Belt Railroad & Stock-Yards Company), which constructed and owns a belt line of railroad in and around the city of Indianapolis, intersecting and connecting with other roads entering the city, was required, by an ordinance, which it accepted, and which was afterwards embodied in a state statute, to extend to all persons doing business on or along its line full facilities to connect switches with its road, and to carry and transport freight to and from such switches at rates per car not exceeding those charged for through freight of like class and character. *Held*, that such ordinance and statute imposed upon the company the duty of affording to all persons constructing such switches equal and impartial service in respect to all freight, and that neither such company nor its lessee could lawfully limit the right to use such switch connections so as to exclude any kind of interstate freight transported over its line, for the purpose of giving to itself or to another a monopoly in the receiving or shipping of such freight.

**6. SAME—LIVE STOCK—REFUSAL TO DELIVER TO OWNER'S AGENT FOR FEED AND CARE IN TRANSIT.**

Neither the national live-stock shipping law, nor that of Indiana, which is identical, requiring stock in shipment to be unloaded, fed, watered, and rested within stated times, justifies an interstate carrier of stock in discriminating between different stock yards at the same place by refusing to deliver such stock at one of the yards, although consigned to it by the owner for care. Such statutes impose the duty of feeding and caring for the stock in the first instance upon the owner, and the carrier has the right to control the same only when the owner or person in charge neglects such duty.

**7. SAME—SUIT FOR DISCRIMINATION—JURISDICTION OF EQUITY.**

The rule that equitable relief will not be granted until the complainant's right or title has been established in an action at law does not apply where the subject-matter of the litigation is alleged discrimination in violation of the interstate commerce act; and where, in such case, the remedy at law is not adequate, equity will take jurisdiction.

**On Motion for Preliminary Injunction.**

Ferdinand Winter, for complainant.

Baker & Daniels, Morris, Newberger & Curtis, W. A. Ketcham, John B. Cockrum, Miller, Elam & Fesler, John G. Williams, Samuel O. Pickens, and E. C. Field, for defendants.

BAKER, District Judge. This is a suit by the Interstate Stock-Yards Company against the Indianapolis Union Railway Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, the Cincinnati, Hamilton & Dayton Railway Company, the Cincinnati, Hamilton & Indianapolis Railroad Company, the Lake Erie & Western Railroad Company, the Chicago, Indianapolis & Louisville Railway Company, the Indiana, Decatur & Western Railway Company, the Peoria & Eastern Railway Company, and Volney T. Malott, as receiver of the Terre Haute & Indianapolis Railroad Company, charging each with unlawful discrimination against the complainant in the transportation of interstate commerce by refusing to deliver at its switch live stock in car-load lots consigned to it from other states for delivery at its stock yards in the city of Indianapolis, and to receive for shipment live stock in car-load lots to be transported and delivered to consignees in other states than the state of Indiana. On the filing and presentation of the bill of complaint duly verified, a temporary restraining order was entered, enjoining such alleged discrimination until the further order of the court, and a day was fixed for hearing the complainant's application to enter an order of injunction for the like purpose, to continue in force until the final determination of the suit. This application has been heard on the verified bill of complaint, the verified answers of certain of the defendants, and on numerous affidavits filed by the respective parties. The application, broadly stated, presents only two questions: First. Is the cause of action exhibited in the bill of complaint within the jurisdiction of this court? Second. Under the facts and law of the case, is it shown that the unlawful discrimination complained of exists or is threatened?

The defendants claim that the Indianapolis Union Railway Company, if not an absolutely indispensable party, is at least a necessary party, and, being within the jurisdiction of the court, must be made a party; and because it is a corporation created under the laws of the state of Indiana, and its railroad is located and operated exclusively within the county of Marion, in this state, that it is not engaged in interstate commerce, within the true construction of the interstate commerce act, and is, therefore, subject only to the jurisdiction of the courts of the state for the redress of the grievances complained of. All the parties defendant except the Union Railway Company are confessedly common carriers of interstate commerce, and no question is made but that this court has jurisdiction over them, unless such jurisdiction is ousted because the Union Railway Company is a necessary or indispensable party over which the court has no jurisdiction because it is not engaged in interstate business. If the Indianapolis Union Railway Company is a necessary party, without the presence of which a decree cannot be rendered against the other defendants without prejudice to their substantial rights, then it would be the duty of the court to dissolve the restraining order, to overrule the application for a temporary injunction, and to dismiss the bill. The Indianapolis Union Railway Company is a corporation organized under an act of the general assembly of

the state of Indiana for the incorporation of union railway companies approved March 2, 1885, and as such it has constructed, and now owns in the city of Indianapolis a system of railways, side tracks, and switches connected in or near said city with the above-named railroads, operated, respectively, by said railroad companies and Volney T. Malott, as receiver. The Belt Railroad & Stock-Yards Company is a consolidated corporation, the constituent members of which are the Belt Railroad & Stock-Yards Company and the Belt Railroad Company of Indianapolis, which were incorporated under the general laws of the state of Indiana for the incorporation of railroad companies, for the special purpose, stated in the articles of incorporation, of providing a convenient method for the transportation and transfer of freight and stock across, through, into, and around the city of Indianapolis, and to effect the speedy and economical exchange of such cars between all the railroads entering or passing through said city, and for the erection and maintenance of ample stock yards for the accommodation of all the live stock that may be brought into or pass through said city. The Belt Railroad & Stock-Yards Company, whose name, until changed by the decree of the Marion circuit court of the state of Indiana, was the Union Railroad Transfer & Stock-Yards Company, immediately upon its incorporation applied to the common council of the city of Indianapolis for assistance to the extent of \$500,000 of the bonds of the city in the construction of the railroad proposed to be constructed by it, namely, a railroad extending around the city, and connecting by means of side tracks and switches with all the railroads which entered the city, and also with the railway of the Indianapolis Union Railway Company, and with the manufacturing and other establishments and places of business in or near the city, whereby through freight trains and cars being transported upon any of the railroads entering the city could be carried around the city, and all freight sent to or by persons, firms, or corporations at their places of business connected by switches with the Belt Railroad could be directly delivered upon or received from said switches; and, to induce the city to give such assistance, said company proposed in writing to the common council of the city, if it would extend such assistance, that it would construct said railroad, together with all necessary and proper switch connections with other railroads crossed by it, and with permission to manufacturers and others to connect with it by switches and side tracks; which said proposition was accepted by an ordinance adopted by the common council of the city, and the bonds of the city to the above-named amount were issued to the Belt Railroad Company, whereby it was enabled to construct its railroad. The fourth section of this ordinance which was accepted by the Belt Railroad Company is as follows:

"Sec. 4. The said Union Railroad Transfer & Stock-Yards Company [whose name was thereafter changed by decree of court to the Belt Railroad & Stock-Yards Company] shall extend to all persons doing business on or along the line of said railroad full facilities to connect switches with the said road, and shall carry and transport freight to and from such switches at rates per car not exceeding that charged by said company for transporting through freight of a like class and character over said road."

By an act of the legislature of this state approved March 2, 1877, the foregoing ordinance was enacted into law, the fourth section of which act is in the identical language of the fourth section of said ordinance. The switch connections now owned and used by the complainant were connected with the Belt Railroad in or about the year 1880 under and pursuant to the foregoing ordinance and statute. The act of March 2, 1885, under which the Indianapolis Union Railway Company is incorporated, and which authorized it to lease and operate the Belt Railroad, provided as follows:

"Sec. 11. Any such union railway company may by agreement in writing with any railroad company, not being one of said proprietary companies and owning or operating a railroad which extends to, into or through, or near the town or city in or near which such union railroad is or may be situated, admit said last mentioned railroad company to the use of the tracks, side tracks, switches, depots, depot grounds, yards, sheds and other structures or railroad facilities and appliances (including the use of its belt railroad and belt railroad facilities, if any) during such time, on such terms and conditions, and for such compensation or rent as may be agreed upon. The right of any associate company to continue in the use and enjoyment of the property and facilities of the union company may be made to depend upon the faithful performance of such terms and conditions by such associate company as may be inserted in said agreement. The companies which may be so admitted are herein designated as associate companies: provided, that no such associate company shall be admitted to the use of the property and facilities of such union railway company except upon the unanimous vote of the directors of such union company."

The thirteenth and fourteenth sections of the act provide that, in case other railroad companies are admitted to the use of the railroad and other property of the Union Railway Company, a board of managers shall be appointed, composed of one representative selected by each railroad having such use, to whom it shall be competent to delegate so much of the authority, power, and jurisdiction of the board of directors as may be agreed upon. The seventeenth section provides that any agreement entered into before the taking effect of the act for the use of such property by other railroad companies shall have the same force and effect, and be as valid and binding, as if it had been made after the taking effect of the act. By the last preceding section the so-called "reorganization agreement" of October 17, 1882, was ratified and confirmed. The fifth and sixth clauses of this agreement provide for an appraisement of the value of all the property, including the lease of the Belt Railroad, owned by the Union Railway Company; also of all engines, cars, and other equipment, tools, or machinery used in operating and maintaining the Belt Railroad; and that such appraisement shall for all time to come constitute the basis on which the fixed rental shall be computed and paid as hereinbefore provided. The seventh clause provides that interest at the rate of 7 per centum per annum shall be paid upon the appraised value of all such property, and the amount thereof shall constitute the fixed rental to be paid to the Union Railway Company by the several other railroad companies making use of the same, and said fixed rental shall be from time to time divided into as many equal shares as there are railroad companies using said property, and each company so using the same shall pay one of said shares. The

eighth clause provides that the tracks of the Union Railway Company shall be used exclusively, as far as possible, for passenger train service and such local freight deliveries as may be necessary in consequence of the location of freight houses and private sidings. All other freight transfers and deliveries shall be made over the Belt Railroad. And it further provides that all expenses growing out of the maintenance, operation, renewal, and replacement of the Belt and Union Railroads, including taxes, assessments, insurance, wages and salaries, and moneys paid for damages to person or property shall be paid by the several companies having the joint use of the property in proportion to such use on the wheelage basis. In the ninth clause the property is spoken of as the joint property of the companies using the same. The tenth clause imposes upon the companies the obligation to pay the cost of rebuilding or replacing the property in case of a partial or total destruction by fire or other cause. In the eleventh clause each company is made responsible for loss or damage to person or property, except to property used in common, which arises out of the conduct or neglect of its own employes; claims for loss or damage to person or property, including property used in common, arising out of the conduct or neglect of employes paid in common, shall be paid by the Union Railway Company, and all moneys so paid by it are to be charged to the current account of expenses of operating and maintaining the belt railroad and union railway property, as the case may be, and paid by the companies using the property on the wheelage basis, as provided in clause 8. The twelfth clause provides that the current operation, maintenance, renewal, and repair of said Belt Railroad and said Union Railway Company property shall be conducted by a board of managers, to be composed of one representative from each company using said Union Railway Company property, and under such rules, and by such officers and employes as said board shall prescribe; and it further provides that the board of managers is hereby vested with authority to make rules governing all joint employes, and to prescribe the terms and conditions upon which such Belt Railroad and said Union Railway Company property may be used in common; also to appoint all officers, agents, and employes who may be necessary to conduct the joint business. They shall also fix the time of the arrival and departure and regulate the movement of all trains upon said Union Railway property and said Belt Railroad. Each company shall receive equal and impartial privileges in the use of said joint property. All financial transactions incident to the maintenance, operation, renewal, and replacement of said property shall be conducted wholly through the officers and agents of the Union Railway Company. The fourteenth clause provides that the grant of right of joint use of said Belt Railroad and said Union Railway property, subject to the conditions above stated, is hereby made perpetual to the companies accepting the same and executing a certified copy of this agreement; and it further provides that each of said companies binds and obligates itself, its successors and assigns, to forever continue the joint use aforesaid, and subject to and upon the terms and conditions herein stated.

The Belt Railroad & Stock-Yards Company was incorporated for the purpose of providing a convenient method for the transportation and transfer of freight and stock cars through, into, and around the city of Indianapolis, and to effect the speedy and economical exchange of such cars between all railroads entering into or passing through the city. The ordinance of the city, which it accepted, required it to construct a railroad with all necessary and proper switch connections with all other railroads crossed by it, and expressly required it to extend to all persons doing business on or along the line of its railroad full facilities to connect switches with its railroad, and to carry and transport all freight to and from such switches at rates per car, not exceeding that charged by it for transporting through freight of the like class and character. The act of March 2, 1877, in express terms imposed the same duties upon it. If the Belt Railroad Company had made with each of the other defendants an arrangement to receive from them cars containing freight transported from other states, and to deliver the same to the consignee upon the consignee's switch or side track connected with its railroad, could it be doubted that in handling such freight it would have been engaged in interstate transportation? Such an arrangement would have made the Belt Railroad a common carrier for a continuous shipment of interstate freight within the terms of the interstate commerce act. But it is contended by the defendants, because the jurisdiction of this court is limited to the enforcement of right growing out of national legislation in the absence of diverse citizenship, that the articles of incorporation, the ordinance, and the ratifying statute are irrelevant, and should be disregarded. The complainant does not resort to the jurisdiction of this court to enforce its right to switch service generally, for that, for want of diversity of citizenship, would not be within its jurisdiction. It simply complains of discrimination as to switch service in respect to interstate freight, and of the refusal to transport and deliver such freight in accordance with the terms of through bills of lading. It seeks to have the Belt Railroad and its lessee, the Union Railway Company, as a carrier engaged in the transportation of interstate freight received from connecting interstate railroads, which it has voluntarily received for shipment and delivery, compelled to carry and deliver the same in accordance with the bills of lading under which such freight was received. Its right to this relief grows out of national legislation. But why is the complainant not entitled to show that its right to such switch service for interstate freight consigned to or received by it does not rest solely upon the ground that such service is voluntarily afforded to others and denied to it? Is it any the less a discrimination, within the prohibition of the interstate commerce act, that the party complaining has a legal right created by ordinance and statute to the service which is denied, than if the right to such service grew out of mutual arrangement between connecting interstate carriers? The duty in the one case grows out of contract, and in the other is created by law. But in each case the obligation to perform the duty is equally binding. Neither grows out of federal legislation, but either may be looked

to in determining whether there has been a discrimination in the performance of that duty within the prohibition of the interstate commerce act. The thing forbidden by the federal statute is discrimination by a carrier engaged in whole or in part in the transportation of interstate freight, and whether the existence of such discrimination depends on the duty of the carrier created by statute or on a duty growing out of contract, express or to be inferred from a common course of business, would seem to be quite immaterial. The jurisdiction of this court does not depend upon the ultimate determination of the case, but on the question whether it is made to appear by the averments of the bill of complaint that the Union Railway Company has discriminated, within the true intent of the interstate commerce act, in failing to perform a legal duty owing to the complainant by refusing to deliver or to receive interstate freight, consigned to or by it on through bills of lading on its switch connected with the Belt Railroad. It seems to me that the complaint shows the existence of a duty imposed upon the Union Railway Company to deliver and receive interstate freight consigned to or by the complainant on its switch connected with the Belt Railroad. The agreement referred to in the complaint, and hereinbefore set out, leads to the same conclusion. The effect of this agreement is that the Union Railway Company, as a corporate entity, and as the lessee and owner of the Belt and Union railways, locomotives, cars, and other property pertaining thereto, leases the same in perpetuity to the defendant railway companies other than itself, and as compensation for such lease receives a fixed rental computed upon the value of the property which is to be paid by the leasing companies to it for its own exclusive use as a distinct corporation. It has nothing to do as a corporation with the use that is to be made of the leasehold property. Its board of directors has no control over such use. The railroads and other leasehold property are placed under the exclusive control and management of a board of managers, which is a body distinct and separate from the Union Railway Company or its board of directors. This board of managers does not, in any respect, represent or act for the Union Railway Company as a corporation, but acts solely as the representative of the other railway companies which are engaged in using and operating the Belt and Union Railroads for their own several purposes in performing their duties as interstate common carriers of freight and passengers. Every agent and employé who has anything to do in the maintenance and operation of the Belt and Union Railroads is employed by this board of managers. The entire expense of their maintenance and operation is paid by the railroads having their use in proportion to the use by each severally on the wheelage basis. If there is loss or damage to person or property, caused generally by the companies having such use, it is, in the first instance, paid by the Union Railway Company; but it is treated as an expense of the operation, and is charged to and repaid by the operating companies on the wheelage basis. The officers of the Union Railway Company have nothing to do except to keep the account of the operating expenses, and apportion them to the operating

companies, and collect from each its proportionate share of such operating expenses, and disburse the moneys so received in payment of salaries, wages, taxes, and other expenses. In all this they act simply as agents and employes of the operating companies. Their salaries are included in the expenses, which, under the eighth clause are paid by the operating companies on the wheelage basis. The switching charge of one dollar per car which is collected from each railroad company for the transportation of its cars over the Belt and Union Railroads is not paid to or received by the Union Railway Company for its own benefit, as is the fixed rental which is paid for the use of the property, but is collected for the joint benefit of the operating companies exclusively; and the aggregate amount of such charges is credited in each month upon the operating expenses for that month, and the balance is then apportioned to the operating companies severally on the wheelage basis. From the foregoing review of the facts it seems perfectly clear that under the third clause of the first section of the interstate commerce act the Belt Railroad leased to the Union Railway Company is to be regarded as a part of the railroad system of each of the other defendant railway companies, except the Union Railway Company, so that, for the purposes of interstate freight traffic, the complainant's stock yards and switch connections are to be treated as being connected with each of said railroads. And, if there is any discrimination by either of them, or any other violation of duty in respect to the delivery or receipt of interstate freight to or from the complainant by the defendant railroad companies, other than the Union Railway Company, it is entitled to invoke the jurisdiction of this court for the relief sought by the bill of complaint. If the Union Railway Company is to be regarded as operating a belt railroad as a common carrier, then, as it received shipments of interstate freight consigned to or from the complainant on through bills of lading issued by the defendant railroad companies upon whose line the shipment begins or ends, it is to be treated as having subjected the Belt Railroad to a common control for a continuous shipment within the first clause of section 1 of the interstate commerce act. *Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935. If, on the other hand, the Union Railway Company is to be regarded as operating the Belt Railroad in its corporate capacity as a switching road for the other defendant railway companies, for a switching charge to be paid to it for its own use and benefit, then it is properly joined as a necessary party defendant. But, if the Belt Railroad is being controlled and operated by the other defendant railroad companies, as joint sublessees of the Union Railway Company, then the latter company, while a proper, is not a necessary, party. But in either case, if the discrimination charged as to the shipment of interstate freight is shown, the court would be authorized to entertain jurisdiction; for, if it be conceded that the Union Railway Company is not engaged in carrying interstate freight over the Belt Railroad, and hence is simply a proper, but not a necessary, party, the only result would be that the court would dismiss the suit as to it, and would retain



jurisdiction as to the other parties defendant. The court, however, while of opinion that the Union Railway Company is not a necessary party, is still of the opinion that it is so implicated by the averments of the bill and the proofs in the alleged discrimination charged against all of the defendants that it is proper to retain jurisdiction over it as a party defendant. For these reasons the court must decline to dismiss the bill for want of jurisdiction.

The remaining question is whether, under the facts and the law, it is shown that the unlawful discrimination complained of is threatened or exists. It is clear, by force of the express terms of the interstate commerce act, that in respect of interstate commerce there can be no lawful discrimination to the advantage or disadvantage of any person, place, locality, or kind of traffic. A common carrier of interstate freight cannot lawfully deny switch connections and service to one person, place, locality, or kind of traffic which it affords to others similarly situated. The complainant is the owner of switch connections with the Belt Railroad, which have been in existence for a long period of time. Such switch connections were made with the consent of the Belt Railroad, and under the authority of the fourth section of the ordinance and statute above mentioned. The contention of counsel for the defendants is that these switch connections were made simply for the purpose of delivering and receiving dead freight thereat and therefrom. The existence of switch connections rightfully existing implies the right of the owner thereof to service thereat by the carrier consenting to such connections. It would be a vain and foolish thing to incur the labor and expense of making such connections unless they were to be used in connection with the transportation of freight to and from the same. And, unless the right to service at such switch connections is limited, either expressly or impliedly, the owner thereof may lawfully insist that the carrier shall there deliver and receive all such freight as it customarily carries, if the switch connections are suitable and convenient for the delivery and receipt of such freight. There is no evidence of any limitation of the purposes for which the switch connections now owned and used by the complainant should be used, other than that which is to be implied from the fact that such connections were constructed for the delivery and receipt of dead freight. In the opinion of the court, the Belt Railroad could not lawfully limit the right to use such switch connections for any kind of interstate freight transported by it. Any such limitation would be prohibited by the true construction of the fourth section of the ordinance and statute. The ordinance and statute under which they were put in cannot be construed as limiting the right to use the switch connections of the complainant solely for the receipt and delivery of dead freight. There is nothing in the ordinance or statute justifying such a construction. The language of the fourth section of each is clear and unambiguous. Each requires switch connections to be granted to all persons, and service in respect of all freight to be afforded upon equal rights and impartial terms. It is to be assumed that the switch connections were put in upon the implied understanding

that the owners of such connections should, so long as they existed, have the right to service thereon for all sorts of freight and upon impartial terms. It would do violence to the language employed to construe it as counsel for the defendants contend that it should be construed. They construe it as though it read to afford full facilities to connect switches with the Belt Railroad for the delivery of all freight other than live stock, and to carry and transport such dead freight to and from such switches. There is not a word in the ordinance or in the statute, nor anything in the situation of the parties, to show that either the city or the state had any purpose to establish or encourage the stock-yards business of the Belt Railroad, or to confine the location of the stock-yards business to any particular locality, or to limit the number of stock yards in or about the city. If it had been the intention of the city or state to secure to the Belt Railroad & Stock-Yards Company a monopoly of the stock-yards business for all time to come, it would have been easy to have so provided in plain and unambiguous terms. Nothing short of the clearest and most unambiguous language would justify the court in holding that it was the purpose of either the state or city to create a perpetual monopoly. It may well be doubted whether a statutory enactment for that purpose would not be declared void, as in conflict with the constitution, which provides that the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, on the same terms, shall not equally belong to all citizens. The business of operating and maintaining a stock yards for private gain is separate and distinct from that of operating and maintaining a railroad. The business reserved to itself by the Belt Railroad & Stock-Yards Company in its lease of its railroad and railroad property to the Indianapolis Union Railway Company is that of maintaining and operating a stock yards for private gain. In the lease to the Union Railway Company the latter agrees to assist and encourage the stock-yards business of the lessor company so far as it may lawfully do so. This stipulation does not authorize the Union Railway Company to assist the Belt Railroad & Stock-Yards Company in its private business as a stock-yards company in creating and perpetuating a monopoly. It is not to be supposed, whatever may be the private views of the judge as to monopolies and trusts, that any self-respecting court could anywhere be found that would sanction by its decree the creation or maintenance of a monopoly or trust, unless constrained so to do by some imperative requirement of law. It is firmly settled that a railway company cannot discriminate, even in favor of itself, in respect of business which is not railroad business proper. *Railway Co. v. Dohn* (Ind. Sup.) 53 N. E. 937; *Parkinson v. Railway Co.*, L. R. 6 C. P. 554, 1 Nev. & McN. 280; *Ilwaco Ry. & Nav. Co. v. Oregon S. L. & U. N. R. Co.*, 6 C. C. A. 495, 57 Fed. 673. By a stronger reason it will not be permitted to discriminate in favor of the business of another, even where, for a consideration moving to it in respect to its railroad business, it has contracted to protect and encourage such other business.

It is contended by counsel for the defendants that the national and state statutes requiring railroad companies to feed, water, and

rest live stock in transit give to such companies the right to select the agencies and places for the performance of these duties. This may be conceded, as a general proposition, without affecting the complainant's right to relief. The act of congress provides that no railroad company shall confine live stock in cars for a longer period than 28 consecutive hours without unloading the same for rest, water, and feeding for a period of at least 5 consecutive hours, and that, when so unloaded, the animals shall be properly fed and watered during such rest by the owner or person having the custody thereof, or, in case of their default, then by the railroad company, at the expense of the owner or person in custody thereof. The statute of this state is a copy of the federal statute. The complainant does not ask that the defendant railway companies shall be required to do anything in violation of these statutes. It simply asks that live stock consigned to it, or to persons doing business in its yards, or contracted in the bill of lading to be unloaded, fed, watered, and rested there, shall be delivered in accordance with the contract. As the statute makes it primarily the duty of the owner or person having the custody of the animals properly to feed and water them, the complainant's stock yards would be regarded as the agent pro hac vice of the consignors or consignees under the bills of lading which designated its stock yards as the place of delivery. If the complainant does not properly discharge its duty, then, and only then, would the duty be devolved upon the carrier. In that case the company could employ the Belt Railroad & Stock-Yards Company or any other person to properly care for the animals, and, as the statutes provide, the carrier would have the right to charge the expense to the owner or person having charge of the animals, and would have a lien upon them for its security, and it would not be liable for any detention of the animals occasioned by having to care for them elsewhere; nor would the railroad company be bound to resume the transportation of such animals until the expiration of the five consecutive hours of rest. These considerations would seem to be a sufficient answer to this contention of counsel for defendants.

The nature of the wrong complained of, the fact that it is of a continuing character, that it is not susceptible of accurate pecuniary estimation, and that resort to actions at law would involve a multiplicity of suits, none of which would end the litigation, all tend to make it manifest that the remedy in a court of law is not as adequate to afford relief as is the remedy in a court of equity. The jurisdiction in equity does not depend upon the fact that there is no remedy at law. It is afforded whenever the remedy at law is not as full, adequate, and complete as in a court of equity. The rule that equitable relief will not be granted until the complainant's right or title in respect of the subject-matter has been established in an action at law, does not apply where the subject-matter of the litigation is to prevent discrimination in violation of the interstate commerce act.

A review of the evidence in this case would prove unprofitable, and would needlessly protract this opinion. It suffices to say that,

in the opinion of the court, the discrimination complained of is made out by the proofs. An injunction pendente lite will be awarded.

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**HILDRETH v. SPARKS MFG. CO.**

(Circuit Court, S. D. New York. December 29, 1899.)

**UNFAIR COMPETITION—IMITATION OF LABELS—LIABILITY FOR MAKING AND SELLING.**

A bill to recover for losses sustained by reason of unfair competition may be maintained against one who has made and sold to competitors labels and wrappers in imitation of complainant's, by the use of which, it is alleged, complainant's business has repeatedly been interfered with, and the goods of others sold as his; and such bill is not demurrable because it does not allege that such wrappers were used as coverings for the specific kind of goods sold by complainant.<sup>1</sup>

This is a suit in equity to recover damages for unfair competition, and for an accounting. On demurrer to bill.

Alexander P. Browne, for plaintiff.

F. E. Barnard, for defendant.

**WHEELER**, District Judge. The bill well alleges: That the plaintiff makes molasses candy, and sells it in a peculiar form of package, "consisting of a wrapper having a certain peculiar appearance, the whole being distinctive of the goods" made by him, and representing the same to the public as his manufacture, one feature of which is a word having the appearance of being written in script, beginning with a capital letter, and the last letter extending beneath the body of the word, forming a scroll or flourish, and all printed in red ink, whereby he has built up a large, increasing, and profitable trade. That the defendant has wrongfully printed, and furnished to business competitors of the plaintiff, wrappers similar to those of the plaintiff, in respect to: "The color of the ink used. Its being written in script, with letters of substantially the same form, size, and style. The mark and flourish beneath said word. The length and general appearance of the word. Its relative location on the wrapper. Its similar prominence upon the package when the candy is wrapped. Its association with other printing in red on said wrapper." "That in consequence of the defendant's acts as hereinbefore set forth, and the unlawful imitation of the appearance of your orator's goods, to which it (the defendant) has directly contributed, and which it has in many cases originally produced and brought about, your orator's trade has been and is being and will continue to be wrongfully and unlawfully diverted, and the goods of many of your orator's competitors have been and are being sold as and for the goods of your orator, and upon the reputation acquired for the same by your orator, and thereby your orator is and has been deprived

<sup>1</sup> As to unfair competition in trade, see note to *Scheuer v. Muller*, 20 C. C. A. 105, and, supplementary thereto, note to *Lare v. Harper & Bros.*, 30 C. C. A. 376.

of large sales and profits of his own goods," and "that the said defendant, by its wrongful, fraudulent, and unlawful practices aforesaid, has diverted to itself large profits which would otherwise have accrued to your orator, the exact amount of which your orator cannot with certainty state; but your orator believes, and therefore charges, that the same amounts to the full sum of \$3,000, and prays that the defendant may full and true disclosure make as to the same, and may be decreed to account therefor in full." The bill has been demurred to for want of equity, and the demurrer has now been heard. The brief of counsel says:

"The only grievance presented against defendants is that they have sold labels to competitors of plaintiff, who have used them in unfair competition. The only use of which the plaintiff can complain is in competition with his own use, namely, as wrappers of molasses candy. It is not alleged that these wrappers were not susceptible of an innocent use, or that defendants took part in their improper use, or intended them for such use. If the wrappers made were used for other candy, or for any articles other than molasses candy, plaintiff would have no complaint against the users, and still less against the paper maker and printer."

Although the bill does not allege an unlawful use in the sale of molasses candy, it does allege repeated interference with the plaintiff's business by unlawful imitation of the appearance of his goods, which could be done upon other goods of the same sort, not specifically molasses candy, as well as with that. The foundation of the right to proceed in equity in such cases is the repeated tort, for which repeated suits at law would be an inadequate remedy. In torts all participants are principals, and the plaintiff could doubtless maintain an action at law against the defendant for each of the diversions of his business produced, brought about or contributed to by the defendant, as alleged in the extracts quoted from the bill. Walk. Pat. § 407. The multiplicity having furnished equitable jurisdiction, the right to maintain the bill, upon the allegations quoted, and others of the same import, for full relief, follows. Demurrer overruled; defendant to answer over by the February rule day.

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**MERCANTILE TRUST CO. v. ST. LOUIS & S. F. RY. CO. et al.**

In re WOLFF.

(Circuit Court, D. Missouri, E. D. February 9, 1900.)

No. 3,768.

**1. RAILROADS—PURCHASER AT FORECLOSURE SALE—LIABILITY UNDER DECREE.**

A purchaser of all the property of a railroad company under a decree of foreclosure, which required such purchaser to pay all liabilities incurred by the original company which were prior in lien to the mortgage foreclosed, may be held to account for a fund held in trust by the original company, in so far as, under the principles of equity, such fund could have been recovered by the cestui que trust from the receiver.

**2. TRUSTS—INSOLVENCY OF TRUSTEE—RIGHT TO FOLLOW TRUST FUND.**

A railroad company which held in trust a fund to be used for the benefit of another company became insolvent, having expended but a part of the fund which it had deposited in its current bank account. Held, that by such mingling of the money with its own the trust became impressed

upon the entire fund in the bank, and so much of such fund as could be identified in the hands of the receiver was recoverable by the beneficiary, but that such identification was limited to the smallest amount in the bank account at any one time after the trust fund was deposited, although a larger sum came into the receiver's hands.

In the Matter of the Intervening Petition of A. L. Wolff, Receiver of the Kansas Midland Railway Company.

Burrill, Zabriski & Burrill and Sam H. West, for intervenor.  
L. F. Parker and J. T. Woodruff, for defendants.

ADAMS, District Judge. In the year 1888 the Kansas Midland Railway Company delivered certain of its bonds to the St. Louis & San Francisco Railway Company in trust to sell the same, and apply the proceeds of sale in the equipment and improvement of the railroad of the Kansas Midland Railway Company. The St. Louis & San Francisco Railway Company (hereafter called the "Frisco Company") sold the bonds, realized therefor \$367,586.50, and expended in the due execution of the trust \$324,554.82, leaving a balance of \$43,031.68 unaccounted for. On receipt of the proceeds of the sale of the bonds in 1888, the Frisco Company deposited the same in a general account kept by it, together with other moneys, and thereafter, from time to time, deposited in that account its current and other receipts, and drew out, as occasion required, money for the equipment and improvement of the road of the Kansas Midland Railway Company, as well as for the payment of its other and personal obligations. The balance to the credit of the Frisco Company in this general account varied from time to time according to the deposits in, and checks against, the account; at all times, however, up to December 23, 1893, showing some balance on hand. On November 15, 1890, the balance amounted to \$2,265.55. This remained unchanged from November 15 to December 12, 1890, after which further deposits were from time to time made, resulting in fluctuating balances until December 23, 1893, the date of the appointment of the receiver for said Frisco Company, when it stood at \$36,522.28. This last-mentioned sum came into the hands of the receiver. It appears that the St. Louis & San Francisco Railroad Company, or the "New Frisco Company," as it is called, which became the purchaser of all the property of the Old Frisco Company at a sale under a decree of foreclosure in the main case, took its rights under and subject to the provisions of the decree, requiring it to pay, among other things, all liabilities incurred by the Old Frisco Company, which were prior in lien to the consolidated mortgage under which the foreclosure was had. The special master to whom this intervention was referred reports that the balance which came into the hands of the receiver, namely, \$36,522.28, was subject to the original trust in favor of the Kansas Midland Railway Company, and should be now paid to the intervenor, who is the duly-appointed receiver of the Kansas Midland Railway Company, by the New Frisco Company, under the provisions of the decree of foreclosure in the main case.

Numerous exceptions are taken to the report of the special master, but two of them only were seriously argued, and involve all that is

necessary for a final disposition of the case. The first is that the special master erred in holding that the Old Frisco Company ever became a trustee with respect to the bonds in question, or ever became subject to the equitable doctrine governing trustees, but became a simple debtor to the Kansas Midland Railway Company for any unexpended balance of the money received by it as proceeds of the sale of the bonds in question. The second is that the special master erred in subjecting all the balance found to the credit of the Old Frisco Company in its depositories at the time the receiver was appointed for that company, to the satisfaction of the intervener's claim.

As to the first of these questions, I am entirely satisfied with the conclusion reached by the special master, and will content myself by the statement that the documentary proof in the case clearly creates the relation of trustee and cestui que trust between the Old Frisco Company and the Kansas Midland Railway Company with respect to the proceeds of the bonds in question, and that as a result the defendant, as successor to the Old Frisco Company, under and by virtue of the decree of foreclosure in this case, must be held to an account on the theory of an original trust in the Old Frisco Company, so far as the principles of equity applicable to the facts of the case will permit.

The second exception raises the question whether, under the facts as already stated, the trust and obligation of the Old Frisco Company attached to the entire \$36,522.28 turned over to the receiver, or only to the \$2,265.55, which is the minimum balance at any one time of all the funds with which the trust fund was commingled. Counsel have called attention to a large number of cases, both state and federal, in which the doctrine applicable to this case has been discussed; and, while there is some diversity of opinion found in the cases, I have reached the conclusion that the weight of authority, as well as reason, conduces to the result that the intervener's right to recover the trust fund in question must depend upon his ability to trace it, or the fund with which it was commingled, into the hands of the receiver of the Old Frisco Company. It is now the settled doctrine that commingling a trust fund with the private funds of the trustee does not destroy the right of the cestui que trust to follow it. The commingling being wrong, the entire fund is impressed with the trust; and, as long as an amount equal to the trust fund remains in the commingled mass, the same, and all of it, to the extent of the trust fund, will be made to respond to the claim of the cestui que trust. This last-mentioned rule is in perfect correspondence with the rule first announced, requiring the cestui que trust to show that his money or property is in the hands of the trustee. It simply enlarges the rule, and allows recovery when and so far as the commingled fund in which the trust fund has been inextricably confused is found in the hands of the trustee. The foregoing propositions I believe to be fully supported by the authorities, and they are well set forth in the able opinion of Judge Phillips in the case of Metropolitan Nat. Bank of Kansas City v. Campbell Commission Co. (C. C.) 77 Fed. 705. A large number of cases are referred to and commented upon in this

last-mentioned case, supporting the conclusion reached. There is another line of authority announcing the proposition that because a trust fund, when appropriated by a trustee to his own use, swells his assets, the general estate of the trustee, when insolvency supervenes, will be impressed with a trust for the reimbursement of the cestui que trust, on the ground that such estate has been benefited to an equal amount by the trustee's breach of duty. But this rule, as I understand it, has not received the sanction of any federal court, and of but few state courts. The equity, or, rather, want of equity, of such a rule is well characterized by the court of appeals of New York in the case of *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504, in which it is said:

"We think this is quite too vague an equity for judicial cognizance, and we find no case justifying relief upon such a circumstance. In a very general sense, all creditors of an insolvent may be presumed to have contributed to the assets which constitute the residuum of his estate."

So it seems to me. If the fact that the money or property transferred to a trustee has so increased his assets as, in and of itself, to entitle the creditor to a preference, why will not all general creditors be entitled to the same preference? The consideration of their debts has at some time enhanced the funds or estate of the debtor. Following the well-settled rule already stated, that the entire account with which trust funds have been commingled may be appropriated for the satisfaction of the trust, and giving the intervener the full benefit of that rule, I am of opinion that the minimum amount found at any one time in the account of the Frisco Company must be the maximum amount of the trust fund which by any possibility can be traced into the receiver's hands. Between November 15 and December 12, 1890, this minimum amount stood at \$2,265.55. This may possibly have included a part of the original trust fund. At any rate, it is the remnant of the fund with which it was originally commingled. All the trust fund, excepting this remnant, had been before November 15, 1890, dissipated or appropriated to the trustee's own use. The identification of the original trust fund is here lost, as to all thereof except the remnant of \$2,265.55; and certain it is that no part of the original trust fund can be traced into any of the deposits clearly shown to have been made by the Frisco Company after December 12, 1890. It was conceded at the argument that if in November, 1890, the whole account had been drawn out by the Frisco Company, so that nothing remained, the tracing or identification of the trust fund would no longer have been possible, and that no subsequent deposits would have been subject to the original trust. This concession was manifestly made on the ground that no part of the original trust fund could be said to be mingled with that which was subsequently deposited. If that argument is sound,—and I think it is,—the same conclusion should follow as to all funds subsequently deposited over and above the small remnant then on hand (for it is clear that all trace of the trust fund was lost, except as to that remnant), and that this remnant represented the full amount of which, by any possibility, the original trust fund could then have formed a part. It follows that the intervener has failed to prove that any of the money of the Kan-



sas Midland Railway Company, either in its original or commingled form, came into the hands of the receiver of the Frisco Company, beyond the sum of \$2,265.55, and that all trace or identification of the balance of the original trust fund is impossible. All the exceptions to the report of the special master made by both parties, other than those relating to the amount of recovery, will therefore be overruled, and the exception of the defendant to such parts of the report as relate to the amount of recovery will be sustained; and, the case now being submitted to the court, a decree will be entered requiring the defendant, the St. Louis & San Francisco Railroad Company, to pay to the intervener the sum of \$2,265.55, with interest thereon from May 15, 1897, the date of filing the intervening petition herein, to the present time, at the rate of 6 per cent. per annum.

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BALTIMORE BUILDING & LOAN ASS'N et al. v. ALDERSON et al.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1900.)

No. 313.

**1. APPEAL AND ERROR—MANDATE ON REVERSAL—JURISDICTION OF TRIAL COURT.**

Where a mandate from the circuit court of appeals to the circuit court directs the latter to vacate an order ratifying a sale by a receiver on the ground that the court was without jurisdiction in the suit, and directs that the purchase price in the registry of the court be repaid to the purchaser, the circuit court has jurisdiction to entertain a petition of intervention by the sureties of the receiver, who paid such money into the court registry upon the embezzlement by the receiver of the original payment, and to direct instead that the money be returned to them on the ground that, since the appointment of the receiver was void, they were not liable on the bond.

**2. RECEIVERS—APPOINTMENT—LIABILITY ON BOND.**

Where the appointment of a receiver was regular, and in a matter over which the court had taken jurisdiction, and the receiver takes possession of the property, and embezzles the proceeds, the sureties on his bond are liable, though the bill under which he was appointed was afterwards dismissed for want of jurisdiction.

Appeal from the Circuit Court of the United States for the District of West Virginia.

J. G. McCluer and Fielder C. Slingluff (C. D. Forrer, on the brief), for appellants.

W. P. Hubbard, for appellees.

Before SIMONTON, Circuit Judge, and PAUL and BRAWLEY, District Judges.

SIMONTON, Circuit Judge. This case comes up on appeal from a decree of the circuit court of the United States for the district of West Virginia. One Joseph C. Alderson, a citizen of the state of Maryland, filed his bill of complaint in the circuit court of the United States for the district of West Virginia against the Loch Lynn Heights Hotel Company, a corporation of the state of West Virginia, and certain other parties, citizens and residents of the state of Maryland. Upon the filing of that bill the property of the

defendant corporation was put into the hands of a receiver, who took charge thereof. In the progress of the cause, proceedings were had therein whereby, among other things, realty of the corporation was sold by Sommerville, receiver, under the order of the court. Fielder C. Slingluff became the purchaser of certain parcels of the real estate of the insolvent corporation. Sommerville, the receiver, upon his appointment as such, was required to give bond, with surety. He did this, and gave as his surety D. H. Taylor. The sale to Slingluff was set aside, another sale was ordered, and Sommerville, receiver, was ordered to give an additional bond of \$8,000. This he did, with N. E. Whitaker as surety. Another sale having taken place, Slingluff again became the purchaser in the sum of \$16,610, and paid on his purchase \$5,536.66. This money was paid to the receiver. The receiver made his report of sales, and he was thereupon ordered to pay this sum of \$5,536.66, and a further sum in his hands from other sales,—\$116.52,—into the registry of the court. The receiver did not do this, but embezzled the money. Thereupon his sureties paid the money for him, and it is in the registry of the court. In the final decree of the circuit court this fact is distinctly stated, and the money is said to be in the hands of the clerk of the court to the credit of the cause. Exceptions having been taken to this final decree, and an appeal having been allowed to this court, the exceptions were sustained, and the decree of the circuit court was reversed. 90 Fed. 142. The mandate of this court, sent down after the hearing, recites in full the circuit decree, including the statement that the cash portion of the purchase money paid by Slingluff was in the registry of the court, to wit, \$5,536.66. The mandate then goes on:

"And whereas, in the term of May, in the year of our Lord one thousand eight hundred and ninety-eight, the said cause came on to be heard before the United States circuit court of appeals for the Fourth circuit, on the transcript of the record, and was argued by counsel, on consideration whereof it is now ordered, adjudged, and decreed by this court that the decrees of the said circuit court appealed from in this cause be, and the same are hereby, reversed, and this cause is remanded to the circuit court of the United States for the district of West Virginia at Parkersburg, with instructions to vacate the order ratifying the sales made by the receiver, and the order distributing the purchase money, and that it direct that the payments made by the purchasers be returned to them, and that the decrees for sale be set aside, and the bill dismissed; the costs to be paid by the appellee. It is further ordered that the mandate of this court issue after the expiration of twenty days from the date hereof."

When the case was called in the circuit court, the mandate having been entered, N. E. Whitaker and D. H. Taylor, sureties of Sommerville, receiver, intervened by petition, praying that the money paid by them into the registry be returned to them. The gravamen of the petition is that this court had reversed altogether the decree of the circuit court below, holding that that court had no jurisdiction; that, therefore, all of its acts were void, the appointment of the receiver was void, and his bond a nullity; that there was no obligation on the part of the sureties to pay this money, and its payment into the hands of the clerk did not deprive them of their title thereto. The circuit court granted the prayer of the petitioners in these words:

"It appearing to the court that of the money in the registry of the court to the credit of this cause the sum of \$5,569.18 was not paid into the registry by the receiver in this cause, whose action in making the sale of the property, as well as receiving payment therefor, is held to be void, but was paid into such registry, \$4,455.34 thereof by Nelson E. Whitaker and \$1,113.84 by D. H. Taylor, under a void order of the court, such payment having been made as is set forth in the respective petitions aforesaid of said Whitaker and Taylor, and that it is but just that the money paid by each of them should be returned to him, it is therefore ordered, adjudged, and decreed that of the money now in the registry of this court to the credit of this cause \$4,455.34 be repaid and returned by the registrar to Nelson E. Whitaker, and \$1,113.84 be repaid and returned to said D. H. Taylor by the registrar."

To this decree a petition for leave to appeal was presented and allowed upon the exceptions, and the cause is here for adjudication. The grounds of exception are that the circuit court erred in not obeying the mandate of this court in ordering the return of the money paid by Slingluff, then in the registry of this court, and that the circuit court erred in that it ordered the return of this money to the sureties.

As to the mandate. The mandate of this court recited in full the decree of the court below. That decree recited, among other things: "That the said Slingluff paid to the said receiver the sum of \$5,536.66 in cash, and delivered to said receiver his two notes for \$5,536.66, dated 22d June, 1897, and payable, respectively, in six and twelve months, with interest, and the said money, with the sum of \$116.52; which remained in said receiver's hands from other sources, having been paid into the registry of this court, and being now in the hands of L. B. Dellicker, clerk of this court." The mandate, as has been stated, after reversing the decrees of the court below, remands the case, with instructions to vacate the order ratifying the sales made by the receiver and the order distributing the purchase money, and "that it direct that the payments made by the purchasers be returned to them, and that the decrees for sale be set aside, and the bill dismissed." "It is well settled," says the supreme court in *Re Blake*, 20 Sup. Ct. 42, Adv. S. U. S. 42, 44 L. Ed. — (Nov. 13, 1899), "that when the mandate leaves nothing to the judgment of the court below, and that court mistakes or misconstrues the decree or judgment of this court, and does not give full effect to the mandate, its action may be controlled either upon a new appeal or writ of error, if involving a sufficient amount, or by a mandamus to execute the mandate of this court,"—and cases cited.

In the case *In re Sanford Fork & Tool Co.*, 160 U. S. 255, 16 Sup. Ct. 293, 40 L. Ed. 416, the court says:

"When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court and disposed of by the decree is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must carry it into execution by its mandate. That court cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it, even for apparent error upon any matter decided on appeal, or intermeddle with it further than to settle so much as has been remanded."

See, also, *In re Washington & G. R. Co.*, 140 U. S. 91, 11 Sup. Ct. 673, 35 L. Ed. 339.

Such is the general rule. But it must be observed that the question which came before the circuit court had never been presented to this court, and, in the nature of things, could not have been presented to it at the former hearing.

The petitioners below affirm that the money in the hands of the clerk, in the registry of the court, referred to in the decree below, was not put there by the receiver as part of the proceeds of sales; that it was, in fact, paid in by them under the supposition that they were sureties for the said receiver; that, inasmuch as all the orders of the circuit court have been reversed, including that appointing the receiver, the bond given by them as surety for him, supposing him to be a receiver, is null and void. Under these circumstances they ask restitution of this money. Notwithstanding the strong language used by the supreme court in the cases cited, it would seem that under some circumstances a discretion exists in the circuit court receiving the mandate. "This court," says Mr. Justice Wood, sitting on circuit, "is not, under all circumstances, bound to render a servile obedience to the mandate of the supreme court. It is bound to exercise a judicial discretion in the interpretation and execution of the mandate." *The Sabine*, 50 Fed. 217. In *Story v. Livingston*, 13 Pet. 373, 10 L. Ed. 200, the supreme court says: "The mandate is to be interpreted according to the subject-matter to which it has been applied, and not in a manner to do injustice." In *West v. Brashear*, 14 Pet. 53, 10 L. Ed. 350, the supreme court held that, when the language of the mandate was precise and unambiguous, the duty of the circuit court was to carry into execution, and not to look elsewhere for authority to change its meaning. But, examining the case, the court approved an examination made by the circuit court into the meaning of the mandate, and putting a construction upon it. This construction was coincident with that of the supreme court. In *Ex parte Morris*, 9 Wall. 605, 19 L. Ed. 799, the supreme court had reversed a decree rendered against Morris and another, and by its mandate directed the marshal to make restitution to them of whatever they had been compelled to pay under the reversed decree. Some of the money had been distributed. The remainder had been deposited by the marshal, under order of court, in a national bank, which had failed *pendente lite*. These facts were held to have exonerated the marshal from obeying the mandate, and this was sustained by the supreme court. In 139 U. S. 216, 11 Sup. Ct. 523, 35 L. Ed. 151, is a case (*Fuel Co. v. Brock*), which resembles this case, and, in our opinion, controls this branch of it. In that case the bill had been dismissed for want of jurisdiction, and the mandate went down accordingly. The court below, after the receipt of the mandate, entered an order that certain moneys which had been paid on account of the reversed judgment be returned to the parties who had paid them believing it to be valid. From this order an appeal was taken to the supreme court. Mr. Justice Field, speaking for the court, says: "The alleged error of the court below is that it had no jurisdiction to render judgment for restitution of the money collected on the reversed judgment; \* \* \* that that court had no authority to act fur-

ther in the matter than as directed in the mandate." He says that position is supposed to be supported by decisions of the supreme court that, when a case is dismissed for want of jurisdiction in the circuit court to entertain the action or to render the judgment entered, the power of that court to award costs is gone. "But here," he says, "the jurisdiction exercised by the court below was only to correct, by its own order, that which, according to the judgment of its appellate court, it had no authority to do in the first instance. The power is inherent in every court, whilst the subject of controversy is in its custody and the parties are before it, to undo what it had no authority to do originally, and in which it, therefore, acted erroneously, and to restore, as far as possible, the parties to their former position. Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal." Further, the court says: "The restitution is not made to depend at all upon the question whether or not the court rendering the judgment reversed acted within or without its jurisdiction." Brewer and Brown, JJ., had supposed the law to be different. "But the result is so manifestly equitable, they were glad to know that they were mistaken and that the law is as it is now adjudged to be."

If, therefore, the petitioners are right in their contention that they had paid this money into court under a void order and an invalid bond, the circuit court had jurisdiction, notwithstanding the dismissal of the bill for want of jurisdiction, to correct by its own order that which, according to the judgment of its appellate court, it had no authority to do in the first instance. The circuit court was not in error in entertaining the petitions.

This brings us to the merits of the case. Was J. B. Sommerville receiver in the cause? Was the order requiring him to give bond, with sureties, a valid order? And were the bonds given by him, with these petitioners as sureties, valid bonds? Were the appointment of Sommerville, receiver, wholly irregular,—even contrary to law and its policy,—this would not relieve him, or those persons who became surety for him, from the legal and moral obligation to account for the money placed in his hands by reason of and in faith of his bond, with surety. *U. S. v. Maurice*, Fed. Cas. No. 15,747. In that case, Chief Justice Marshall, sitting on circuit, discusses this same question, and lays down the law as has been stated. He concludes his argument in these words: "If, then, this appointment be contrary to the policy of the law, the repayment of the money under it is not, and a suit may, I think, be sustained on the bond given for that purpose." Referring to the cases cited against his position, of *Collins v. Blanton*, 2 Wils. 341, *Paxton v. Popham*, 9 East, 408, *Pole v. Haerobin*, Id. 416, he shows that these bonds were given for the payment of money for an unlawful purpose. But these cases differed from the one before him and from the case at bar. Neither in that case nor in this was the bond given to induce the illegal appointment, or for any purpose in itself unlawful, but for the sole custody of money placed in the hands of the

principal. But the appointment of a receiver in the case at bar was neither irregular nor unlawful. It was the wise exercise of its discretion by the court in a matter within its jurisdiction, and in the due course of a proceeding in equity. A receiver is an indifferent person, appointed by a court as a quasi officer or representative of the court, to take charge of, and sometimes to manage, the property in controversy, under the direction and control of the court, during the continuance of or in pursuance of the litigation. The appointment of a receiver determines no right. He is a part of the machinery of the court by which equity protects and secures the rights of parties,—all parties in interest. His custody is that of the law. *Booth v. Clark*, 17 How. 322, 15 L. Ed. 164. When, therefore, the court concluded to assume jurisdiction, and to take the property into its custody, it became, not the right, but the duty, of the court to place it in the hands of a receiver, its own officer, whose possession was its possession, and who should hold it, not for this party or that, but, as the representative of the law, for the protection of those whose rights should appear. This being the clear right and duty of the court, it had also the right, as well as the duty, to secure to the parties the protection of the property in the hands of this officer of the law, by requiring and exacting from him a bond with sureties. This bond protected the property and its owners; and when the receiver was called upon to account for it, whether by the decree of the court designating the proper owners, or because the court released the custody of it, the receiver was bound to account for it. Failing in this, his sureties must respond. All this naturally arises from the relation of the receiver to the court. He is its agent,—merely its ministerial officer. His possession is *custodia legis*. Whether the court had the right in that particular case to appoint him, he could not question it. He and his sureties are estopped from denying the jurisdiction of the court. Indeed, one of the reasons for his appointment was the protection of the property in case it should appear that the court was without jurisdiction.

The learned counsel for the appellees with great earnestness contends that these bonds are void, because, the court being without jurisdiction, there could be no receiver *de jure*, and so there can be no receiver *de facto*, if there were no receiver *de jure*. They rely on *Norton v. Shelby Co.*, 118 U. S. 441, 442, 6 Sup. Ct. 1121, 30 L. Ed. 178. That case holds that, where there is no office in existence which the law will recognize, there can be no office *de facto*. But the office of receiver (if we may call it an office) has a recognized existence. It is the mode in which a court of equity protects property which it has taken into its custody. The inherent right of the court of equity is to name such a person, who is called its receiver; and, as has been seen, the appointment of a receiver determines no right. He simply holds for the court. In fact, the receivership is more in the nature of a condition. "His position is somewhat analogous to that of a corporation sole." So long as property remains in the custody of the court, and is administered through the agency of a receiver, such receivership is continuous

and uninterrupted until the court relinquishes its hold on the property, though its personnel may be subject to repeated changes. *McNulta v. Lochridge*, 141 U. S. 332, 12 Sup. Ct. 13, 35 L. Ed. 799. This being the case when Sommerville was appointed receiver, he was appointed to a place which had a recognized existence in the law; and when he was required to give, and did give, surety, this was in the orderly course of proceeding. Even were this receiver in de facto, "the acts of an officer de facto, although his title be bad, are valid so far as they concern the public, or the rights of third persons who have an interest in the things done." *County of Ralls v. Douglass*, 105 U. S. 730, 26 L. Ed. 958. But we are of the opinion that he was not a de facto receiver. When he was appointed, when he gave these bonds, and when he made his default, the circuit court of the United States had taken and held this property. At that time its action was the law of the case. Its appointment of the receiver was not only a valid, but a necessary, act. Sommerville assumed its duties, and took possession of the property and moneys in no other character than that of a receiver regularly appointed, and he gave his bonds under an order of the court, to that extent certainly valid. When he defaulted, and his sureties, the petitioners, paid into the court the money for which he had made default, they were fulfilling their legal as well as their moral obligation, and they are not entitled to its restitution. The decree of the circuit court is reversed. The cause is remanded to that court, with instructions to dismiss the petitions of N. E. Whitaker and D. H. Taylor, and to direct the payment to Fielder C. Slingluff, from the funds in the registry of the court, of the sum paid by him on account of the supposed purchase of the realty bid in by him.

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ELK FORK OIL & GAS CO. et al. v. FOSTER et al.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1900.)

No. 308.

**1. RECEIVERS—APPOINTMENT ON COURT'S OWN MOTION.**

A bill was brought for an injunction to prevent defendants from taking possession of certain land. A defendant filed a bill against complainants, praying an injunction, and obtained the usual restraining order. The court, on argument of the two cases, consolidated them, treating the bill of defendant as a cross bill, and, of his own motion, appointed a receiver of the property in dispute. No order was passed dissolving either of the injunctions. Afterwards other defendants filed a cross bill, and another receiver of different property was appointed by the court of its own motion. The suits all related to rights claimed by the several parties in oil and gas rights under certain leases held by them. All parties concurred in the necessity of operating the property, and each side desired permission so to do. *Held* that the appointment of receivers on the court's own motion was proper.

**2. SAME—PAYMENT OF EXPENSES.**

The cost of a receivership, where the receiver was appointed by the court of its own motion, will be charged against the fund in the hands of the receiver, rather than against one of the parties, in the absence of fraud or improper conduct of any of the parties.

**3. SAME—REPAYMENT OF ADVANCES BY PARTY.**

It is proper to order a return to a party of advances made by him to the receiver appointed in the suit, pending the receivership, where such advances were made under the permission of the court, and in reliance on its order requiring a repayment if the income accruing to the receiver was sufficient therefor.

**4. SAME—ALLOWANCE FOR COUNSEL FOR RECEIVER.**

An allowance may be made to the counsel for a receiver.

Appeal from the Circuit Court of the United States for the District of West Virginia.

W. P. Hubbard, for appellants.

A. Leo Weil and Alfred Caldwell, for appellees.

Before SIMONTON, Circuit Judge. and PAUL and BRAWLEY, District Judges.

SIMONTON, Circuit Judge. This case comes up on appeal from the circuit court of the United States for the district of West Virginia. The Elk Fork Oil & Gas Company and others filed a bill in equity on 19th March, 1897, in the circuit court of Tyler county, W. Va., against E. H. Jennings and others, praying an injunction against them in taking possession of about 1,000 acres of land in Tyler county. The suit was removed into the circuit court of the United States for the district of West Virginia. On the 2d of April of the same year the Elk Fork Oil & Gas Company filed an amended bill against the same parties, and also against George E. Foster, praying similar relief; and on 14th April, 1897, the same complainant filed another amended and a supplemental bill against the same defendants. On the 6th of April, 1897, before he was served with process under the amended bill of the 2d April, Foster filed his bill against the Elk Fork Oil & Gas Company and the other parties who were complainants to the suit first named, praying an injunction, and obtained from the court the usual restraining order. The two causes came before the circuit court, and were argued by counsel. There was in neither of them the prayer for the appointment of a receiver. The court, hearing the argument, consolidated the two suits,—treating the bill of Foster as a cross bill,—passed no order dissolving either of the injunctions, but appointed Charles W. Brockunier receiver of the property in dispute. On 17th April, 1897, Jennings, Guffey, and Glatzau, who were defendants to the bill of the Elk Fork Company, filed their answer, and at the same time, on leave, filed a cross bill against the complainants in the amended bill, and also their bill, called a "cross bill," against Clell Nichols and others. The case was consolidated with the other cases, and thereupon the court appointed W. A. McCosh receiver, so far as the oil and gas rights were concerned, in what was known as the "Wood Lease." By subsequent orders the receivership of Brockunier was extended so as to cover five other tracts; all, however, occupying the same relation as the other tracts over which he had been appointed receiver. These suits all related to rights claimed by the several parties in oil and gas rights under certain leases held by them. The contest was as to the validity of these leases. The re-



ceivers having been appointed, they were directed by the court to conduct the exploration of the lands for oil and gas, and, when oil wells were found, to operate them. Leave was given to any of the parties to advance funds and material necessary for this purpose. Foster and the Elk Fork Oil Company both took advantage of this permission. The result of the suits was in favor of the Elk Fork Oil & Gas Company (84 Fed. 840), and the decree of the circuit court was affirmed in this court. 32 C. C. A. 560, 90 Fed. 178. The mandate having gone down from this court, certain proceedings were had in the court below for the purpose of ascertaining facts necessary for the final determination of the case. These facts relate to the conduct and compensation of the receivers, the person or fund from which this compensation should be paid, and to the right of Foster to be repaid certain advances which he made in money and material. The circuit court, hearing these questions, awarded the receivers, as compensation, as follows: Receiver McCosh, \$200 per month from April 17, 1897, to February 23, 1898, and fees for his counsel, \$250; Receiver Brockunier, \$300 per month from April 23, 1897, to February 23, 1898, and to his counsel \$500, besides \$20 traveling expenses; these sums to be paid out of the funds in their hands, respectively. It directed that the sum of \$28,119.56, advanced by Foster in money and materials, be repaid to him out of the funds of the receivership. To this decree exceptions were taken, an appeal was allowed, and the cause is here on the assignments of error.

It is contended that the court below erred in appointing the receivers, as this was done by the court suo motu, without application on this behalf by either party. For this reason it is sought to put the expenses of the receivership upon Foster, because he readily acquiesced in this appointment, and availed himself of it. If the court erred in appointing the receiver under the circumstances stated, it is difficult to see why Foster should bear the consequences. It is admitted that he did not ask for a receiver; that he had no hand in his appointment; that it was made solely at the will and instance of the court. Why, then, hold him responsible? But the court did not err in appointing the receiver. The bills and cross bills showed conflicting claims to the gas and oil rights in controversy, and presented questions most difficult of solution,—questions of novel aspect. It was impossible at that stage of the case to determine to which side justice inclined. The solution of this question required, not only an examination of questions of law, but also the ascertainment of facts. All the parties were under injunction, and, without the action of the court pending the consideration of the controversy, there was danger of irreparable mischief to the interests of that party to whom the results of the case might award the property. Under these circumstances, using the lights then before him, the learned and experienced judge of the district court determined to put the property in the custody of the court, and to place it in the hands of discreet and disinterested third parties. The wisdom of his course has been demonstrated in the development of the causes, and he has met the unqualified approval of the circuit judge, who heard the case after him. The only question is as to the

power of the court, under the circumstances of this case, to appoint a receiver; there being no prayer to that effect in either bill, and no notice of a motion to this end. The situation was this: The causes were heard on the motions for injunction. Counsel for the parties were all in the presence of the court. Each side asked for injunction against the other. All concurred in the necessity of operating the property. Each asked that he should be allowed to operate it, and, of course, to be protected in doing this. The title was in dispute. The court had concluded to continue the injunctions. As it was deemed necessary that the property must be operated, the only question was who should operate it. Each side craved permission to do so. The court would not consent to give either party this authority, and preferred to select its own agent,—to name its own receiver. The appointment of a receiver was the necessary corollary to the case presented. "Working of mines is something more than the common and ordinary use of real estate, and requires the use of more than ordinary remedies to protect the rights of a party entitled to the possession. The granting of an injunction, and, if necessary, the appointment of a receiver, are common remedies." 15 Am. & Eng. Enc. Law. p. 605. The power of appointing a receiver, when the relief is necessary for the preservation of the property pending an injunction suit, is a necessary incident to the power of granting an injunction. High, Rec. p. 17. So, also, in his eighty-third section of his book on Receivers, Mr. High says, "It is not, however, indispensable that the bill contain a specific prayer for a receiver, if the facts stated are sufficient to justify the appointment, since the necessity for the relief frequently occurs after the filing of the bill;" and at section 98, "It would seem that a receiver may be appointed, in a case otherwise proper for relief, if the facts show the necessity for the relief, and the proper parties are before the court, although the application was made for an injunction, and did not specify the appointment of a receiver." In Daniell, Ch. Pl. & Prac. (Perkins' Ed.) p. 1426, we find it stated thus, "It appears in general that, if the facts of the case authorize it, the court may appoint a receiver, although there is no prayer to that effect;" and at page 1427, "A receiver has also been appointed at the hearing, although there was no prayer to that effect in the bill,"—quoting *Osborne v. Harvey*, 1 Younge & C. 116. Thompson, in his book on Corporations (volume 5, § 6880), lays down the doctrine that it is not indispensably necessary, in all cases, to the validity of the appointment of a receiver, that notice of the application be given to any one. In the present case, not only was notice unnecessary, but it was impossible. The cause came up on motions for injunction. Hearing it, the court became satisfied of two things: That the operations on the property should go on; that no party to the suit should be intrusted with it. As the result of its conclusion on these two points, the court, exercising its discretion, appointed its own receiver, and such an appointment was in its discretion. *Sage v. Railroad Co.*, 125 U. S. 361, 8 Sup. Ct. 887, 31 L. Ed. 694. Reaching that conclusion from the argument before it, it would have been an idle ceremony for the court to direct that notice be given of a mo-

tion to appoint a receiver. Who could give such notice? Neither party desired a receiver. The necessity for a receiver was in the judgment of the court. We concur with it, and see no error in the course it pursued.

The next question is, from what source shall the expenses of the receivership be paid? The appointment of the receivers, as has been seen, was the act of the court. It was not obtained by the fraudulent or improper act of any of the parties to the causes. There was no misrepresentation by any one. The fund in court was the result of the court's action, and that alone. The law on this point is well stated in the case of *Ferguson v. Dent*, 46 Fed. 88,—a case (decided by Judges Jackson and Hammond) of high persuasive authority:

"When it becomes the duty of a court of equity to take property under its own charge through a receiver, the property becomes chargeable with the necessary expenses incurred in taking care of and saving it, including the allowance to the receiver for his services. Such is unquestionably the well-settled law, and a citation of authorities in support of it would seem to be needless. No case to the contrary has been cited by counsel, nor any in support of their position, except those heretofore noticed; and it is believed that not one decision can be found holding that the proper expenses of a receiver, or his compensation, shall be taxed as costs against the losing party, where his appointment was proper and legal, and made by a court in the exercise of its undoubted jurisdiction, and where the fund in his hands is sufficient to pay the same. Nor does the legality or propriety of his appointment depend at all upon the event of the suit. Because it is ultimately determined that the plaintiff in action is not entitled to recover or to the relief he seeks, non constat that the action of the court or the conduct of the parties in the appointment of the receiver has been irregular, improper, erroneous, or unnecessary."

*Couper v. Shirley*, 21 C. C. A. 288, 75 Fed. 168, 44 U. S. App. 586, does not apply to this case. In *Couper v. Shirley* the appointment of the receiver was not made by virtue of any of the established general principles of equity, which, when alleged to exist, would authorize a court of equity to appoint a receiver, but was made solely in pursuance of a stipulation contained in the mortgage. And by the laws of Oregon, in which state the case was heard, no receiver can be appointed over mortgaged premises pending proceedings for foreclosure. So the appointment was against public policy and absolutely void. For this reason the expenses of the receivership were cast on the plaintiff.

The next question is as to the advances made by Foster to the receiver pending the receivership. In an order of April 13, 1897, among other things, was this provision:

"But the said receiver shall not be required or expected to drill any well upon the said premises unless one or more of the parties shall advance funds to an amount sufficient, in his judgment, to pay for the expenses of drilling one well. If the said Elk Fork Oil & Gas Company and the said Foster shall each offer to provide such funds, the receiver shall accept an equal amount from each. If only one of said parties shall offer funds for that purpose, the receiver shall accept them, and in the event that the production from the well drilled by the expenditure of such funds, or the production of any other wells during his receivership, shall be sufficient for the purpose, shall refund to such party the amount received from it or him, with interest. Such repayment shall in like manner be made if the funds shall be contributed by both parties; but, if the production from such territory be insufficient to repay the funds so advanced, the deficit shall be borne and lost by the party advancing the funds, or, if both have advanced funds, by them in proportion to such advancements."

Advances under this order were made by the Elk Fork Oil & Gas Company and by Mr. Foster. The circuit court ordered the return to Mr. Foster for all the advances made by him. This is assigned as error. These advances were made under the order of the circuit court, and in reliance thereon. Good faith demands that the promise of the court be fulfilled. The advances must be returned to Mr. Foster. We see no error in this action of the court.

The court made allowances to the receivers and their counsel. This is in accordance with the practice of a court of equity. On this point the chief justice lays down the rule in *Stuart v. Boulware*, 133 U. S. 81, 10 Sup. Ct. 243, 33 L. Ed. 570:

"The receiver is an officer of the court, and subject to its directions and orders; and while, in the discharge of his official duties, he is at all times entitled to apply to the court for instruction and advice, he is also permitted to obtain counsel for himself, and counsel fees are considered as within the just allowances that may be made by the court. The order of October 20, 1885, recognizes the employment by the receiver of counsel in this litigation, although no specific original order giving that authority is found in the record. So far as the allowances to counsel are concerned, it is a mere question as to their reasonableness. Nor is there any doubt of the power of courts of equity to fix the compensation of their own receivers. That power results necessarily from the relation which the receiver sustains to the court, and, in the absence of any legislation regulating the receiver's salary or compensation, the matter is left entirely to the determination of the court from which he derives his appointment. The compensation is usually determined according to the circumstances of the particular case, and corresponds with the degree of responsibility and business ability required in the management of the affairs intrusted to him, and the perplexity and difficulty involved in that management. Like all questions of costs in courts of equity, allowances of this kind are largely discretionary; and the action of the court below is treated as presumptively correct, 'since it has far better means of knowing what is just and reasonable than an appellate court can have,' as was remarked by Mr. Justice Bradley in *Trustees v. Greenough*, 105 U. S. 527, 537, where the subject is considered."

The court below had full knowledge of the degree of responsibility and business ability required of the receivers, and of the manner in which they discharged their duties. We see nothing extravagant in the allowances, and no error in allowing them. The decree of the circuit court is affirmed.

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#### ACME FLEXIBLE CLASP CO. v. CARY MFG. CO.

(Circuit Court, S. D. New York. December 13, 1899.)

#### EQUITY—REHEARING—NEWLY-DISCOVERED EVIDENCE.

A rehearing will not be granted on the ground of newly-discovered evidence, where the party making the application was put upon inquiry as to such evidence by testimony taken in the case long before the final hearing.

On Motion to Reopen Case and for a Rehearing.

Dyrenforth & Dyrenforth and W. A. Redding, for complainant.  
A. G. N. Vermilya, for defendant.

TOWNSEND, District Judge. Motion to reopen case and for a rehearing. On final hearing, the court held that the patent was valid, and was infringed. 96 Fed. 344. The defendant now moves

for a rehearing, on the ground that the court misunderstood the effect of the testimony of one of the witnesses, because the inflections in his voice were not produced in print, and on the further ground of newly-discovered evidence. An examination of the affidavit of said witness fails to satisfactorily show that the court misunderstood his testimony. Furthermore, it is extremely doubtful whether said testimony, if understood as counsel for defendant now claims it should be, would be sufficient to justify a decision denying the validity of this patent. The other evidence shows that its validity had been acquiesced in by the public for 13 years. It is clear that the motion on the ground of newly-discovered evidence should be denied. The affidavits show that, although the defendant was informed by the testimony of Mr. Mead, long before the final hearing, that tea cooperers used, in coopering teas in this country, fasteners similar to the alleged anticipating Chinese fasteners, yet no evidence of tea cooperers was introduced at final hearing. The defendant has now produced several tea cooperers, who claim, but with considerable indefiniteness, that the use of such fasteners was common in this country prior to the invention in suit. In these circumstances, to now permit the introduction of this evidence would violate the fundamental rules applicable to such motions. The questions herein involved are strikingly like those presented to, and disposed of, by Mr. Justice Story in *Baker v. Whiting*, 1 Story, 218, Fed. Cas. No. 786. The motion is denied.

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#### WELSBACH LIGHT CO. v. AMERICAN INCANDESCENT LAMP CO.

(Circuit Court, S. D. New York. December 9, 1899.)

#### INJUNCTION—THREATENING SUITS FOR INFRINGEMENT OF PATENT.

A complainant in a suit for infringement of a patent will not be enjoined, on a motion by defendant, from sending circulars to defendant's customers threatening suits against sellers of the infringing article, where it is claimed that such threats are made in good faith, and it is not clear that such suits could not be successfully maintained.

On Motion to Restrain Complainant from Sending Circulars to Defendant's Customers.

Otto Horwitz, for the motion.

John R. Bennett, opposed.

LACOMBE, Circuit Judge. Irrespective entirely of the preliminary objection that affirmative relief of this sort will not be granted to defendant,—a question not now passed upon,—there seems no good ground for criticism of complainant's circular. It states that Judge Townsend enjoined the "manufacture and sale" of infringing mantles, and he did grant such an injunction. 87 Fed. 221. And this court has enjoined the sale of mantles which the person enjoined did not himself manufacture, when his past conduct in the matter of infringement created a special equity in favor of the complainant against him. It is true that the circular goes further, and threatens

suit against persons who sell mantles, but who never have been at all concerned in manufacturing or causing them to be manufactured; in other words, it threatens suit upon the patent as if it were a patent for a product. But the complainant insists that the threat is made in good faith; that it intends to bring suits against sellers of the infringing mantles upon the theory that the patent is really one for a product. In view of the peculiar language of the claim, this court is not now prepared to hold that such contention would be wholly without merit, or that the complainant could not succeed against a mere seller. Moreover, it is contended that the seller of a purchased mantle himself promotes the taking of the final step in the process, and such contention has not yet been passed upon adversely to complainant. These are questions which should be left to be determined in one of such suits, rather than here. If complainant intends to prosecute one or more sellers,—and there is nothing before the court to induce a disbelief in its assertion that it does so intend,—it would seem to be its proper course to warn dealers to desist from selling.

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**MONTGOMERY v. McDERMOTT et al.**

(Circuit Court, S. D. New York. February 7, 1900.)

**1. PLEADING—ISSUES—EFFECT OF SUSTAINING PLEA OF RES JUDICATA.**

A decision sustaining a plea, which set up a judgment in a former suit as an adjudication binding upon the parties, becomes the law of the case, and precludes the relitigation therein of any question adjudicated in the former suit.

**2. EQUITY—JURISDICTION—ANCILLARY SUIT.**

A suit in equity cannot be maintained in aid of an attachment at law, where it has been adjudged in a prior suit, to which the complainant was a party, and by the judgment in which he is bound, that his attachment was ineffectual to give him any lien.

**3. FEDERAL COURTS—JURISDICTION—ANCILLARY SUIT.**

Complainant filed a bill in equity in a federal court, alleging that through an attachment in an action at law in said court against an alien the court had acquired jurisdiction of a fund in the hands of trustees, but that, by reason of the death of the defendant leaving no representatives in this country, it had become impossible to proceed further in such action, and praying the aid of the court in the enforcement of his lien as against the trustees, who were made defendants. No federal question was involved, and the parties were all citizens of the same state. *Held*, that the only ground of federal jurisdiction was the ancillary nature of the suit, and that, on its being determined therein that a judgment of a state court adjudging that the attachment was ineffectual to give a lien upon the fund was binding upon the complainant, the court was without jurisdiction further to entertain the suit.<sup>1</sup>

This was a suit in equity. On final hearing.

William W. MacFarland and Stephen H. Olin, for complainant.  
Charles C. Beaman and Gherardi Davis, for defendants McDermott, Boyd, Woodman, Bischoffsheim, and Dunning.  
Edward Clifford Perkins, for defendants Perkins and Fowler.

<sup>1</sup> As to supplementary and ancillary jurisdiction of federal courts, see note to Toledo, St. L. & K. O. R. Co. v. Continental Trust Co., 36 C. C. A. 195.

COXE, District Judge. This controversy has been before the court on two prior occasions. First on demurrer (83 Fed. 576), and second, on plea. 87 Fed. 372. In the first instance the bill was sustained as being in aid of a suit at law in which an attachment had issued, but in which no relief was possible because of the death of the defendant and the failure of his foreign executors to revive. In the second instance a plea of *res judicata* was allowed. A motion for a reargument was made and denied. That the decision sustaining the plea is controlling upon this court until reversed is axiomatic. There is no exception to the rule; it lies at the threshold of an orderly and consistent administration of justice. This court having decided that the questions determined by the state court in *Perkins et al. v. Montgomery et al.* cannot again be litigated, it becomes important to ascertain what those questions were. The action was brought by Perkins and Fowler, as trustees, against Montgomery, Dunning, the sheriff of New York and the United States marshal. The defendants Montgomery and Dunning, who are parties to this action, demurred and the demurrers were sustained, the court holding that the suit could not be maintained for the reason that the complaint failed to show a valid lien upon the property alleged to be covered by the attachment. The court decided the following propositions: First. An action of interpleader can only be sustained where a reasonable doubt exists as to which of the claimants is entitled to the fund. Second. The suggestion that the deed of trust is invalid is without color of support. Third. The principal contention of Montgomery namely, that the transfers made by McHenry and his grantee were colorable and voidable as against creditors and that Woodman, the last transferee, held the certificates in reality for the benefit of McHenry who had an interest therein which was subject to the lien of the attachments, is without reasonable foundation. Fourth. The attachments were not levied until 12 years after the legal title to the certificates had passed from McHenry to others. McHenry had no title and there was nothing on which the attachment could operate. Fifth. Conceding that the transfer was made for the purpose of defrauding creditors this would afford a good ground for a judgment creditor's action but not for an attachment. Sixth. Neither the sheriff, the marshal nor the attaching creditors could bring any suit in aid of the attachment challenging the validity of these transfers, and an action of interpleader, which involves the trial of such an issue between the defendants, cannot be sustained. Seventh. Montgomery acquired no lien upon the interest sought to be attached and, therefore, none upon the fund in question. His contention is without reasonable foundation; he has no claim upon the trustees. Upon this decision judgment was entered, the court finding the following conclusions of law:

"(1) That the amended complaint does not state facts sufficient to constitute a cause of action, inasmuch as it does not show that the defendant Montgomery acquired any lien upon the fund in controversy in this action under the attachments referred to in said amended complaint therein, or either of them. (2) That the defendants Montgomery and William F. Dunning are entitled to an interlocutory judgment which shall adjudge that their respective demurrers are sustained with costs."

The defendant Dunning, who, as before stated, was a party to the interpleader suit, joins with his answer a plea of *res judicata* based upon the decision in that suit as follows:

"And this defendant avers that by reason of the proceedings and judgment aforesaid the complainant herein is barred and estopped from bringing and maintaining any suit or action whatever upon the grounds set forth in his bill of complaint herein, and that as to the matters and things therein alleged and the relief therein demanded the said complainant is concluded by the said judgment."

Of course, this plea must be sustained upon the authority of the former decision of this court. It is of no moment that Montgomery and Dunning were both defendants in the interpleader suit; their interests were conflicting and the judgment is as conclusive as if rendered in a suit in which they held the relation of plaintiff and defendant. *Corcoran v. Canal Co.*, 94 U. S. 741, 24 L. Ed. 190; *Leavitt v. Wolcott*, 95 N. Y. 212, 222. The theory of the bill is that it can be maintained as ancillary to the action at law to enable the complainant to preserve and enforce the lien of the attachment which otherwise would be lost. The bill avers:

"Your orator is advised that he requires the aid of this court as a court of equity in order to enable him to avail himself of the benefit of the said attachment to enforce the lien thereof, and appropriate the property attached to the payment of the said debts when the amount thereof shall be ascertained."

If no attachment had been issued in the action at law it is manifest that there would be nothing on which to base the action in equity. It is only because of the lien alleged to have been acquired that the aid of equity is invoked. If the complainant had no lien there is nothing for equity to aid. The mere fact that an attachment issued is of no consequence unless it fastened itself upon some property of the defendant and impounded it so that the plaintiff could reach it if he obtained a judgment. The state court has decided that the attachment was inoperative in that it gave the complainant no lien, and this court has decided that none of the parties to the action in the state court can relitigate that question. As to them it is a closed book, the estoppel is complete.

It is urged that the interpleader suit was collusive and fraudulent. It is unnecessary to decide whether this question can be litigated in the present action and, if so, to what extent, for the reason that the court is of the opinion that the charge is without foundation in fact. The suggestion of an interpleader seems to have come in the first instance from the attorneys for the complainant. In a letter, dated December 8, 1894, they write to the trustees:

"It seemed obvious to us that you, as trustees, would not be willing to pay the money to any one until you were protected by the order of some court of competent jurisdiction. Such an order, it seemed to us, might be obtained in various modes of proceeding. Thus you might begin an action of interpleader and pay the money into court."

There is no pretense that any fact bearing upon the issue was withheld from the state court or misrepresented in the pleadings. The claim of the complainant was fairly stated and was, indeed, the identical claim alleged in the present bill. A proposition to pay money into court in New York can hardly be regarded as proof of



a plot to smuggle the money into the hands of a favored creditor in London. How, in these circumstances, it is possible to disregard the judgment of the state court on the theory that it was obtained by fraud is beyond the power of this court to comprehend. It follows, therefore, that by virtue of the judgment in the interpleader suit and the decision of the court holding that judgment to be *res judicata*, the complainant is estopped from asserting, as against the defendants Perkins, Fowler and Dunning, that he obtained a lien by virtue of his attachment. As to them there was no lien and, therefore, no basis for an ancillary suit.

The theory of the bill, as before stated, is that the complainant needs the assistance of a court of equity to enforce his lien; there being no lien, there is nothing which a court of equity can aid, it is without jurisdiction. What, then, is there left for decision? It is true that the defendants McDermott, Boyd, Woodman and Bischoffsheim are not affected by the estoppel, but no decree can be rendered against them which will avail the complainant. In other words, should the court determine each of the many issues presented by the briefs in favor of the complainant the result would be a mere *brutum fulmen*. With the defendants last named alone on the record the complainant can obtain no relief. They are treated in the complainant's brief as nominal defendants only. The logic of the former decisions is that the complainant has had his day in court with the real defendants—the custodians of the fund and the holder of the legal title of the 100 shares standing in the name of Woodman. The interpleader suit in effect decided that the trustees could not pay the fund to Montgomery for he had no interest therein and that they were safe in paying to Dunning, at least so far as Montgomery's claim was concerned. The court has never been able to perceive how the complainant can obtain the relief sought for in the present action while the decision upon the plea remains the law of the case. It is an insurmountable barrier in the path of the complainant and until it is removed he cannot reach the desired goal. But it is argued that, irrespective of the lien, the fund in the hands of the trustees may be regarded as the property of a dead man who left no legal representatives here and that the court will retain jurisdiction in order to prevent the fund from being carried beyond the reach of creditors. The difficulties here are many. *Imprimis*, this is not such a suit. It rests upon the foundation that, irrespective of the citizenship of the parties, the court has obtained jurisdiction of the subject of the litigation, having acquired control of the fund in controversy in an action at law in which further proceedings are impossible. This is the cause of action presented by the bill and on this theory the demurrer was overruled. Remove the foundation on which it rests and the action must fall. The lien is gone, or, at least, the complainant cannot assert its existence, and it is not easy to see how the bill can be retained or transformed so as to afford any relief to the complainant. It will hardly be maintained that this court could have obtained jurisdiction for any purpose if the suit at law had not been begun against McHenry, for the reason, among others, that no federal question is involved in the controversy between the complainant Dun-

ning and the trustees and they are all citizens of the same state. The pendency in this court of a naked action of assumpsit, which has become inoperative, does not confer jurisdiction over a subsequent action in equity relating to the same subject-matter. In brief, the court is constrained to hold that this is not an ancillary action and that no other ground of federal cognizance is stated. The bill must be dismissed.

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NORTHERN PAC. RY. CO. v. SODERBERG.

(Circuit Court, D. Washington, N. D. February 9, 1900.)

PUBLIC LANDS—GRANTS IN AID OF RAILROAD—RESERVATION OF MINERAL LANDS—BUILDING STONE.

Land which is chiefly valuable for the building stone which it contains is reserved from the grant to the Northern Pacific Railroad Company (Act Cong. July 2, 1864; 13 Stat. 365), because the granting act reserves all mineral lands, except iron and coal. The word "mineral" is not synonymous with "metal," but in its general definition includes every variety of stone and rock. The granting act does not indicate an intention on the part of congress to restrict the meaning of the word "mineral," and in subsequent statutes stone lands are classed as mineral lands.

In Equity.

Suit in equity for an injunction, and to determine adverse claims of title to part of an odd-numbered section of land situated in the state of Washington, and within 40 miles from the completed part of the line of the Northern Pacific Railroad; the Northern Pacific Railway Company, successor of the Northern Pacific Railroad Company, claiming the same as a part of the land granted by the act of congress of July 2, 1864, to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound (13 Stat. 365), and the defendant, J. A. Soderberg, who, when the suit was commenced, was in possession of said land, and engaged in quarrying and disposing of merchantable granite, claiming title to the land, and a right to remove stone therefrom, under proceedings commenced by him to acquire the title from the United States as a placer mining claim, pursuant to the act of congress of August 4, 1892, entitled "An act to authorize the entry of lands chiefly valuable for building stone under the placer mining laws" (2 Supp. Rev. St. U. S. p. 65). Decree for defendant.

H. M. Stephens, for complainant.

Ballinger, Ronald & Battle, for defendant.

HANFORD, District Judge. The land which is the subject of this suit contains a large and valuable ledge of granite. It is situated in the Cascade Mountains, and is apparently of no value except for the granite. There is no controversy between the parties as to any material fact, and their rights with respect to the land depend entirely upon the determination of the question whether granite is a "mineral," within the definition of that word as it is used in the act of congress granting lands to aid in the construction of the Northern Pacific Railroad. The defendant has perfected his right to the land, if a title can be lawfully acquired to part of an odd-numbered section which is valuable chiefly for stone, and situated within the limits of the Northern Pacific Railroad Company's grant. The land department has decided the question in favor of the defendant, and issued a patent to him. In the month of April, 1895,

this court, at a term held at Spokane, decided the question the other way in the case of Northern Pacific Railroad Company v. Stanton. At that time the court did not have an opportunity to study the question as thoroughly as it appears to have been studied by the counsel who have argued this case. No opinion was prepared, and the considerations upon which the decision was based have not been publicly set forth. Therefore, to justify a departure from precedent, it is proper at this time to say the court then considered that the act of congress of June 3, 1878, authorizing the sale of lands chiefly valuable for stone, on the same terms as timber lands (1 Supp. Rev. St. U. S. [2d Ed.] p. 167), and the act of August 4, 1892, authorizing the entry of lands chiefly valuable for building stone under the placer mining laws (2 Supp. Rev. St. U. S. p. 65), placed stone lands in a class separate and distinct from other mineral lands, and justified an inference that the word "mineral," as used in prior acts, was understood and intended by the legislative branch of the government as having a limited definition including only metalliferous minerals. The second section of the act of 1892 extends the act of 1878 to all the public land states, so there can be no presumption that it repeals the act of 1878 by implication. The court, as then informed, supposed that its decision in the Stanton Case was in harmony with the rule at that time prevailing in the land department. See Conlin v. Kelly, 12 Land Dec. Dep. Int. 1; Clark v. Ervin, 16 Land Dec. Dep. Int. 122; Hayden v. Jamison, Id. 537; South Dakota v. Vermont Stone Co., Id. 263; Florence v. Delaney, 17 Land Dec. Dep. Int. 120; Tucker v. Navigation Co., 19 Land Dec. Dep. Int. 414. In the presentation of this case the attorneys on both sides have made oral and written arguments supporting their respective contentions with great force and much learning, and, after considering the same with deliberation, I am fairly convinced that the reasons controlling the decision in the Stanton Case are insufficient, and it appears, also, that the practice in the land department is now governed by a different rule, as shown by the action of the department in issuing a patent to the defendant for the land which is the subject of controversy in this case. In its common and ordinary signification the word "mineral" is not a synonym for "metal," but is a comprehensive term, including every description of stone and rock deposits whether containing metallic substances or entirely non-metallic. Congress having chosen a word of such broad significance to define the class of lands reserved from the grant to the Northern Pacific Railroad, the courts and the land department have no authority to construe the act, giving a narrow or limited definition to the word, in order to enhance the value of the grant, and to diminish the rights of the general public in the lands reserved, unless the act itself, or other acts of congress, prescribe conditions which require an interpretation of the statute allowing the word to have force only in a restricted sense. The granting act itself does not expressly or by implication so prescribe, otherwise than by making an exception of coal and iron. Looking, then, for other acts of congress, which might be regarded as giving a legislative construction to the granting act, I find only one which indicates a purpose

to give a legislative definition to the word "mineral," as it is there used; that is, the act of February 26, 1895, to provide for the examination and classification of certain mineral lands in the states of Montana and Idaho (2 Supp. Rev. St. U. S. p. 385). This statute provides for a commission to examine and classify the odd-numbered sections of land within the limits of the Northern Pacific Company's grant in the states of Montana and Idaho, and the third section reads as follows:

"That all said lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase under the provisions of the United States mining laws, and the commissioners in making the classification hereinafter provided for shall take into consideration the mineral discovered or developed on or adjacent to such land, and the geological formation of all lands to be examined and classified, or the lands adjacent thereto, and the reasonable probability of such land containing valuable mineral deposits because of its said formation, location, or character; \* \* \* provided, that the word 'mineral,' where it appears in this act, shall not be held to include iron or coal."

If congress had intended by this act to interpret the reservation clause of the granting act so as to give a restricted definition to the word "mineral," there is no good reason why it should not have directed that only lands valuable for the metalliferous minerals therein should be classified as mineral lands; and it is significant that, instead of prescribing any such limited rule, the words of the act correspond with the words in the grant expressing the purpose to reserve all minerals, the test being, not the nature or quality of the mineral, but its value; and lands containing any mineral deposits of sufficient value to be subject to sale by the government under the provisions of the United States mining laws are required to be classified so as to come within the class of lands which are reserved. This statute must be understood as referring to the United States mining laws in force at the time of its enactment, including the act of August 4, 1892, by which lands "that are chiefly valuable for building stone" were made subject to entry under the provisions of the law in relation to placer mineral claims. It may be conceded that congress could not, after the granted lands had been earned, by any form of enactment withdraw any part not in fact originally reserved, and the court is not at all inclined to give any such effect to the act of 1895. But the complainant in this case contends for an interpretation of the granting act in accordance with a supposed particular legislative intent, which is not expressed by the words of the statute according to the definitions found in the dictionaries, and in prosecuting an inquiry as to the intent of the legislature it is not improper to give due consideration and weight to the repeated and harmonious expressions found in the statutes. It is not to be presumed that the intention or purpose of congress with respect to what lands should be granted and what reserved was changed between the time of making the grant and the enactment of the law providing for the classification of the lands within the limits of the grant in the states of Montana and Idaho, when no such change of intention or purpose is declared. On the other hand, it is fair to presume that the intention of congress was

the same with respect to mineral lands reserved from the grant in other states that is expressly declared with reference to lands in Montana and Idaho.

On the part of the complainant it has been argued that prior to August 4, 1892, lands valuable for the deposits of stone contained therein were not regarded by congress as mineral lands, else congress would not have enacted the law of June 3, 1878, providing for the sale of such lands on the same terms as timber lands, nor have enacted a law specially providing for the entry of lands chiefly valuable for building stone under the laws providing for the disposition of placer mineral lands, and it must be admitted that this argument is supported by the decision of the circuit court of appeals for the Ninth circuit in the case of *McFadden v. Milling Co.*, 97 Fed. 670. I should not feel at liberty to disregard a decision of the appellate court if the case under consideration necessarily had to turn upon the same point, but while it is true that the act of 1892 only prescribes a rule for the future, and therefore may not be treated as being declaratory of the previously existing law, still it does not follow as a logical deduction that lands chiefly valuable for the ledges and deposits of stone therein had been theretofore considered by congress as nonmineral. If a new statute should be passed, providing a particular method of acquiring title to lands containing valuable deposits of nickel or zinc, and also providing that the same character of lands may be entered under the general mining laws of the United States, thus giving to purchasers an option to acquire the title by either method, it would be just as reasonable to say that by implication the new law had added something to the list of recognized minerals as to suppose that the act of 1892 had the effect to place stone for the first time in the list of minerals. On the part of the defendant an argument has been made that, because there was apparent confusion in the practice of the land department, growing out of contradictory rulings with reference to stone lands, the act of 1892 was intended to avoid the consequences of certain decisions which class stone as nonmineral, and therefore it must be inferred that the act was intended to restore stone lands to the classification of mineral lands, in harmony with the general policy of the government. I do not rest my decision upon that inference. I hold that it does not clearly appear from all or any declarations of the legislative will that the word "mineral" in the grant to the Northern Pacific Railroad was there used in a restricted sense, and the rules for construing statutes making grants require that effect be given to the whole act, including the reservation clause, according to the common and general definition of the words selected by congress. Decree for the defendant.

## TOWLE v. HAMMOND.

(Circuit Court of Appeals, Sixth Circuit. February 6, 1900.)

No. 660.

## 1. PARTNERSHIP—PURCHASE OF CO-PARTNER'S INTEREST IN FIRM.

A partner's purchase of the interest of another partner in a firm does not inure to the benefit of a third partner, as a matter of law or equity, even though the purchaser acquired the equity of redemption in the interest after the failure of the selling partner.

## 2. SAME—SALARY OF PARTNER—WEIGHT OF EVIDENCE.

A partner testified that when the firm was formed it was agreed that H. and I., two of the partners, were to receive no salary, but that P. and the witness were to be paid a salary. The books kept by I. showed that from the organization of the firm H. received a salary, and that I. did not. P. never made any objection. *Held*, that the unsupported evidence of the witness is insufficient to establish his claim as to H.'s salary.

## 3. SAME—PARTNERSHIP ACCOUNTS.

The mere failure of a witness to recall the receipt of money on a certain date 20 years before, where it was conceded that he did receive money from the same source at some time, will not impeach a charge against a partner in the partnership accounts, for an advance to the witness, where the account in every other respect is entirely accurate.

## Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

This is an appeal by Marcus M. Towle from a decree of the circuit court dismissing his bill in equity against the personal representatives of George H. Hammond, deceased. The prayer of the bill was for an accounting by the administrators of the estate of George H. Hammond to Towle for profits received by Hammond in the business of slaughtering cattle and transporting meat by refrigerator cars from what is now Hammond, Ind., to the Eastern markets and to Europe, in which business, the bill averred, Towle and Hammond had been associated together as partners, with others, from the year 1869 to 1877, and thereafter as sole partners until 1881, and subsequently as fellow stockholders in a corporation organized to conduct the same business. The bill, in effect, charged that Hammond had control of the business, kept the books under his supervision at Detroit, and that Towle, whose part of the business was done at Hammond, knew nothing of the books or of the profits earned, and that, by misrepresentation of material facts, Hammond had induced Towle to accept as his share of the capital stock of the corporation organized in October, 1881, one-fifth thereof, when he was entitled, by reason of his actual ownership in the business at that time, to one-third of said capital stock. It was further averred in the bill that, in the partnership books kept under Hammond's direction, Towle had been charged in his personal account with items amounting to more than \$100,000, which were properly chargeable to the business of the firm and corporation, and that such false charges had inured to the benefit of Hammond. The bill further charged that, under the direction of Hammond, money had been paid out of the firm funds as loans to different persons, and charged to Towle's personal account, but that when these loans had been repaid Hammond had appropriated them to his own use, and had not credited them to Towle.

The administrators of Hammond answered, admitting the business relationship between Hammond and Towle as averred in the bill, but denying all charges of fraud. The answer further pleaded the bar of the statute of limitations, both that of six years, and also that of two years for the presentation of claims against the estate of deceased persons. The bill, in anticipation of a plea of laches, had set forth, in considerable detail, why complainant had not before discovered the fraud; the chief ground being that Hammond managed the business at Detroit, while Towle superintended the slaughtering of cattle at Hammond, and rarely, if ever, visited Detroit, and never examined the

books; and, further, that Hammond concealed the evidence of the fraud from Towle, and that never until a suit was brought against Hammond by one Davis for the settlement for royalties upon a patent on refrigerator cars was Towle advised of the actual facts upon which he now seeks a recovery.

The following is a short history of the transactions involved in this controversy:

In September, 1869, Towle, the complainant, and one Plummer, who were butchers in Detroit, and who had in a small way been transporting slaughtered beef to the Boston market for sale, associated themselves with George H. Hammond, the defendant's intestate, and one Caleb Ives, for the purpose of carrying on the business of slaughtering cattle and selling the meat in the Eastern markets. Prior to this time, Hammond and Ives had entered into a contract with Samuel H. Davis and David W. Davis and Thomas B. Rayl, by which the Davises and Rayl, who owned a patent for refrigerator cars, gave a license to Hammond and Ives to use said patent for transporting meat, for the consideration that Hammond and Ives should build cars according to the patent, and conduct the business of slaughtering cattle and transporting the meat, after it had been dressed, to the Eastern market, and should pay the owners of the patent one-sixth of the profits of the business. This contract was made in July, 1869, and the partnership between Hammond and Ives and Plummer and Towle was entered into in September of the same year. Plummer and Towle did not have any interest in the patent except as it was used in the business in which they were partners. To the original partnership, Hammond contributed \$4,000; Ives, \$4,000; Plummer, \$2,000; and Towle, \$2,000. The contract of partnership was oral, but under it Hammond and Ives were each to receive one-third of the profits, and Plummer and Towle each one-sixth. Land was purchased in the name of all of them on the Calumet river, on the state line between Indiana and Illinois, and slaughter houses were there erected. To Plummer was assigned the duty of buying cattle in Chicago and elsewhere; to Towle, that of superintending the slaughtering and dressing of the cattle at Hammond and the shipping of the same; to Ives, that of keeping the books at Detroit; and to Hammond, the general management of the business at Detroit and elsewhere. The business was fairly profitable from 1869 until the death of Plummer, in 1873. After the death of Plummer, Hammond, Ives, and Towle met Plummer's representatives in Detroit, and Plummer's interest in the business was purchased for \$25,000. In the partnership which succeeded Plummer's death, the profit and loss account upon the books which were thereafter kept by M. W. Allen, brother-in-law of Ives, who was called into the business to represent Ives' interest, showed that Hammond had seven-fifteenths interest, Ives five-fifteenths, and Towle three-fifteenths. The bill avers that the division should have been, under the agreement, two-fifths to Hammond, two-fifths to Ives, and one-fifth to Towle. There were no written articles of partnership, and the agreement, if there was one expressed, was oral. The original partnership had been called Hammond, Plummer & Co. Upon Plummer's death, the partnership then formed was known as George H. Hammond & Co. Hammond, Ives, and Towle carried on the business under this name together until March, 1877. Ives had been engaged in a good many other business ventures, and, becoming involved in the summer of 1876, induced Hammond, for his accommodation, to indorse notes aggregating in amount something over \$66,000. To secure Hammond against loss on these indorsements, he executed to him two instruments, the first of which authorized Hammond to apply, to the payment of any of these notes which he might be called upon to pay, Ives' share of the profits in the business, and the second of which, executed a few days later, was a chattel mortgage of Ives' interest in the partnership, whereby Ives purported to convey title and to vest in possession of Hammond his share in the firm of George H. Hammond & Co. The condition of the mortgage was that Ives should take up and pay his notes upon which Hammond was accommodation indorser, and save Hammond harmless from liability thereon. Notwithstanding the assistance which Hammond thus gave Ives, on March 11, 1877, he was obliged to make a common-law assignment for the benefit of creditors, and 10 days later filed a petition in bankruptcy in the United States district court for the Eastern district of Michigan. Immediately after Ives' assignment

and failure, the business was continued, with Hammond and Towle as the only partners. New books and new accounts were opened. At the close of the year 1877, the credit to Ives on the books was \$82,600, and on the 1st of January, 1878, this credit was transferred from Ives to Hammond's personal account, and the account of Ives was closed. Upon Ives' failure in March, Hammond telegraphed Towle to meet him on the train as it passed through Hammond to Chicago. This Towle did, and Hammond then informed Towle that Ives had failed, and the situation was discussed. Towle testifies that Hammond said to him that the business could go on without Ives; that Towle inquired what became of Ives' interest, and that Hammond replied, "We take it." In February, 1878, Ives' assignee in bankruptcy filed a bill in equity against Hammond and Towle for an accounting by them, as partners, to him for the share of Ives. In this bill, Ives' credit upon the books of the firm, as of January 1, 1878, is set forth, and the claim is made that the partners in possession ought also to account for the good will and other property of the old firm. A joint answer was filed in the name of Hammond and Towle, in which was set forth at considerable length the terms between Ives and Hammond, and the agreement and chattel mortgage by which Hammond was put in possession of Ives' interest in the firm, and Hammond's right thereafter to hold such interest until the payment of the notes, which were produced, and he was obliged to take up as indorser. Hammond further filed a cross bill against Towle and Ives, in which he set up the mortgage prayed, and dissolution of the firm, and a sale of Ives' interest therein to satisfy the mortgage. Towle denies all knowledge of this proceeding, and it is admitted that his name was signed to the joint answer of himself and Hammond, by Hammond. The cause remained pending until June, 1880, when Hammond settled with the assignee in bankruptcy by an agreement, which was approved by the district judge, whereby Ives' interest in the firm of George H. Hammond & Co. was assigned by the assignee to Hammond upon payment of \$5,000 in addition to the release of Ives' estate from any further liability upon the notes which Hammond had taken up. Hammond took up the notes by checks of George H. Hammond & Co., which checks were charged against his personal account on the books of the company. The same was true of the \$5,000 payment, whereby he obtained the equity of redemption in the share of Ives. The profit and loss account in the new firm of George H. Hammond & Co. (for the firm name was not changed by Ives' withdrawal) showed a division of profits for the first time in August, 1880, and in that division Hammond received four-fifths and Towle one-fifth. Another division of profits was made in January, 1881, in the same ratio, and another one in July, 1881. In October, 1881, Hammond, at one of his frequent visits to Towle at the city of Hammond, presented to Towle articles of incorporation for the organization of a Michigan company, to carry on the business of George H. Hammond & Co., for his signature and acknowledgment of the same. These articles showed that Towle's subscription to the capital stock was for nearly one-fifth thereof, and Hammond's for nearly four-fifths, with a small residue to two other stockholders.

Carroll Towle, a brother of the complainant, testifies to the conversation between Hammond and Towle at this time as follows: "Mr Hammond pulled a bunch of papers out of his pocket, and looked around at Mr. Towle. He looked at it, and said, 'How much is my interest in that business?' Hammond said, 'Twenty per cent.' He says, 'How's that?' He says, 'How much do you expect?' Mr. Towle says, 'What became of Mr. Ives' interest?' He says, 'I bought that.' Towle says, 'Who from?' He said, 'From Mr. Ives.' He said, 'Did you pay for it with your own money or the company's money?' He said, 'I paid for it with my own money.' Mr. Towle said, 'That's funny I should not know that perhaps for two or three years.' He took the paper, and walked around the room with it, and seemed to be disappointed. Finally he walked up to the desk, and signed it, and handed it back to Mr. Hammond." This statement of Carroll Towle is corroborated by the complainant and his wife. Two years after the original testimony of the complainant was taken the complainant was recalled, and testified that in that conversation Hammond told him that he bought the Ives interest before Ives failed. No other witness testifies to this. Thereafter the corporation was duly formed, Towle received one-fifth of the shares of stock and Hammond four-fifths, and the business



was carried on most successfully. Towle subsequently sold out his interest in the stock. Hammond died in 1886, and this bill was filed in January, 1892.

The charges of the bill that Towle had been debited with a large number of items, aggregating \$100,000, which should have been charged to the firm, were not sustained by the evidence. It appeared that Ives, as the bookkeeping member of the firm, devised a plan by which all the expenses of the Hammond plant, together with some purchases of cattle, and bills which were ordered paid by Towle as having been incurred by his authority, were charged to his personal account as the money was paid out, and at the end of the month he transmitted a statement of his expenditures to the Detroit office, upon which statement he was given credit on the other side of his personal account for the same items. The statement forwarded by him included the pay roll, and it was entered upon the books in his account in a lump sum as pay-roll account. This peculiar system of keeping the books of the business was made clear, not only by the son of M. W. Allen, the bookkeeper, by whom most of these facts were recorded, and who succeeded his father as bookkeeper, but also by the discovery of a book kept at Hammond, in which many of the entries were made in Towle's own handwriting. With respect to the amounts which the bill averred that Hammond had loaned for Towle and charged to his account, and then, upon repayment of the same, had appropriated to his own use, without giving Towle credit therefor, it appeared fully upon the cross-examination of the expert bookkeeper, called by the complainant, that the loans and interest upon repayment had all been properly credited to Towle. So clear was this made that complainant's counsel withdrew all claims based on wrongful charges to the personal account of Towle except as to three items. One was a charge of \$5,200 for the payments purporting to have been made to P. Myrick. Another was a charge for \$20,000, stated to be for an overcredit of \$100,000 by refrigerator cars. The same proportionate charge was made against Ives in his account and against Hammond in his account, according to their holdings in the firm, to wit, seven-fifteenths of \$100,000 against Hammond, five-fifteenths against Ives, and three-fifteenths against Towle. Further objection was made to the fact that Hammond was credited with salary during all the partnership, the amount varying from time to time. It is claimed on behalf of Towle that Hammond was to receive no salary, though Plummer and Towle were to receive it.

Towle was called to the stand to testify in the case by the complainant. Objection was made to his competency as a witness to transactions between him and Hammond, both under the statute of the United States (section 853, Rev. St.) and the statutes of Michigan. After the complainant closed his case, the defendant called Towle to the stand, and examined him further. The questions put were all relevant on cross-examination upon subjects testified to by him when called by the complainant.

The bill charged that Hammond had paid the notes indorsed by him for the accommodation of Ives out of the funds of George H. Hammond & Co., and that he had paid the \$5,000, with which Ives' share had been purchased, from the same source. The averment of the bill as to Hammond's alleged misrepresentation to Towle, on the faith of which Towle was induced to accept one-fifth of the capital stock of the corporation in 1881 as his proper share thereof, is as follows: "Sixteenth. And your orator further shows that the co-partnership of George H. Hammond & Company, above referred to, was as aforesaid, in the year A. D. 1881, merged into a corporation, under the laws of the state of Michigan, under the name and style of 'George H. Hammond & Company,' with a capital stock of one million dollars; that the whole of said capital stock was paid for with the assets and good will of the aforesaid co-partnership of George H. Hammond & Company; that no new capital was put into said corporation; that your orator, being the owner of one-third of the assets and good will of said co-partnership, was lawfully entitled to receive one-third of said capital stock, or three hundred and thirty-three thousand three hundred and thirty-three and one-third dollars' worth of it; that both at the time of the allotment of said capital stock between your orator and the said George H. Hammond, and at other times prior thereto, the said George H. Hammond wickedly, fraudulently, falsely, deceitfully, and knowingly, with the intention to cheat, wrong, and defraud your orator, said and represented to your orator,

and to other persons who communicated the fact of such representations before that time to your orator, that he, the said George H. Hammond, bought the aforesaid interest of the said Caleb Ives in and to the assets of the said co-partnership of George H. Hammond & Company at its full cash value, and that he paid for the same out of his separate estate, and not out of the undivided assets of the said co-partnership of George H. Hammond & Company, and at the time of said allotment he, the said George H. Hammond, was the separate and sole owner of that interest, and that the interest of your orator in the said co-partnership of George H. Hammond & Company was a one-fifth interest, and not a one-third interest; and your orator, confiding in the said George H. Hammond, and believing that the aforesaid statements of the said George H. Hammond, both to your orator and to the said other persons as aforesaid, were true, and believing that the said George H. Hammond had purchased the aforesaid interest of the said Caleb Ives with his own separate money, and not with the money of the said co-partnership of George H. Hammond & Company, and that the said George H. Hammond was the sole owner of the said Caleb Ives' interest, consented to take, and took, one-fifth, or two hundred thousand dollars' worth, of said stock, and the said George H. Hammond took four-fifths, or eight hundred thousand dollars' worth, of it."

Upon the pleadings and proof the circuit court dismissed the bill.

John B. Corliss, Alfred Russell, and W. B. Coy, for appellant.

Elliott G. Stevenson and Leo M. Butzel, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts as above). Serious questions as to the admissibility of material evidence upon which the complainant relies, as to the statute of limitations, and as to laches were considered by the circuit court, and decided adversely to the complainant. We do not find it necessary to consider any of them, for the reason that upon the record, and all the evidence as it is presented to the court, this seems to be a very plain case for the defendant. The main controversy turns on the terms of the contract of partnership entered into between Hammond and Towle in the spring of 1877, after Ives, by reason of his failure, assignment, and bankruptcy, caused a dissolution of the partnership then existing between him, Hammond, and Towle. Towle testifies that he met Hammond upon the train between Chicago and Detroit by appointment; that Hammond told him that they would be able to continue the business without Ives; and that, when Towle inquired what became of Ives' interest, Hammond replied, "We take it." Hammond then had a chattel mortgage upon Ives' interest for \$66,000, and Ives' interest did not at that time on the books amount to more than that sum. On the 1st of January, 1878, the amount to Ives' credit in the partnership was \$82,000, and Hammond then directed that Ives' interest should be transferred to his credit. Hammond had meantime paid out of his own pocket the \$66,000, with interest, due from him as an accommodation indorser for Ives. Then ensued the litigation which in June, 1880, resulted in an assignment by the assignee in bankruptcy of Ives' interest to Hammond. In August of 1880, in January of 1881, in July of 1881, balances were struck and profits divided between Hammond and Towle on a basis of four-fifths interest in Hammond and one-fifth interest in Towle. In October, 1881, Hammond invited Towle

to subscribe to the corporation which was to succeed the firm, and to take therein one-fifth of the capital stock. Towle demurred to this, on the supposition that he had a larger interest, and inquired what became of Ives' interest. Hammond replied that he has purchased Ives' interest with his own money. Towle, on the faith of this statement, consented to receive a one-fifth interest in the new corporation. If Hammond said to Towle, in 1877, that he and Towle would buy Ives' interest, and Hammond did then buy Ives' interest, and take it to himself, Hammond would hold Ives' interest for the benefit of both of them. But Towle's acquiescence in Hammond's statement in 1881, that he had bought Ives' interest and paid for it with his own money, and Towle's acceptance of one-fifth interest in reliance upon that statement, and his failure to object to the new arrangement for more than ten years, and until nearly six years after Hammond's death, make it very clear to our minds that Hammond did not tell Towle, at the time that Towle met Hammond on the train, that they would both take Ives' interest. Towle's conduct is utterly at variance with such a state of fact. The bill makes no such averment, and Towle did not so testify until his cross-examination. The statement is not corroborated by any direct evidence as to the interview between the two men, because no one else appears to have been present. It is attempted to corroborate this, however, by alleged statements made by Hammond at other times,—one testified to by a witness (Mason) as made in June, 1880, and another by a witness (Davis) as made in September, 1880. These witnesses say that Hammond, in effect, told them that Towle then had one-third of the business, because he and Towle had bought Ives out. Mason was a former employé of Hammond's, whose services Hammond had dispensed with because of a new arrangement he was obliged to make with the railroad companies, and who subsequently became a confidential agent of Towle. Davis was engaged in litigation with Hammond, and seems to have been one of those instigating Towle to bring the present suit. The statements were made at a time when it is altogether unlikely that Hammond could or would have made them, for they were made after Ives' share had been assigned to Hammond under an order of the court, and they were made at a time when the profits were being divided, one-fifth to Towle and four-fifths to Hammond. The evidence relied on was of casual conversations, held 10 years before the testimony was given, by witnesses who were naturally hostile to Hammond and friendly to the suit against him. The truth is, moreover, that the evidence of the complainant himself does not seem to the court to be worthy of the utmost credit; for in this very bill, filed in 1892, he permitted himself, on his oath, to charge his dead partner with false entries against him of more than \$100,000, and with the appropriation and embezzlement of other sums, when it is made satisfactorily to appear that he was fully aware of the system of book-keeping under which such charges were properly made, and were duly offset by proper credits on the other side of the ledger. Not only were these averments made in the bill by complainant, but his early testimony tended to support them, and it was not until a rigid

cross-examination and a production of the account book, a large part of which was kept by the complainant himself, and which showed the falsity of these averments, that their unfounded character clearly appeared, and complainant's counsel properly felt obliged to withdraw them. A party who puts himself in such a position before the court cannot expect that his testimony on other material points in the case will be accorded great weight, especially when it is so utterly at variance with his subsequent conduct. Eliminating, therefore, from our consideration, the conversation which Towle reports between himself and Hammond on the train in 1887, the only other evidence as to the terms of that partnership is the conversation which took place when Towle consented to receive one-fifth interest in the corporation. If there had been no agreement or understanding theretofore, this was a ratification of the terms which Hammond claimed, and must be regarded as settling the ratable interests of the two in that firm, unless Towle was induced to agree to it by misrepresentation. Complainant's witnesses state that Hammond said to Towle that he had bought Ives' share from Ives, and that he paid for it with his own money. The bill avers that this was false, and that he paid for it out of the money of George H. Hammond & Co. The books show conclusively that while, in making the payments to Ives, he used the checks of the firm, as he did in all his personal business, they were charged to him on the books of the firm as his individual payments. The statement of Hammond, therefore, that he paid for Ives' interest with his own money was true. This is the only alleged misrepresentation averred in the bill, and it is difficult to understand how, in the absence of amendment, complainant can rely on any other.

Still, let us consider the circumstance resting on the evidence of Towle alone, that Hammond, in his statement to Towle, fixed the purchase of Ives' interest as at a time before Ives failed. When Towle was first a witness he did not report Hammond as fixing any time. It was not until two years later, when it became clear that Hammond had paid for Ives' interest with his own money, that Towle recalled this part of the conversation. Such evidence, in view of the recklessness of Towle in his other testimony already alluded to, would be a very slender thread on which to hang a decree setting aside transactions of 20 years' standing. But let us assume that it is true. Literally, Hammond did not buy Ives' interest before he failed, but he did take a chattel mortgage on his interest to secure an amount equal to the entire sum then to the credit of Ives on the books of the firm, and as all he thereafter paid to secure the equity of redemption was \$5,000, which was less than the increase in Ives' book credit between the execution of the mortgage and the closing of Ives' account, it would not have been unnatural for him to regard his real purchase as made when the chattel mortgage was given. Strictly speaking, of course, he had but a defeasible title before Ives' failure; but, as it ripened into an absolute one afterwards, a reference to his purchase as of the time when he took the defeasible title was a mistake entirely consistent with good faith. He did, in fact, transfer the account of Ives to himself on the books of the

firm two years before he really acquired the equity of redemption. We can be quite sure that the distinction between the statement said to have been made to Towle and the facts was not sufficiently material to have made any change in Towle's conduct. Towle does not say that it would have made any difference, and there is nothing else in the case to support such a conclusion.

The material legal distinction between a purchase before and after Ives' failure is pressed upon the court. The contention is that while it is true that one of three partners may buy the interest of another, and take an assignment of the same to himself, without acting as a trustee or agent for the third partner, and without holding the assigned share for his benefit, before the dissolution of the partnership, he may not do so afterwards, and, if he does do so afterwards, he holds as trustee for the third partner. No case has been cited in which such a distinction is announced, and if it existed there is nothing to show that either Hammond or Towle regarded it as important or likely to influence Towle in accepting or rejecting a one-fifth interest. The difference between the purchase before and after dissolution is said to grow out of the consequences of the dissolution. When one of several partners becomes bankrupt, it is said that the assignee of the bankrupt has no right to the possession of the assets of the partnership, and has only a claim for an accounting against the solvent members of the firm, and that thereafter the solvent members of the firm occupy a trust relation towards each other in dealing with the representative of the bankrupt partner. The concession by the complainant, that one partner may buy the interest of another without liability to other partners to account for the profit of the purchase, is well justified by the cases following: *Cassels v. Stewart*, 6 App. Cas. 64; *Lobdell v. Baldwin*, 93 Mich. 569, 53 N. W. 730; *Karrick v. Hannaman*, 168 U. S. 334, 18 Sup. Ct. 135, 42 L. Ed. 484; *Monroe v. Hamilton*, 60 Ala. 232; *Edens v. Williams*, 36 Ill. 254; *Frederick v. Cooper*, 3 Iowa, 171; *Dimon v. Hazard*, 32 N. Y. 65; *Reese v. Bradford*, 13 Ala. 837. Upon dissolution by reason of the bankruptcy of one of the partners, the solvent partners have the right to settle the firm business, collect the assets, pay the debts, and distribute the surplus. *Amsinck v. Bean*, 22 Wall. 395, 403, 22 L. Ed. 801; *Ex parte Owen*, 13 Q. B. Div. 113; *Lindl. Partn.* 671; *Bates, Partn.* § 754, and cases cited. They, of course, are under obligation to pay the full share of the bankrupt to his assignee. The character of the respective shares to be distributed is not changed by the fact that the settlement is intrusted to the solvent partners. The title of the latter is not different from that of the assignee by reason of the bankruptcy. The change effected is only in the person to administer. The solvent partners do not occupy any different relation as between themselves and the assignee and his share than they did when it was owned by the assignor. The extent of the interest of each is exactly that which it was before dissolution. Neither of the solvent partners is a trustee for the other in the division of the surplus between them and the assignee. They are settling up the estate for the firm's benefit, and not for the benefit of the two

solvent partners as against the assignee. After the surplus is accumulated and fixed, the shares are known. It is immaterial to each partner who owns the other shares, so long as he receives his rightful share of the surplus. If one of the solvent partners acquires the share of the bankrupt's assignee, this neither increases nor diminishes the share of the other solvent partner, because it cannot affect at all the amount of the surplus to be divided. Each partner occupies to the other a fiduciary relation in collecting the assets and paying the debts of the partnership and accumulating the surplus fund for distribution; but, when the fund is accumulated and fixed, it cannot be material to each partner who the distributees shall be, provided always he secure his rightful share. If, therefore, one of the solvent partners buys the interest of the bankrupt partner from his assignee, he does nothing which prejudices the other solvent partner. It will neither increase nor cut down the amount which such partner will receive in the distribution. It therefore follows that Hammond's purchase of Ives' interest in the old firm did not inure to the benefit of Towle as a matter of equity or law, even though he acquired the equity of redemption in it after Ives failed. The representation, therefore, that he bought it before Ives failed, even if made, was immaterial, both in fact and law.

We conclude that there was no material misrepresentation upon which the acquiescence of Towle in the division of interests between him and Hammond in the partnership of George H. Hammond & Co. from 1877 to 1881 was secured. We have proceeded on the assumption made by counsel for complainant that Towle had no knowledge whatever of the entries upon the books,—no knowledge whatever of the basis upon which the actual division of profits was made during the partnership. Counsel argued that Towle was an unlettered man, and not a man of business, and was completely under the control of Hammond. The evidence shows that Towle was engaged in large business ventures outside of the business of Hammond & Co. He was engaged in the sale of general merchandise, and in the lumber business; he was president of the First National Bank of Hammond; he was in the real-estate business; he was mayor of Hammond; trustee of the township; had a large interest in a distillery, in a spring manufacturing business, in a carriage factory, in a steel-making plant, in a foundry, and in the oil business. He kept such books as were kept at Hammond, and seems to have been quite successful in the management of all his ventures. This would seem strongly to refute the claim that he was a mere puppet in the hands of Hammond.

The bill avers, and counsel claim, that the division of interests after the death of Plummer between Hammond, Ives, and Towle was two-fifths to Hammond, two-fifths to Ives, and one-fifth to Towle. If we understand it, this attempt to increase the interest of Ives, beyond what the books showed him to have had between 1873 and 1877, is to increase the amount for which Hammond was accountable to Towle by increasing the amount of the Ives interest in the business and the profits therefrom. We must presume that Ives knew what his interest in the business was after Plummer retired.

Allen, Ives' brother-in-law and representative in the business, kept the books, and from 1873 to 1877 there were divisions of the profits made as often as once a year, and in that division Hammond was credited with seven-fifteenths, Ives with five-fifteenths, and Towle with three-fifteenths. When Ives' assignee came to file his bill for an accounting against the solvent partners, he averred that Ives' interest was only five-fifteenths, and this was admitted by Hammond. Ives was an active business man, who lived in Michigan, and may be presumed to have known what the books contained. He never claimed more than one-third interest, and it would seem absurd for Towle now to attempt to establish that his interest was larger than Ives himself claimed it to be.

Towle seeks to recover from Hammond's estate his distributive share of the amount drawn by Hammond as salary. He testifies that, when the firm of Hammond, Plummer & Co. was formed, it was agreed that Hammond and Ives were to receive no salary, but that Plummer and Towle were to be paid one. The books kept by Ives show that from the organization of the firm Hammond received a salary, and Ives did not. Certainly, then, Ives understood the agreement to be that Hammond should draw a salary; and we may presume that Plummer knew what the books showed, and acquiesced in Hammond's salary. Without proof to support it, we cannot assume that Plummer was so densely ignorant of the partnership affairs as Towle testifies that he himself was. On Towle's unsupported statement, inconsistent as it is with the books and with Ives' and Plummer's conduct, we cannot hold that his claim as to Hammond's salary has been sustained.

As to the amount charged to the complainant by payment to Myrick of \$5,200, we have no doubt that this is offset by a credit to complainant of the same amount. There is every probability that the credit was included in a larger lump credit denominated in the books the "pay-roll account." Upon cross-examination, the complainant, in effect, admitted that this was the probability. Myrick's failure to recall the receipt of the money at this date, more than two decades before, when it is conceded that he did receive money to make purchases of cattle at some time, is not a successful impeachment of the account, which in every other respect is entirely accurate.

The charge against the defendant of \$20,000 because of an over-credit of \$100,000 on refrigerator cars is not fully explained, but, as the books show that the other partners, Hammond and Ives, were each charged their proper share of the \$100,000, it certainly worked no injustice as between the partners.

Upon the merits of the case, upon all the evidence, competent and incompetent, we are convinced that Hammond dealt justly with Towle, and was the chief instrumentality in laying the foundation of complainant's fortune. The decree dismissing the bill is affirmed.

## RED RIVER LINE v. SMITH et al.

(Circuit Court of Appeals, Fifth Circuit. February 13, 1900.)

No. 832.

## 1. MASTER AND SERVANT—STEAMBOATS—NEGLIGENCE.

The fact that the work of unloading cotton from a barge onto a steamboat engaged in the river trade on the Mississippi was carried on after dark, and while the boat was moving down the river, and that the mate was hurrying up the work, does not show negligence on the part of the owners of the steamboat, since it is the common practice and duty of the masters and crews of boats engaged in the river trade to push their employment, and, when called for, to receive, deliver, and stow freight at night as well as in the daytime.

## 2. SAME—ASSUMPTION OF RISKS.

The risks attendant on service on a steamboat engaged in the river trade on the Mississippi, being well known to the people employed, are assumed by the crew.

## 3. SAME—FAILURE OF ELECTRIC LIGHTS.

The owner of a steamboat engaged in the river trade on the Mississippi is not liable for the death of a servant who fell overboard while unloading cotton at night from a barge onto the steamboat, because of the failure of the electric lights, which was not shown to have been the fault of the owners or the master, but was an incident common to the employment of such lights, where the lard-oil hand lanterns furnished as a substitute were the best that could be obtained, and formerly were considered fully sufficient for the purpose.

## 4. SAME—FAILURE TO FURNISH STAGING.

Where the use of staging or connecting planks in transferring cotton from a barge to a steamboat was neither customary nor practical, the failure to furnish such staging was not negligence.

## Appeal from the District Court of the United States for the Eastern District of Louisiana.

This is an action in personam brought by Johanna Smith, widow, and J. H. Smith, half-brother, of John Smith, deceased, against the Red River Line, a Louisiana corporation, owner of the steamboat Electra, for subtraction of wages, and to recover damages for the death of the said John Smith, who lost his life on the night of the 12th of December, 1897, by falling overboard from the steamboat Electra and drowning. During the month of December, 1897, the Electra was employed in the Red river trade, carrying freight and passengers to and from the port of New Orleans. John Smith was shipped and employed on board the Electra as a roustabout, at the wages of \$13 per week. The third article of the libel charges: "That on the said 12th day of December, 1897, while the said steamboat was so descending Red river, three miles this side of Black river, and was on her way to the port of New Orleans, on her said voyage, she was receiving cotton from a barge which was brought alongside of her, and the said cotton was being unloaded from the said barge onto the said steamboat Electra while said steamboat proceeded on her said voyage, and without stopping. The transfer of said cotton from the said barge onto the said steamboat was so being made by the said John Smith and other members of the crew of the said steamboat under the direction of the said mate of the said steamboat, who was driving the said crew and the said John Smith, and compelling them and the said John Smith to work with great haste in rolling with their hands the bales of cotton from said barge onto the said steamboat. That the night was dark, and it was difficult to see sufficiently to prevent falling into the river between the said barge and the said steamboat. That the lighting apparatus of the said steamboat had just previously broken down, and was not in working condition, and no lights were supplied where said transfer of said cotton from said barges to said steamboat was being made,



until the said John Smith fell overboard and was drowned. That when said steamboat, with the said barge alongside of her, reached a point on Red river, on the said night of the 12th of December, 1897, about three miles below Black river, and while the said mate was so directing the crew of the said steamboat and the said John Smith in the loading of the said cotton upon the said steamboat from the said barge, and while the said mate was driving the said crew and the said John Smith, and compelling them and the said John Smith to work with great haste, and the said steamboat was running at her usual rate of speed, she swung around the bend of the river, and as she did so the barge swung out from the steamboat; and at that moment the said John Smith turned the bale of cotton which he was rolling, so as to place it upon the steamboat from the said barge, and, owing to the darkness of the night and the want of light, he, the said John Smith, endeavoring to step from the barge onto said boat, as he and the rest of the crew had been doing, and not being able to see the space which then existed between the said barge and the said steamboat, fell overboard into the river and was drowned; the said mate of the said steamboat being at the time in charge of and directing the said unloading from said barge, and the loading upon said steamboat, of said cotton, and was so driving the said crew and the said John Smith, and requiring them to work with great haste and without light." The fourth article of the libel is much to the same import, but charges that the barge was not sufficiently and securely lashed; no connecting planks or other guards were supplied to prevent the space between the barge and the steamboat while the transfer of cotton was being made; that the mate and officers were reckless in urging haste in the work; and that the steamboat was in fault for not providing sufficient lights. The fifth article of the libel charges the officers of the steamboat with neglecting to use proper efforts to rescue and save the life of said John Smith. And the sixth article charges that after Smith fell in the river he called for assistance, and was not drowned for some time thereafter, during which period of time he suffered agony of mind, fear, and torture, and finally sank, with a full consciousness of the fate to which he was doomed; and further charges the officers of the steamboat with not making adequate efforts to rescue the said John Smith, and alleges that the Red River Line is liable for the suffering of said Smith prior to his death, as well as for his loss of life, and further liable for balance of wages due him, but no amount is averred. The answer admits the employment of the said Smith on the Electra, and the time and location of the accident, but avers that the barges were securely, safely, and closely fastened to the steamboat. It admits that the loading was done by the crew, including the said Smith, under the direction of the proper officer of the steamboat, both at the various landings and while running, during the night of the said 12th of December, 1897. It avers that competent and sufficient lights, ample in number, were had and used upon the steamboat during the said night, and avers that during the day and night the said Smith had been engaged in making the transfer of cotton from the barges to the steamboat, and had become acquainted with the location, and the duties incumbent upon him, and the risks which he was running, and that the steamboat and its officers were not at fault. The answer also avers that no fault existed on the part of the steamboat in its equipment, apparatus, or management; that it is impossible and unknown on vessels lashed together to keep connecting planks or guards between the two; that no haste was ordered, required, or had, and the duties performed by said Smith at the time he lost his life were those which were usual, proper, and customary, etc. The answer further denies that the steamboat at the time of the accident was running at the regular rate of speed, and avers that she was running under a very low rate of speed; that the engines had been slowed down before reaching the point at which the accident occurred, and at the time of its occurrence the steamboat was simply floating with the current. And the answer avers that when the said Smith fell into the river the yawl of the steamboat was immediately lowered, and proper search made for the man, but without avail, and "that immediately thereafter the said steamboat was tied to the bank of the river, to await the rising of the moon, to make further search and examination, and to further navigate the said river without accident or detriment to the said steamboat, its barges or crew. And the answer avers that the wages due to the

said Smith at the time of the accident amounted to only \$10, which it is averred was tendered to libelants, and is put in deposit as a tender in this suit." On hearing, the district court decreed that "the libelants, Johanna Smith, widow of John Smith, deceased, and J. H. Smith, do have and recover of and from the Red River Line, respondent, the sum of three thousand dollars, and all costs of suit." After vainly endeavoring to obtain a new trial, the respondent sued out this appeal.

W. S. Benedict, for appellant.

J. Ward Gurley, for appellees.

Before PARDEE and SHELBY, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts as above). It is assigned as error that neither under the law of Louisiana nor in admiralty is there any survivorship to, or right of action in, the libelants, or either of them, under the circumstances set forth in the libel and proofs. There is a very grave doubt whether the libelant J. H. Smith, brother of the deceased, John Smith, can maintain an action for damages for the unlawful death of the said John Smith. The libel pretends to be for the recovery of wages due the said John Smith, and for certain damages accruing to the said John Smith personally, by reason of his sufferings while drowning; and it is contended that, as these damages accrue to the estate of John Smith, his heirs can maintain an action. So far as the action is for wages, the sum due was tendered in court, but no specific action was taken in relation thereto. The decree rendered below does not show that any part thereof was for wages due the said John Smith, or for damages due his estate. The right of the libelants, as heirs, to recover either wages or debts due the estate of John Smith, would have been adversely settled upon an exception. However, the objection now assigned was not made in the court below, and, from the view we take of the case on the merits, it is unnecessary to pass upon the said assignment, and we decide nothing in regard thereto.

The evidence submitted on the hearing establishes that John Smith, deceased, was regularly shipped and employed as a roustabout on the stern-wheel steamboat *Electra*, then navigating the Mississippi river and tributaries; and at 7 o'clock p. m. of the 12th of December, 1897, when the *Electra*, with a barge load of cotton in tow, was descending the Red river, the said John Smith lost his life by falling overboard and drowning. The night was dark. It was known that there were many and dangerous bends in the river. The electric lights with which the steamboat was provided were broken down and could not be used, and in lieu thereof, and to furnish light for the transfer of the cotton from the barge to the boat, lard-oil hand lanterns were supplied and used, which, while inferior to, and a poor substitute for, the electric lights, were the best lights that could be furnished under the circumstances, and the same kind of lights as were used on all steamboats carrying cotton prior to the introduction of electric lights. In fact, the use of coal oil was prohibited to boats carrying cotton, by the underwriters. On account of the low state of water in the river, the

method of bringing the cotton out of Red river was to load the same on barges, which were towed by the steamboat to deeper water, and then the cotton was transferred from the barge, and regularly loaded on the boat. On this occasion the steamboat had two barges in tow, one on each side, each nearly as long as the steamboat. They were as closely and securely lashed to the steamboat as the nature of the case permitted,—with head line, breast line, stern line, and tow line. Although as securely lashed as the case would permit, on account of the stretching of lines whenever the boat entered the bend or rounded the same, the barges would swing out, first at the bow, and afterwards at the stern, the distance of 18 inches to 2 feet. At the time in question the steamboat was rounding a bend, but she was under no headway,—merely keeping straight in the stream and floating. In transferring cotton from the barge to the boat, no stage planks were used. Although the business carried on as above is of long standing, there is no proof in the record of any custom to use stage planks on such occasions. What proof there is is to the contrary of such usage, and the reasons given for not using stage planks appear to be satisfactory. The customary method of unloading cotton from barges was, as shown by the evidence of the master of the *Electra*, as follows:

"Q. Did you have, or is it customary to have, in unloading from barges onto the boat, staging between the two? A. No, sir. Q. Why? A. Because it is always one or the other: The cotton on the barge will be higher than the cotton on the boat, or the boat's cotton will be higher than the cotton on the barge. Therefore we can't use them. Q. What is the method pursued in taking the cotton from the barge onto the boat? A. We roll it as long as— Dump it off onto the boat as long as we can. Or, if it is on a level, we roll it from the barge to the boat; and, after it gets too low below the boat to roll or dump it on there, why, we ship it with the capstan. Q. Have you any employes at the same time on board the boat, and for what purpose, in connection with the cotton, at the same time that men are rolling the cotton off the barge to the boat? A. Yes, sir; we have from four to six men stowing the cotton. Q. How long have you been steamboating? A. I have been steamboating ever since I was 13 years old, and I am 44 years old."

And this evidence is not contradicted.

John Smith fell overboard and was drowned while cotton was being transferred from the barge to the steamboat, but exactly how he fell overboard is uncertain. The libel charges that he was rolling cotton from the barge to the steamboat, and, owing to the darkness,—want of light,—he, the said John Smith, in endeavoring to step from said barge onto said boat, as he and the rest of the crew had been doing, and not being able to see the space which then existed between the said barge and the said steamboat, fell overboard into the river and was drowned. Edward Ross, roustabout, for the libelants, testifies that, "In jumping down from the barge to the boat, Smith did not jump far enough, and went into the river." Jeff Henry Smith, one of the libelants in this case, says that "the barge swung out from the boat as John Smith was rolling a bale of cotton from the barge to the boat; and, by way of being rushed, and no light at all, he goes in this hole between the boat and the barge." Charlie Hughes, roustabout, for libelants, says that "the barge swung out, and Smith tumbled and went

overboard." Heywood Stephens, another witness for libelants, says that "the night was dark. The mate was rushing them, and Smith could not see. He stepped backwards overboard." James W. Doubleau, porter of boat, for libelants, says that "the barge swung out, and, in stepping from one bale to another, John Smith missed the bale, and went in between the barge and the boat, and fell into the river." George Hawkins, roustabout, for the respondent, says that "Smith was careless,—stepping and not looking,—and fell in between the barge and the boat." George McCutcheon, roustabout, for respondent, says: "John Smith rolled a bale of cotton off the barge to me, and I put my hook in the bale,—took it away from him; and, as he turned it loose, he turned around, turned away from me, and then stepped down between the boat and the barge. He was actually crossing over from the barge onto the boat. He had one foot on the barge and one foot on the boat, and when he fell he was returning to the barge." When Smith fell in the river, it appears, he went with the current, ahead of the boat. As soon as the alarm was given, which was immediate, his cries being heard ahead of the boat, attempts were made to throw him a head line; and as soon as it could be done, under the circumstances, a yawl was lowered, and search made for him, but without avail. It is not disputed that the steamboat *Electra*, when she started on the voyage in question, was staunch and strong, fully manned and equipped, and fully supplied with all the appliances required by law, or usual to boats engaged in her trade. The negligence assigned as resulting in the death of John Smith is that the work of unloading the barge was carried on after dark, and while the boat was moving down the river; that the lights furnished were insufficient; that the mate was hurrying up the work; and that no stage planks were used between the barge and the boat. It is not only the common practice, but it is the duty, of the masters and crews of boats engaged in the river trade, to push their employment, and, when called for, to receive, deliver, and stow freight at night as well as in the daytime. The risks attendant upon such service are well known to the people employed, and are assumed by all hands composing the crew. The failure of the electric lights is not shown to have been the fault of the owners, or even of the master, but was an incident common to the employment of such lights. The lights furnished as a substitute were the best that could be obtained,—formerly were considered as fully sufficient for the purpose; and we think no negligence, particularly on the part of the owners, can be deduced from using them. We have already shown that the use of staging in transferring cotton from barge to boat is neither customary nor practical. Under the circumstances, we are unable to hold that the owners of the *Electra* were guilty of any fault resulting in the death of John Smith. No negligence on their part for which they were responsible is shown, but the case does show that all the matters complained of were customary perils of navigation, which John Smith necessarily assumed when he shipped on the steamboat. *Howes v. The Red Chief*, 15 La. Ann. 321, is not applicable here. That suit was to recover the value of a hired slave,

and was ruled on the law of bailment, instead of on maritime law. The decree of the district court is reversed, and the cause is remanded, with instructions to dismiss the libel.

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HALSEY v. BIRD et al.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1900.)

No. 286.

**1. FACTORS—POWER TO PLEDGE.**

A factor cannot pledge the goods consigned to him, as his own, for his individual debt, though he has an interest in the goods by reason of advances made thereon by him.

**2. SAME—CONVERSION.**

The hypothecation by a factor of the goods of his consignor, for his individual debt, which is in excess of his advances to and charges against the consignor, makes him bound to account to the consignor for the whole amount received on such hypothecation.

**3. SAME.**

A factor, who hypothecates the goods of his consignor for his own individual debt, thereby disposing not only of his own special interest therein, but also of the whole property, by use of the symbols of title, so that any surplus which might arise from the sale of the goods in excess of the amount necessary to recompense the factor for his advance, and to satisfy all charges against them, would go to others than the consignor, and not be available for remittance to the consignor in due course of business, is liable to the consignor for the value of the goods at the time he so disposed of them, free from charges made against the goods subsequent to the hypothecation, including commissions and charges on subsequent sales.

Brawley, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of Virginia.

J. D. Horsley and John W. Daniel, for plaintiff in error.

F. S. Kirkpatrick, for defendant in error.

Before GOFF, Circuit, Judge, and MORRIS and BRAWLEY, District Judges.

GOFF, Circuit Judge. The facts which we deem it necessary to state, bearing on the questions raised by the pleadings and discussed by counsel, are as follows: Stephen P. Halsey, a tobacco-nist of Lynchburg, Va., shipped to Walter Bird, a commission merchant doing business in London, England, under the style of Walter Bird & Co., 1,148 tierces of Virginia leaf tobacco, the first shipment of the consignment being made on April 4, 1891, and the last on April 9, 1892. There had been other dealings between the parties, relating to certain shipments of tobacco in preceding years, and Halsey claimed that Bird was indebted to him in a considerable sum of money at the time the first shipment of the last consignment was made. Upon the new shipments, as on those previously made, Halsey drew drafts on Bird for such advances as were considered proper, and when the tobaccos had all been sold a controversy arose as to the final settlements, which resulted in the institution

of this suit by Bird against Halsey in the circuit court of the United States for the Western district of Virginia. This action is trespass on the case, in assumpsit. The defendant below, in addition to the general issue, pleaded specially, in substance, that the plaintiff below did not faithfully and diligently endeavor to sell the tobacco consigned to him, and did not sell the same for the best prices that could have been obtained, and did not honestly account for the proceeds of sales actually made, and that he wrongfully appropriated the tobacco to his own use, by hypothecating the same for his own debts. The defendant in his said pleas also set up a counterclaim against Bird for damages on account of the injuries complained of. On these pleas issue was joined, and the case was tried to a jury, which found for the plaintiff, on which finding the court below entered judgment against Halsey for \$20,000, with interest thereon, and costs of suit. During the trial many exceptions were noted to the rulings of the court, and to the instructions as given and refused; but we do not find it necessary to consider all of them, as the disposition we make of the main questions involved will doubtless eliminate the others from the further proceedings herein that we find it our duty to direct.

The plaintiff in error claims that the court below erred in refusing to give to the jury the three following instructions asked for by his counsel:

"The court instructs the jury that if they believe from the evidence that Halsey consigned to Bird, for sale by him as a commission merchant, the tobacco in controversy, and that said Bird hypothecated the tobaccos of said Halsey to secure money borrowed by said Bird, without said Halsey's consent, such hypothecation was a conversion by Bird of Halsey's tobacco to his own use, and he was immediately upon such conversion liable to said Halsey for the value of said tobacco at the time of the conversion; and, further, that the right of a commission merchant to assign a debt due to him by his principal is different in law from the hypothecation of his principal's goods to secure the commission merchant's debts, and the court is now dealing with hypothecation by a commission merchant without transferring the debt due him for advances."

"If the jury believe from the evidence that the plaintiff Walter Bird wrongfully hypothecated the tobaccos of S. P. Halsey for a debt of his own, and that such debt was in excess of his advances and charges to Halsey, he is bound to account for the whole amount received upon such hypothecation, and must be taken to have sold the tobaccos for such amounts; and he cannot recover in this action without first accounting to Halsey respecting such hypothecation, and accounting for the whole amount received thereon."

"If the jury believe from the evidence that Walter Bird, in hypothecating the tobaccos of Halsey, disposed not only of his own special interest therein, but disposed also of the entire property therein, by use of the symbols of title, and that any surplus which might arise from the sales of said tobaccos over and above the amount necessary to discharge in full the advances made thereon by Bird, and all charges made against it, would go to others than the consignor, and not be available for remittance to Halsey in due course of business, then and in that event the jury should regard the transaction as the conversion of said tobacco to his own use by Bird, and treat it as then fairly disposed of, as between Halsey and himself; and, if the jury so believe from the evidence, Bird is liable to Halsey for the value of said tobaccos at the time he so disposed of them. All charges made against the tobaccos subsequent to the times of hypothecation must be stricken from the account against Halsey, including commissions and charges upon the subsequent sales of tobacco by either Bird or the bank or its agents."

The court below refused to give these instructions as asked for, but in lieu thereof gave the following:

"The court instructs the jury that if they believe from the evidence that Halsey consigned to Bird, for sale by him as a commission merchant, the tobaccos in controversy, and that said Bird had no interest in said tobacco by reason of advances made by him to Halsey, and that said Bird hypothecated the tobacco of said Halsey to secure money borrowed by said Bird, without said Halsey's consent, then such hypothecation was a conversion by Bird of Halsey's tobacco to his own use, and Bird was immediately upon such conversion liable to said Halsey for the value of said tobacco at the time of conversion."

"When one consigns goods to his agent for sale, the agent has no right to pledge the goods, and, if he pledges them, it is an unlawful abuse of his position as agent, and the act of pledging amounts to a conversion. But when one consigns goods to his agent, and then draws on those goods in the hands of his agent, who advances the money by cashing the draft, the simple relation of agent and consignor becomes changed, and the agent becomes both agent and creditor of his principal, and he has an interest in the goods in common with his principal. The consignor is the legal owner. The agent has a qualified ownership by reason of his advances. This being so, if the agent pledges the goods, he has a right to pledge them to the extent of his advances. If these advances equal the value of the goods, then his principal suffers no harm. If the advances be less than the value of the goods, then, to the extent of the difference between the value of the goods and the amount of the advances, the principal may be injured, unless the agent make good to him the amount of such difference. The agent, then, if he has made advances, having a qualified interest in the goods, to that extent can hypothecate them; and if the goods be hypothecated, and during the hypothecation be sold at their market value, and if the proceeds are applied towards the payment of the advances, the principal cannot complain. The bare fact of hypothecation, if it brings no loss to the principal, cannot create a liability on the part of the agent."

The instructions, as presented to the court below by counsel for defendant, were intended to present to the jury the law relating to commission merchants and consignors, as that law was found to be applicable to the facts before them. Did the court below err in refusing the said instructions as they were offered, and also in giving them as amended? We think so, for the following reasons:

A commission merchant has no right to use the goods of his consignor as if they were his own, and he cannot alienate them in the adjustment of his own personal debts, unconnected with his advances and charges on them. No statute that we are aware of gives him such a right, commercial customs do not sanction it, and the common law forbids it. The consignor places his goods in the hands of the factor to be sold, and the latter exceeds his authority when he hypothecates or pledges them for advances he has made thereon; and this is so even in cases where the consignor has drawn upon the factor in anticipation of the sale. If the factor pledges the goods as his own, he by such act appropriates them to his own use, and renders himself liable for their value as of the date when the pledge is made. The factor may transfer his lien on the goods existing by virtue of the advances made by him to the consignor, and also for proper charges due to him on the same; but this must be done under certain conditions and limitations, with express notice of the lien to the party to whom the goods are delivered, and with the right on the part of the factor to re-take them into his custody at any time he may desire to do so, or when he may be instructed to sell them. It has long been the

doctrine of the common law that a factor cannot pledge as security for the payment of his individual debt the goods consigned to him for sale. It has been uniformly so held in the courts of England, except where by act of parliament the rule has been changed or modified, and it is the law in the United States where special legislation has not made a change. To pledge the goods of the principal is not within the factor's power, and, if he attempts it, his act is tortious and void. *Edw. Bailm.* p. 117; *Story, Ag.* § 113; 2 *Kent, Comm.* p. 626; *Paterson v. Tash*, 2 *Strange*, 1178; *Graham v. Dyster*, 2 *Starkie*, 20; *McCombie v. Davies*, 6 *East*, 540, 7 *East*, 5; *Queiroz v. Trueman*, 3 *Barn. & C.* 342; *Brown v. McGran*, 14 *Pet.* 479, 10 *L. Ed.* 550; *Warner v. Martin*, 11 *How.* 208, 13 *L. Ed.* 667; *Benny v. Rhodes*, 18 *Mo.* 147; *Allen v. Bank*, 120 *U. S.* 20, 7 *Sup. Ct.* 460, 30 *L. Ed.* 573.

A factor will not be permitted to deliver the goods of his principal in satisfaction of his own debt, nor to pledge them as security for his individual debts, so as to pass the title thereto; and such conduct on the part of the factor amounts to the conversion of the goods to his own use, and renders him liable to his consignor for the value of the same at the time of such conversion. In order to pass the title to the goods, they must be sold according to the usages of the trade; and, if sold in an irregular way, the title will not pass, even if the factor should have a lien on them for advances made by him. *Benny v. Rhodes*, 18 *Mo.* 147; *Same v. Pegram*, *Id.*, 191; *Bott v. McCoy*, 20 *Ala.* 578; *Bigelow v. Walker*, 24 *Vt.* 149; *Bowie v. Napier*, 1 *McCord*, 1.

The fact that the defendant in error had an interest in the tobaccos, by reason of advances made thereon by him, did not authorize him to pledge the same for his individual debts; and, therefore, if he hypothecated said tobaccos for the purpose of securing money borrowed by him individually, such hypothecation amounted to their conversion, and rendered him liable to the consignor for their value at the time of such conversion. Under such circumstances a factor's interest is only a qualified one; consisting of a lien upon the goods consigned to him, for the amount of the charges due thereon, and also for the advances made by him concerning the same. If the factor, having such lien, transfers it for purposes of his own, any surplus that may remain after discharging such lien from the proceeds of sale is clearly the property of the consignor. The instructions referred to, propounded by the defendant below, properly stated the law applicable to the facts of this case as the same were presented to the jury, and should have been given, in substance, at least, as asked for.

The other assignments of error do not impress us as important, as they exist only because of questions not now likely to arise under the law that will be then applicable when the case is again tried. The judgment complained of will be reversed, and this case will be remanded, with instructions to grant the plaintiff in error a new trial.

**BRAWLEY**, District Judge, dissents.



## PENNSYLVANIA R. CO. v. MILLER.

(Circuit Court of Appeals, Third Circuit. February 7, 1900.)

No. 26.

**1. RAILROADS—ACCIDENTS AT CROSSINGS—EVIDENCE—DIRECTION OF VERDICT.**

Where plaintiff was struck by a train while driving across the defendant's tracks in the nighttime, during a storm of rain and sleet, the question whether he was negligent in failing to see the train is properly left to the jury, although there was evidence that in the daytime, under ordinary circumstances, an approaching train could be seen for a considerable distance.

**2. SAME—DUTY OF RAILROADS AS TO SIGNALS.**

A railroad company is not relieved from liability for injuries at a public crossing by merely complying with the statutory requirements in regard to audible signals by approaching trains, but must take such additional precautions as may be rendered necessary by the circumstances at the particular crossing.<sup>1</sup>

In Error to the Circuit Court of the United States for the District of New Jersey.

Alan H. Strong, for plaintiff in error.

Erwin E. Marshall, for defendant in error.

Before **ACHESON** and **DALLAS**, Circuit Judges, and **KIRKPATRICK**, District Judge.

**KIRKPATRICK**, District Judge. The writ of error in this cause brings here for review the record of a suit in which Adolph Miller, the plaintiff below and the defendant in error, recovered a judgment against the Pennsylvania Railroad Company, the defendant below and the plaintiff in error, for personal injuries sustained by him while crossing the tracks of the said railroad company in the city of Trenton. Early in the morning of January 10, 1897, while it was still dark, Miller was driving along Broad street, a public highway in said city, at a point where it crosses said railroad's tracks. It was about the hour of 5 o'clock in the morning. The weather was foggy, and a slight sleet of snow and rain was falling. According to Miller's testimony, he slowed his horse as he approached the tracks, almost stopping. He listened, and he looked both ways. He heard no signals, and failed to see any approaching train. He therefore proceeded on his way, and when the horse was actually upon the railroad tracks he saw the headlight of an engine coming rapidly from the south. It was too late to turn back. He hurried forward, but the rear wheel of the wagon was struck by the locomotive, and the wagon overturned, whereby he was injured in the back and leg. There was evidence to show that the crossing was one of more than ordinary danger; that the view of the track southwardly, to one approaching it from the eastward, as was Miller, was obstructed by a fence, by telegraph and telephone poles, and by buildings erected by the railroad company. It was contended on the part of the railroad company that the view of the tracks was

<sup>1</sup> As to duty of railroads to give warning signals at crossings, see note to *Chesapeake & O. Ry. Co. v. Steele*, 29 C. C. A. 90.

clear for a long distance to the southward, and that every one who looked could not fail to see an approaching train in ample time to avoid collision. They therefore asked the court to direct a verdict for the defendant upon the ground that the plaintiff had been guilty of contributory negligence, because, they said, if he had looked he could have seen the approaching train, and therefore that he did not see it, as he said, is conclusive evidence that he did not look. This, it seems to us, was matter of argument to be addressed to the jury, and to be by them determined from the evidence in the cause. Whether the plaintiff below could have seen the approaching train in time to avoid the collision was a question of fact, dependent upon a variety of circumstances, and upon inferences to be drawn from the testimony produced, with regard to the speed at which the train was approaching the crossing, the condition of the atmosphere, the glare of the electric lights, and the nature of the alleged obstructions to the view. True it is that there was testimony tending to show that in the daytime, under favorable circumstances, a traveler upon the highway could see an approaching train for a considerable distance; but, as was said in *Massoth v. Canal Co.*, 64 N. Y. 524:

"It does not necessarily follow from the fact that a skilled engineer can demonstrate that, from a given point in a highway, the track of a railway is visible any distance, that an individual in charge of a team approaching the track is guilty of negligence because he does not from the same point see a train approaching at great speed in time to avoid collision."

Upon the evidence disclosed in the record, we are of the opinion that the learned judge committed no error in refusing to direct a verdict for the defendant.

Of the remaining assignments of error, the second, sixth, and seventh alone were relied upon for reversal of the judgment by counsel for the plaintiff in error, either in the brief presented, or upon the oral argument before the court. They relate to the refusal of the learned judge to charge as requested, and respecting the charge of the learned judge in respect to the subject-matter of the request. They are as follows, viz.:

"Second Exception. That the said court refused to charge the jury, as duly requested on behalf of said defendant, that the defendant was under no obligation at the time of the injury to the plaintiff to do anything more than to give the usual statutory signal by ringing a bell for the required distance before reaching the Broad street crossing; and if the bell was rung as testified to by the engineer, foreman, and head brakeman, there is no liability on the part of defendant, even if plaintiff did not hear it."

"Sixth Exception. That the said circuit court, after charging the jury that it is not of itself, or per se, negligence to omit the employment of a flagman or of safety gates at a road or street crossing under ordinary circumstances, further charged said jury as follows: 'If the circumstances are so extraordinary as, in your opinion, to make some additional precaution necessary, it is for you, upon a consideration of all the evidence in the case in regard to the circumstances surrounding the point in question, to so decide.'

"Seventh Exception. And there is error in this: That the said circuit court charged the jury as follows: 'But if you should determine from all the evidence that the defendant was guilty of negligence, either in not giving the proper signals of the approach of the train, or not exercising such proper precautions to guard the approaches to the crossing as the exigencies of the situation reasonably demanded, and that the plaintiff, in the exercise of due care,

and without negligence on his part, came into a place of danger, and suffered the injuries described, then your verdict will be for the plaintiff.'"

These assignments of error bring before the court here the question of the measure of obligation imposed upon a railroad company in operating their road at highway crossings, and whether they discharge their full duty to the public by ringing a bell or blowing a whistle at the time and in the manner prescribed by the statute of New Jersey. The cases of *Railroad Co. v. Leaman*, 54 N. J. Law, 202, 23 Atl. 691, and *Hackett v. Railroad Co.*, 58 N. J. Law, 4, 32 Atl. 265, are cited by counsel for plaintiff in error in support of his contention. The *Leaman Case* came before the court upon a writ of error from the trial judge, who charged, inter alia, that it was for the jury to determine whether, under the circumstances of the case, it was not the duty of those in charge of the train to cause signals to be sounded, additional to those required by the statute. In delivering the opinion of the court of errors and appeals, Mr. Justice Read, after stating that the only question before the court was "whether a company which, by its agents managing a train, has performed its whole duty in respect to an audible warning of the approach of the train," says:

"When the prescribed audible signals are given in conformity with the statute, whether they are heard or heeded by the traveler crossing the track or not, the company is absolved from negligence, so far as concerns this kind of audible warning of the approach of its trains."

So, too, in the case of *Hackett v. Railroad Co.*, supra, the trial judge submitted to the jury the question whether the persons in charge of the train gave such other signal as would give reasonable warning, and said that if the jury thought such warning was not given as the statute required, or as they thought was required, there was a basis on which defendant could be held responsible. The supreme court, reviewing the charge of the learned judge, held it to be erroneous in this respect, and reaffirmed the principle laid down in *Railroad Co. v. Leaman*, supra, with regard to the sufficiency of a compliance with the statutory requirement to absolve the defendant from liability for negligence, so far as concerns that kind of audible warning. With this construction of the statute we entirely concur, but in so doing we cannot adopt the conclusion of counsel, that, in having performed its duty with regard to audible signals, the company thereby becomes exempt from all liability, or is relieved from the obligation of taking additional precautions to provide for the safety of the travelers upon the highway. We hold that it is the duty of railroad companies, in crossing public highways at grade, to use all reasonable care to avoid collisions, and provide for the safety of travelers who enjoy thereon privileges in common with them (*Favor v. Railroad Corp.*, 114 Mass. 350); that the degree of care varies with the character of the crossing,—whether the view be free, or obstructed by trees, fences, buildings, or the natural configuration of the land,—with the use made of the highway by the traveling public, and with the speed and frequency of passing trains. Whether the care actually exercised is reasonable, or whether, by the omission of such precautionary measures as were proper, or as

they had accustomed travelers on highways to expect, the railroad company has been guilty of negligence, are questions of fact to be determined by the jury upon all the circumstances of the case. *Linfeld v. Railroad Corp.*, 10 Cush. 569; *Norton v. Railroad Co.*, 113 Mass. 366; *Zimmer v. Railroad Co.*, 7 Hun, 552, affirmed in 67 N. Y. 601.

Entertaining these views, we find no error either in the charge of the learned judge, or in his refusal to charge as requested. The judgment of the circuit court should be affirmed, with costs.

**KETTENRING v. NORTHWESTERN MASONIC AID ASS'N.**

(Circuit Court, N. D. Illinois, N. D. January 16, 1900.)

No. 23,824.

**LIMITATION OF ACTIONS—PLEADING—ILLINOIS PRACTICE.**

Under the Illinois practice, matter in avoidance of a limitation contained in an insurance policy cannot be pleaded in the declaration on such policy, but is matter for replication after the limitation has been pleaded by defendant.

On Demurrer to Amended Declaration.

Bulkley, Gray & More, for plaintiff.

Walker & Payne, for defendant.

KOHLSAAT, District Judge. In view of section 914 of the Revised Statutes, and in order to promote uniformity in common-law pleadings between the state and federal courts of this district, the decision of the Illinois supreme court in *Gunton v. Hughes*, 181 Ill. 132, 54 N. E. 895, will be followed in this case. While the earlier decision of that court in the case of *Insurance Co. v. Baker*, 153 Ill. 240, 38 N. E. 627, is contrary to the decision in the *Gunton Case*, still the later case should govern, even though the former was not referred to nor expressly overruled. The special demurrer to the declaration is, therefore, sustained upon the ground that the matters in avoidance of the limitation in the policy which was set up in the pleas to the first declaration herein should be availed of by replication under the state practice, and not by amendment to the declaration.

**VOLK v. B. F. STURTEVANT CO.**

(Circuit Court of Appeals, First Circuit. February 2, 1900.)

**1. APPEAL—PROCEEDINGS IN FORMA PAUPERIS.**

It seems that Act July 20, 1892 (27 Stat. 252, c. 209), permitting proceedings in the federal courts in forma pauperis, should be construed to apply to proceedings by appeal or writ of error in the circuit court of appeals.

**2. SAME—REQUISITE OF SHOWING.**

To authorize the granting of leave to proceed in forma pauperis under such statute, it must be shown that the petitioner is a citizen of the United

States, and, where he sues as representative of a decedent, the financial condition of the estate, as well as his own, must appear; and inasmuch as the statute is expressly limited to those who are unable to pay the fees or costs of the suit, or to give security for the same, a showing of inability, and not merely inconvenience or hardship, is essential.

In Error to the Circuit Court of the United States for the District of Massachusetts.

Edward H. Savery, for petitioner.

Before COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. This is a petition filed by Teresa Volk, administratrix, plaintiff in error, for leave to proceed in forma pauperis under the act of July 20, 1892 (chapter 209, 27 Stat. 252). It appears by the record that the original suit was brought in the circuit court by one Esch, who described himself in his writ as a subject of His Majesty William, the German emperor, and an alien. Therefore, inasmuch as the statute under which the petition was filed is expressly limited to citizens of the United States, Esch could not have availed himself of it. After the suit was entered in the circuit court, Esch deceased, and this petitioner was admitted to prosecute as administratrix of his goods and estate. Neither her petition nor the record shows whether she is a citizen of the United States or an alien. In view of this omission, the petition fails to bring itself within the statute referred to, and might be denied on that account.

Moreover, the petition contains no facts with reference to the financial condition of the estate of Mr. Esch; and, as that estate may be in condition to furnish the necessary funds and security for fees and costs, and as, moreover, it would be holden to make good to the petitioner whatever fees or costs she might be required to pay, the petition ought to set out its financial condition, as well as the financial condition of the petitioner individually. As it fails to do this, it might also be denied on this account.

The question has been raised whether this statute applies to writs of error and appeals. *Wickelman v. A. B. Dick Co.*, 29 C. C. A. 436, 85 Fed. 851; *Brinkley v. Railroad Co.* (C. C.) 95 Fed. 345, 354. The view has been expressed in this circuit, in *Columb v. Manufacturing Co.* (C. C.) 76 Fed. 198, that it does. Certainly this is within its equity, and is not excluded by its letter.

Aside from the defects to which we have called attention, and which possibly may be overcome by amendments, the petition alleges that the petitioner is a laundress; but it admits that she has about \$600 out in loans to different persons, and about \$200 in some savings bank. She attempts to excuse the force of these facts by a statement that she cannot take these funds for the purpose to which the petition relates, because it is all she has with which to provide for herself in case of illness, and for her old age. Nevertheless, the statute is expressly limited to those who are unable to pay the fees or costs of the suit, or to give security for the same. The record in this case is brief, and the fees and costs involved would be so

small that this court cannot determine judicially that a person of the means which the petitioner possesses has the inability which the statute requires. Therefore we must deny the petition. Nevertheless, inasmuch as the record is brief, as we have already said, the court, under the circumstances, would be disposed to listen favorably to an application to hear the case on a sufficient number of clear typewritten copies being furnished for that purpose.

Ordered, that the petition of Teresa Volk, administratrix, for leave to proceed in forma pauperis, be denied.

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### HATHAWAY et al. v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Circuit Court, D. Washington, N. D. January 22, 1900.)

#### 1. LIFE INSURANCE—FORFEITURE FOR NONPAYMENT OF PREMIUM—NEW YORK STATUTES.

Under a life policy, which was an entire contract for the life of the insured, and not a term policy, issued in New York while Laws 1877, c. 321, was in force, which provided that no forfeiture should be declared until 30 days after the giving by the company of a prescribed notice, in a prescribed manner, the rights of the parties were not affected by Laws 1892, c. 690, which repealed the former law, with a saving clause, and which re-enacted practically the same provision as to forfeiture of such policies, and further provided that, where its provisions were substantially the same as existing laws, they should be construed as continuations of such laws.

#### 2. FEDERAL COURTS—NECESSITY OF PLEADING STATE STATUTES.

A federal court is required to take judicial notice of the general laws of the different states, and, where a party asserts rights under a state statute, the court cannot ignore a subsequent statute which affects such rights, although it is not pleaded.<sup>1</sup>

#### 3. PLEADING—ISSUE AND PROOF.

Under the Code of Procedure of Washington, by which the pleadings, so far as relates to issues of fact, are closed by the reply, where a plaintiff in his reply pleads a statute of another state the defendant is entitled to show, without further pleading, that such statute has been repealed or amended by a subsequent statute.

#### 4. LIFE INSURANCE—FORFEITURE FOR NONPAYMENT OF PREMIUMS—NEW YORK STATUTE.

The New York act of 1897 amending Laws 1892, c. 690, by enacting that the provision of such law which required a notice to be given before the forfeiture of a life insurance policy could be declared for nonpayment of premiums should protect such policy from forfeiture for one year only, and that it should become forfeited in accordance with its terms, and without notice, at the expiration of a year from the time of the default, is not retroactive, and did not operate to work an immediate forfeiture of a policy previously issued, upon which the insured had been in default for more than a year prior to the taking effect of the act, where such policy was not a term policy, but an entire contract for the life of the insured, which had not, therefore, expired by its own limitations.

This was an action at law on a life insurance policy.

George H. Durham, R. W. Emmons, and V. H. Faben, for plaintiffs.  
Struve, Allen, Hughes & McMicken, for defendant.

<sup>1</sup> As to state laws as rules of decision in federal courts, see notes to *Griffin v. Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

HANFORD, District Judge. This is an action by the beneficiaries named in a life insurance policy issued by the defendant. By a written stipulation, a jury was waived, and the case has been tried and submitted upon the pleadings, evidence, and arguments; and, upon due consideration, I find that the policy was issued by the defendant at its office in the city of New York on the 26th day of January, 1892, insuring the life of Homer M. Hathaway, of Pomeroy, in this state, for the sum of \$3,000, in favor of his wife and son, who are the plaintiffs in this action. The contract is a New York contract, to be performed in the state of New York, and as to all the rights and liabilities of the parties the law of the state of New York must govern. The policy declares that the Mutual Life Insurance Company of New York will pay at its home office, in the city of New York, unto Caroline L. Hathaway and Horace C. Hathaway, son of Homer M. Hathaway, their executors, administrators, or assigns, \$3,000, upon acceptance of satisfactory proofs at its home office of the death of said Homer M. Hathaway during the continuance of the policy, upon specified conditions, and subject to the provisions, requirements, and benefits stated on the back of the policy. The annual premium of \$113.10 was required to be paid on the delivery of the policy, and thereafter to the company, at its home office, in the city of New York, on the 26th day of January of every year during the continuance of the contract, until premiums for 20 full years should be fully paid to said company. This contract is not an assurance for a single year, with a provision for renewal from year to year by paying the annual premiums; but it is the kind of a policy which the supreme court of the United States, in the case of Insurance Co. v. Statham, 93 U. S. 24-37, 23 L. Ed. 789, declared to be "an entire contract of assurance for life, subject to discontinuance and forfeiture for nonpayment of any of the stipulated premiums." When the contract was made, a statute of New York, viz. chapter 321 of the Laws of New York for the year 1877, prescribed that no life insurance company doing business in the state of New York should have power to declare forfeited or lapsed any policy thereafter issued or renewed, by reason of nonpayment of any annual premium or interest, or any portion thereof, unless a prescribed notice should first be given in a prescribed manner, and that payment made within the time limited by such notice should be taken to be in full compliance with the requirements of the policy in respect to the payment of the premium or interest, notwithstanding any contrary stipulation contained in the policy, and further providing that "no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of 30 days after the mailing of such notice." In the year 1892 there was a complete revision of the insurance law of the state of New York, and the new statute contained a substitute for the section in the law of 1877, prescribing the notice to be given as a prerequisite to the forfeiture of a policy for nonpayment of premiums. That section of the law of 1892 is by its terms applicable only to policies subsequently issued or renewed. By another section, chapter 321 of the Laws of 1877 is declared to be repealed. Another section contains the following saving clause:

"The repeal of a law, or any part of it specified in the annexed schedule, shall not affect or impair any act done, or right accruing, accrued, or acquired, or penalty, forfeiture or punishment incurred prior to Oct. 1, 1892, under or by virtue of the laws so repealed, but the same shall be enjoyed, asserted, enforced, prosecuted or inflicted, as fully and to the same extent as if such laws had not been repealed."

Another section provides that the provisions of the new law, as far as they are substantially the same as the laws existing on September 30, 1892, shall be construed as a continuation of such laws, modified or amended according to the language employed, and not as new enactments.

It is my opinion that the rights of the parties under the policy of insurance in suit were not affected or changed by the new legislation of 1892. Conceding that the statute of 1877 prescribing the notice to be given was repealed, still there was no interval of time intervening after the repeal of that law, and before the substituted section became effective, within which the insurance company could have claimed a forfeiture of the policy for nonpayment of the premium; and under the law of 1892 the policy could not be forfeited for nonpayment of the premium until 30 days after the mailing of the prescribed notice. In the year 1897 the law was again amended, and section 92 of the law of 1892, which saves life insurance policies from forfeiture for nonpayment of premiums unless the prescribed notice shall have been given, was re-enacted, but with such a change of phraseology as to change the effect so as to only save policies from forfeiture for a period of one year after a premium has been due and unpaid, and with an additional provision barring actions on policies after the lapse of one year from the date of a default in the payment of any premium. No premiums on the policy in suit have ever been paid, except the first annual premium, which was paid at the time the policy was delivered, and the statutory notice was never given. Under the statutes of New York in force prior to the 8th day of April, 1897, the policy was kept alive, notwithstanding the nonpayment of the premium, by the mere failure of the insurance company to proceed in the manner prescribed by the statute to declare a forfeiture. The sole question to be decided in the case is whether the amendment of the law of 1892 by the act of 1897 had the effect to terminate the contract between the parties immediately, and to bar an action upon the policy after the death of the insured, which occurred subsequent to the date of said statute.

The plaintiffs make strenuous objections to consideration of the statute of 1897, on the ground that the same has not been pleaded; but I consider the objections to be without merit, for two reasons: In the first place, this is a court of the United States, and it is required to have judicial knowledge of the general laws of the different states which affect the rights of litigants. The defendant issued the policy in suit for the gain expected by receipt of the annual premiums to be paid by the insured. By failure to pay the premiums, and by the express provisions of the contract, the defendant would be absolved from liability, but for the statute laws of the state of New York; and this court cannot enforce a right based entirely upon the New York statutes, and at the same time ignore those statutes.



In the second place, the statutes of 1877 and 1892 upon which the plaintiffs rely were not pleaded by the plaintiffs in their complaint, but are set up as affirmative matter in their reply. Now, by pleading these statutes in the reply, the plaintiffs have tendered an issue which, according to the practice under the Code, cannot be met by further pleading on the part of the defendant, except by a demurrer; but an issue of fact arises, and the defendant may controvert the allegations, or avoid the effect thereof, according to the truth, either by showing that the statutes which the plaintiffs have pleaded in their reply never existed, or that they have been repealed or amended, without filing any rejoinder to the reply. The act of 1897 permits life insurance companies doing business in the state of New York to forfeit their policies for nonpayment of the premiums, and without giving the prescribed notice, but only after the lapse of one year from the date on which the unpaid premiums become due and payable, and bars an action upon a forfeited policy unless it be commenced within one year from the date of default in the payment of the premium for which the forfeiture is claimed. There is no express declaration in the statute making it applicable to policies which were issued prior to the amendment, and there is nothing to indicate an intention of the legislature to make the new law retroactive. On the contrary, the statute refers to "any policy hereafter issued or renewed." The questions involved in the decisions of this court and of the circuit court of appeals for the Ninth circuit in the case of *Phinney v. Insurance Co.*, 67 Fed. 493; *Society v. Nixon*, 26 C. C. A. 620, 81 Fed. 796; *Same v. Trimble*, 27 C. C. A. 404, 83 Fed. 85; *Insurance Co. v. Dingley*, 35 C. C. A. 245, 93 Fed. 153; and *Insurance Co. v. Hill*, 97 Fed. 263,—are entirely different from the main question decided in the case of *Rosenplanter v. Society*, 91 Fed. 728; *Id.*, 37 C. C. A. 566, 96 Fed. 721. I feel entirely free to concur in the opinions in the latter case, and I assent to the general proposition that existing rights which do not rest upon agreements of the parties, nor upon any consideration of value received, but only hang upon arbitrary provisions of paternal statutes, may be cut off at any time by act of the legislature which created them, without impairing the obligations of contracts. But, to cut off existing rights, the act must contain explicit declarations of its purpose to cut them off, or its provisions must necessarily cut them, as would be the case where the statute upon which they depend is repealed, without a saving clause. The courts will not presume that a new statute was intended to cut off any existing right, when there is no express declaration of such intention, for the reason that it is contrary to the policy of our government to construe statutes so as to make them operate retroactively. In the *Rosenplanter Case* the policy under consideration was a term policy, and expired by its own limitations, unless it was renewed by the omission of the insurance company to proceed according to the provisions of the act of 1877 to effect its forfeiture. It was not kept alive by the statute of 1892, because it belonged to the excepted class, and it was not protected by the act of 1877 after the repeal of that act. The policy in suit was not issued or renewed after the statute of 1897 was

passed, and therefore it does not come within the purview of that statute. As it is not a policy which had to be renewed periodically in order to keep it alive, there was not even a constructive renewal of it, by force of the statute against forfeiture. I direct that findings be made in accordance with this opinion, and a judgment will be entered thereon in favor of the plaintiffs for the amount of the policy, with interest, after deducting all unpaid premiums, with interest, to be computed at the New York rate.

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**In re PAIGE.**

(District Court, N. D. Ohio, E. D. November 22, 1899.)

**INVOLUNTARY BANKRUPTCY—PLEADING—ALLEGATIONS OF ANSWER.**

In the answer to a petition in involuntary bankruptcy, the respondent is not limited to the simple denial of insolvency contemplated by form No. 6. If the petition sets forth the debts alleged to be due by the respondent, the answer may contain detailed averments of defenses and counterclaims to such debts, showing the solvency of the respondent at the times alleged.

**In Bankruptcy.** On motion to strike out parts of an answer filed to a petition in involuntary bankruptcy.

Rowley & Bradley, for the motion.

**RICKS, District Judge.** This case now comes before the court upon the motion to strike out from the answer of Albert T. Paige such parts as are specified in the motion, to which reference is made for the ascertainment of the parts asked to be expunged. The forms and orders in bankruptcy prescribed by the supreme court of the United States indicate the form, in substance, of the answer to be filed by the alleged bankrupt. The law does not contemplate that the respondent shall be confined to that particular form, and set out in his answer only such facts as are suggested by the order. The petitioning creditor alleges that Albert T. Paige is a bankrupt, and sets out the nature and amount of the provable claim which he alleges makes the respondent a bankrupt. The respondent denies insolvency, but sets up, with great particularity, defenses and counterclaims which he alleges show him to have been solvent at the times charged, and when the act of bankruptcy was committed. This same defense, it is alleged, has been used to defend against a suit filed in the court of common pleas of Summit county, Ohio. I think the respondent is entitled to set forth these facts as fully as he has done. It is a matter of importance to him whether or not he is adjudged a bankrupt. It will affect his credit, and bring upon him other evils which follow such a final result in this proceeding. I think the motion to strike out must be disallowed.

## In re JACOBS.

(Circuit Court of Appeals, Eighth Circuit. February 8, 1900.)

No. 15.

**1. BANKRUPTCY—APPEAL AND REVIEW.**

Bankr. Act 1898, § 24b, giving to the circuit courts of appeals jurisdiction to "superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy," on petition filed by any party aggrieved, applies only to some action taken or order made in the course of a proceeding in bankruptcy. Such a petition will not lie to obtain a review of an alleged error of the district court in entertaining jurisdiction of a bill in equity brought by a trustee in bankruptcy against a stranger, a citizen of the same state, to set aside an alleged fraudulent conveyance of property to him by the bankrupt.

**2. SAME.**

From a final decree rendered by the district court in such a case an appeal may be taken to the circuit court of appeals in the ordinary way, bringing up for review every question decided in the case, or the question of the jurisdiction of the district court may be certified by that court to the supreme court of the United States.

Petition to Review Proceedings of the District Court of the United States for the Eastern District of Missouri in Bankruptcy.

Chester H. Krum, for petitioner.

Nathan Frank and Mr. M. N. Sale, for respondents.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is a petition for review under subdivision "b" of section 24 of the bankrupt act, approved July 1, 1898 (30 Stat. 544, 553, c. 541), which is filed in behalf of Charles F. Jacobs, against whom an original bill in equity was exhibited by Samuel Rosenfeld, trustee in bankruptcy of the Mechanics' Clothing Manufacturing Company, a bankrupt, on the 10th day of January, 1900, in the district court of the United States for the Eastern judicial district of Missouri. The purpose of the suit was to obtain a decree vacating a certain deed of trust, and to recover the property, or rather the proceeds of the property, which was thereby conveyed to said Charles F. Jacobs, the trustee in said deed of trust. The instrument in question was executed on April 16, 1899, by the Mechanics' Clothing Manufacturing Company, and proceedings in bankruptcy were instituted against it on May 1, 1899, under which it was subsequently adjudged a bankrupt on November 20, 1899. Samuel Rosenfeld, the complainant in the bill, was appointed and qualified as trustee in bankruptcy of the Mechanics' Clothing Manufacturing Company on December 18, 1899, and on the 10th day of the following January he exhibited an original bill in the district court, where the adjudication had taken place, to annul the aforesaid deed of trust, charging, in substance, that it was conceived by the bankrupt company in bad faith, for the purpose of hindering, delaying, and defrauding its creditors, and for the express purpose of evading the operation of the existing bankrupt act.

The petitioner insists that the district court has no jurisdiction of the bill to vacate the deed of trust, and that the suit should have

been brought in the courts of the state, under the provisions of section 23 of the bankrupt act, because Rosenfeld and Jacobs, the parties plaintiff and defendant to the bill, are both citizens of the state of Missouri, and because subdivision "b" of section 23 expressly provides that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed bankrupt." It is claimed that the district court erred in entertaining the bill, and such is the error of law which we are asked to review. The respondents have filed a motion to dismiss the petition for review, and we are confronted in limine with the inquiry whether the alleged error of law is one which may be reviewed under subdivision "b" of section 24 of the bankrupt act. That section reads as follows:

"Sec. 24. Jurisdiction of Appellate Courts.—a. The supreme court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the territories, in vacation, in chambers and during their respective terms, as now or as they may hereafter be held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The supreme court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the district of Columbia.

"b. The several circuit courts of appeals shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved."

The first paragraph of section 2 of the bankrupt law of March 2, 1867, which now appears in the Revised Statutes of the United States as section 4986, reads as follows:

"The circuit court for each district shall have a general superintendence and jurisdiction of all cases and questions arising in the district court for such district when sitting as a court in bankruptcy, whether the powers and jurisdiction of a circuit court have been conferred on such district court or not; and except when special provision is otherwise made may upon bill, petition or other proper process of any party aggrieved, hear and determine the case as in a court of equity; and the powers and jurisdiction hereby granted may be exercised either by the court in term time or in vacation by the circuit justice or by the circuit judge of the circuit."

In view of the similarity of the language employed in the two statutes above quoted and the general object designed to be accomplished by the two acts, we are of opinion that the jurisdiction conferred on the several circuit courts of appeals by subdivision "b" of section 24 of the recent bankrupt act is the same as that which was vested in the circuit courts by the bankrupt act of March 2, 1867, under the first paragraph of section 2 of that act, which now appears in the Revised Statutes as section 4986, above quoted. Congress, as we think, intended to confer on the several circuit courts of appeals the same supervisory control "of controversies arising in bankruptcy proceedings" in the district courts which the circuit court exercised under the act of 1867 by virtue of the above-quoted provisions of that act. It was doubtless deemed most ex

pedient to transfer the supervisory jurisdiction formerly exercised by the circuit court to the several circuit courts of appeals, because since the creation of the latter courts by the act of March 3, 1891, the circuit court has ceased to exercise appellate functions, and is generally held by the district judge whose action that court would be called upon to review. But, be this as it may, we discover nothing in the provisions of the recent bankrupt act which leads us to infer that the revisory power of the circuit courts of appeals to be exercised by petition for review is in any respect more extensive than that formerly exercised by the circuit courts under the act of 1867.

In the case of *Lathrop v. Drake*, 91 U. S. 516, 23 L. Ed. 414, it was held by the supreme court that the bankrupt act of 1867 conferred on the district court two distinct kinds or classes of jurisdiction:

"First, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bankrupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him."

The court further said:

"The language conferring this jurisdiction on the district courts is very broad and general. \* \* \* The various branches of this jurisdiction are afterwards specified, resulting, however, in the two general classes before mentioned."

It was also held in the same case with respect to the circuit courts that the appellate jurisdiction conferred upon them by the act of 1867 was likewise of a twofold character, one species of which was to be exercised by petition for review, and the other in the ordinary way, by appeal or writ of error. In an earlier case, decided in 1873 (*Coit v. Robinson*, 19 Wall. 274, 282, 22 L. Ed. 152), it was held, in substance, that when the district court exercised the second species of jurisdiction mentioned above, pursuant to authority conferred by the bankrupt act,—that is to say, when it entertained jurisdiction of a suit at law or in equity brought therein either by or against the assignee,—the action of the district court in such a case could not be reviewed by the circuit court by a petition for review under the first clause of the second section of the act of 1867, but could only be reviewed in the ordinary way by appeal or writ of error, under the provisions of the judiciary act regulating such proceedings. Substantially the same views were expressed by the supreme court in other cases, to wit: *Sandusky v. Bank*, 23 Wall. 289, 292; *Morgan v. Thornhill*, 11 Wall. 65, 80, 20 L. Ed. 60; *Marshall v. Knox*, 16 Wall. 551, 555, 21 L. Ed. 481; and in the case of *Kidder v. Horrobin*, 72 N. Y. 159, 166, the court of appeals of that state held that a suit by an assignee in bankruptcy against a third party to recover the property of the bankrupt or debts due to the bankrupt was not "a proceeding in bankruptcy," and within the exclusive jurisdiction of the federal bankrupt court, but was an ordinary action, which could be maintained as well in the courts of the state.

In view of these adjudications upon the bankrupt act of 1867, we feel constrained to hold that it is only some action taken or order made in the bankruptcy proceeding itself which can be reviewed by an original petition addressed to this court, under subdivision "b" of section 24 of the bankrupt act, and that the power thereby conferred "to superintend and revise" the action of the district court does not extend to suits brought in that court by the trustee in bankruptcy against third parties to collect the assets of the estate, or to suits brought by third parties against the trustee, whether such suits are rightfully or wrongfully brought in that court, as to which point we express no opinion at this time. Such suits as those last referred to, whether at law or in equity, are not proceedings in bankruptcy, or "controversies arising in bankruptcy proceedings," within the meaning and intent of the law authorizing petitions for review, but they are suits which must be reviewed in the ordinary way, by appeal or writ of error, when they have reached a final determination in the court of first instance. We can discover nothing in the language or policy of the recent bankrupt act which would seem to require the various circuit courts of appeals to review every interlocutory order made or proceeding taken, in an ordinary action at law or in equity, in a suit between a trustee in bankruptcy and a third party, which happens to be brought in the district court, simply because the trustee's title to the property claimed, or his liability to be sued, is founded on the bankrupt act. Nor do we believe that such a construction of the act was within the contemplation of congress.

The final decree which may be rendered by the district court in the case which we are asked to review can be brought to this court by appeal, in the usual way, for the consideration of every question which may be decided therein, or, on such final determination of the case, the question relating to the jurisdiction of the district court to entertain the suit (the same being one of great moment, which ought to be speedily determined by the court of last resort) can be certified by the district court to the supreme court of the United States. *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118, 35 L. Ed. 893; *Bardes v. Bank* (decided by the supreme court of the United States, Dec. 22, 1899) 20 Sup. Ct. 196, Adv. S. U. S. 196, 44 L. Ed. —. The petition for review is therefore dismissed, and this fact will be forthwith certified to the district court.

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LEHMAN v. CROSBY et al.

(District Court, S. D. New York. February 9, 1900.)

1. CREDITORS' SUITS—LIMITATIONS—DISCOVERY OF FRAUD.

Under the ruling of the New York court of appeals, that the discovery by a creditor of a fraudulent transfer of property by his debtor does not start limitations running against a suit to subject the property, unless the creditor has already obtained judgment and issued execution thereon in the state, but that his right of action accrues only when he has taken such preliminary steps, where sufficient time has not elapsed thereafter to bar his suit, the time, manner, or circumstances of discovering the al-

leged fraud are immaterial, and need not be alleged; such allegations being necessary only when the ordinary period of limitation is sought to be extended by reason of lack of knowledge of the fraud.

**2. BANKRUPTCY—JURISDICTION—SUITS BY TRUSTEE.**

Bankr. Act 1898, § 23b, providing that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted," is to be strictly construed, as being a limitation upon the general grant of jurisdiction to the courts of bankruptcy in other parts of the act; and this provision does not apply to a suit by the trustee to set aside an alleged fraudulent conveyance of property by the bankrupt, which is one the bankrupt could not have maintained, but the court of bankruptcy has jurisdiction of such suit.

In Equity. Suit by the trustee of a bankrupt to charge the proceeds of property alleged to have been fraudulently transferred by the bankrupt. On demurrer to bill.

\* Putney & Bishop, for plaintiff.

Rich, Woodford, Bovee & Wallace, for defendants.

BROWN, District Judge. The complaint seeking to charge the proceeds of the alleged fraudulent transfer in the hands of the defendant Mathilda G. Crosby, with the payment of the judgment creditor's claim, is identical in principle with the case of Weaver v. Haviland, 142 N. Y. 534, 37 N. E. 641. In that case it was held that a discovery of fraud in the judgment debtor's transfer would not set the statute of limitations running within this state unless the creditor had already procured judgment and issued execution upon the debt within this state; that the cause of action does not accrue until this latter date, although the fraud was discovered before.

1. The above decision and others therein cited to the same effect, seem to me decisive of the present demurrer, so far as relates to the long lapse of time since the transfers were made, and the lack of explanation as to when and how the alleged fraud was discovered. For the only state statute of limitations applicable to this action, is that of the state of New York, and that must be construed as determined by the highest court of the state. Until the recovery of the judgment in Massachusetts in May, 1898, based upon the Indiana judgments of 1874, there was never any judgment against the debtor upon which a creditors' bill could have been maintained anywhere, except in the state of Indiana, where the debtor never resided. The statute, therefore, never began to run within this state. Nor was the right of action ever barred in Illinois, where the defendant at one time resided (Code N. Y. § 390); since, for the above reason, it never even accrued there, and the statute of limitations therefore did not begin to run. The present action could not be maintained here without a new judgment and execution in this state, except for the fact that in favor of a trustee in bankruptcy the recovery of the additional judgment is not necessary.

In cases like the present, therefore, where, so far as it appears from the complaint, the cause of action has not accrued, nor the statute of limitations commenced, *prima facie*, to run, I think the

requirement of any detailed statement as to the time, manner or circumstances of discovering the alleged fraud (*Pearsall v. Smith*, 149 U. S. 231, 236, 13 Sup. Ct. 833, 37 L. Ed. 713; *Jones v. Smith* [C. C.] 38 Fed. 380) is unnecessary. That is only required when the ordinary period of limitation is sought to be prolonged through lack of knowledge of the alleged fraud. This ground of demurrer should, therefore, be overruled.

2. As respects the right of the trustee to maintain an action like the present in this court under the bankruptcy act of 1898, I adhere to my previous rulings. There are so many reasons for the exercise of jurisdiction by this court in cases of fraud, that I think section 23b should not be enlarged by construction beyond its terms, and its apparent purpose. In terms it applies only to such actions as the bankrupt himself could have brought but for the institution of bankruptcy proceedings. This action is not of that kind. By no possibility could the bankrupt have maintained an action to set aside his own fraudulent dealings. There is a broad and proper field for the operation of section 23b as it reads; namely, in its application to the collection of the ordinary debts owing to the bankrupt, to collect which in the usual course of proceeding he would be required to seek his debtors in the counties where they reside, and where usually it would be far more convenient and just that such litigations should be had, rather than to bring the defendants often over long distances to the federal district court. This I think is the purpose of subdivision "b." Its terms do not include actions like the present, which are therefore, as I think, rightly brought in this court under section 2, subd. 7. See *Murray v. Beal* (D. C.) 97 Fed. 567, and cases there cited.

The demurrer is overruled.

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#### In re WILLIAMS.

(District Court, D. Washington, E. D. February 2, 1900.)

#### **BANKRUPTCY—JURISDICTION—DOMICILE OF BANKRUPT.**

A court of bankruptcy has jurisdiction of a voluntary petition for adjudication in bankruptcy, filed by a debtor who has had his domicile within the district for the preceding six months, although, during the greater portion of that time, he has resided abroad, provided there was no abandonment of the original domicile, nor acquisition of a new one, and the debtor returned to the district, before the filing of the petition, with the intention of making his permanent home there.

**In Bankruptcy.** On review of order of referee in bankruptcy dismissing a voluntary petition for adjudication.

Judson & Geraghty, for the bankrupt

**HLANFORD**, District Judge. This is a case of voluntary bankruptcy, in which the referee has raised a question as to the jurisdiction of the court on the ground that upon examination of the petitioner it was made to appear by his testimony that he has not had his place of business, resided, or had his domicile within the terri-



torial jurisdiction of this court for the six months next preceding the date of filing his petition, or the greater portion thereof; and the case has been certified by the referee for the opinion of the court upon that question. The facts shown by the testimony are as follows: The petitioner did reside and had his domicile in this state, and was for a time engaged in business at Fairhaven, in Whatcom county, and at Everett, in Snohomish county, and while engaged in business at said places contracted the debts for which, by his petition, he is now asking to be discharged. He closed up his business at Everett in the year 1893, and went to Spokane in search of employment. Being unable to obtain employment there, he went to British Columbia the same year, where he was for a time employed in mining, and afterwards engaged in business with a partner as a hardware merchant, and continued in that business until the fall of 1899, when he closed up his business, and removed to Spokane, purchased a home, and established a permanent residence there. His petition to be adjudged bankrupt was filed in this court in less than one month after the date of his removal to Spokane. The petitioner is a citizen of the United States, and did not at any time while sojourning in British Columbia exercise or claim the rights of a citizen of that country, nor have an intention to change his domicile, or to permanently reside there; and each year during said time he returned to this state, looking for employment, or a business opening, and had a definite intention to return and reside permanently in this state whenever circumstances, from a business point of view, should favor his return. At the time of taking up his residence in Spokane, he would have been willing to go to Montana, or elsewhere, if he found opportunities for business, but he did not actually resolve to locate anywhere outside of this state. Under the provisions of the second section of the bankruptcy law it is essential to the jurisdiction of this court for the petitioner to have had a domicile within the state during the greater part of the six months preceding the date of filing his petition. "By 'domicile' is meant that residence from which there is no present intention to remove, or to which there is a general intention to return. The domicile of a bankrupt does not depend on citizenship, nor on residence, but on the concurrence of two elements: First, residence in a place; and, second, the intention, for the present, to make that place his home. A person cannot be without a legal domicile somewhere. The domicile of a person may be changed. To constitute a new domicile, two things are indispensable: First, residence in a new locality; and, second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Mere absence from a fixed home, however long continued, cannot work the change. There must be *animus* to change the prior domicile for another. Until the new one is acquired, the old one remains." Loveland, Bankr. p. 335. The statement of the law to be applied in deciding the question contained in the above quotation is fully sustained by the following decisions of the supreme court of the United States, cited by the author: *Mitchell v. U. S.*, 21 Wall. 352, 22 L. Ed. 584; *Desmare v. U. S.*, 93

U. S. 610, 23 L. Ed. 952; *Morris v. Gilmer*, 129 U. S. 328, 9 Sup. Ct. 289, 32 L. Ed. 690. See, also, 10 Am. & Eng. Enc. Law (2d Ed.) pp. 7, 11, 14, 15. Under the law, as I find it declared by the highest court of this country, the petitioner did not change his domicile when he went to British Columbia in 1893, nor afterwards, because he did not have the intention to remain there, and he did have a definite intention to return to this state. The order made by the referee that the petition be dismissed will be vacated, and the case will proceed in the usual course.

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COX v. WALL et al.

(District Court, W. D. North Carolina. January 15, 1900.)

**1. BANKRUPTCY—JURISDICTION—SUITS BY TRUSTEES.**

Bankr. Act 1898, § 23b, providing that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted," is a limitation upon the jurisdiction of the circuit courts of the United States, and does not affect the jurisdiction in bankruptcy conferred upon the district courts by other clauses of the act; and a court of bankruptcy has jurisdiction of a suit in equity by a trustee to recover property alleged to have been fraudulently conveyed or transferred by the bankrupt, although the trustee, the bankrupt, and the defendant are all citizens of the same state.

**2. SAME—JURISDICTION OF STATE COURTS.**

State courts have jurisdiction, concurrent with that of the courts of bankruptcy, of actions by a trustee in bankruptcy to collect the assets of the estate or to set aside alleged fraudulent transfers or conveyances by the bankrupt; and whichever court, state or federal, first takes cognizance of such an action will have the right to dispose of the case finally and conclusively.

**3. SAME—REMEDY AT LAW.**

A bill in equity, brought by a trustee in bankruptcy to set aside a sale of a stock of goods made by the bankrupt in fraud of his creditors and in fraud of the bankruptcy act, will not be dismissed on the theory that complainant has a plain and adequate remedy at law, equity being the appropriate forum for such a suit.

**4. SAME—PARTIES—THE BANKRUPT.**

A bankrupt is not a necessary party to a suit in equity by his trustee to set aside an alleged fraudulent transfer or conveyance by the bankrupt to the defendant.

**5. SAME—APPOINTMENT OF RECEIVER.**

On a bill in equity by a trustee in bankruptcy to set aside a sale of a stock of merchandise by the bankrupt to the defendants, alleged to have been fraudulent as to creditors, and asking for the appointment of a receiver, it appeared that the bankrupt, while in embarrassed circumstances, had secured an extension from his creditors, executing notes in large amounts, had then proceeded to make large purchases of stock, had offered his stock in trade at a price below its alleged cost, and, upon effecting its sale to defendants, had immediately left the state; that the stock consisted of goods subject to deterioration and fluctuation of price, and had not been inventoried, so that its value could not be correctly estimated; and that the defendants were probably not worth much more than the amount of their debts. *Held*, that a receiver should be appointed to take possession and control of the property in question, and sell it, depositing the proceeds in a designated depository.

**In Bankruptcy.** On demurrer to bill in equity filed by Walter O. Cox, as trustee in bankruptcy of W. H. Gilbert, against John D. Wall and T. W. Huske.

A. H. Eller, Jones & Patterson, and Louis M. Swink, for complainant.

Watson, Buxton & Watson and Glenn & Manly, for defendants.

**EWART, District Judge.** This is a bill in equity filed by the complainant, as trustee of the bankrupt, for the purpose of setting aside a sale made by the bankrupt, Gilbert, to the respondents, of a certain stock of hardware; the said sale having been made, as complainant alleges, in fraud of the bankruptcy act, and in fraud of the creditors of the said estate. The facts are as follows: Gilbert was a retail hardware dealer in the city of Winston, N. C., carrying a stock of \$16,000 or \$18,000. Becoming embarrassed in June, 1899, he secured an extension from his creditors, executing notes in large amounts, maturing December, 1899, and January, 1900. Immediately after securing this extension, he bought largely of hardware dealers, increasing his stock to an abnormal extent; at the same time selling stock in hand at cut prices, at and below cost. In September, 1899, Gilbert repeatedly attempted to dispose of his stock, both at Martinsville, Va., and Winston, N. C., offering the same at figures considerably below alleged cost. On or about the 5th of October, 1899, he sold his Winston stock to respondents, and immediately thereafter left the state. Proceedings in involuntary bankruptcy were at once instituted by his creditors, and he was duly adjudged a bankrupt, and Cox, the complainant, elected trustee of his estate.

The respondents demur to the bill filed in this case, raising the question of the jurisdiction of the district court to entertain this cause. It is claimed that, as the bankrupt, the trustee, and the respondents are all citizens of this state and residents of this district, by section 23b of the act cognizance of such a controversy can only be taken by the state courts.

It is to be regretted that the decisions of the courts upon this question have not been uniform. On the contrary, there are many conflicting opinions. In support of the proposition that the district court has jurisdiction, vide *In re Gutwillig*, 34 C. C. A. 377, 92 Fed. 337; *Davis v. Bohle*, 34 C. C. A. 372, 92 Fed. 325; *Carter v. Hobbs* (D. C.) 92 Fed. 594; *In re Sievers* (D. C.) 91 Fed. 366; *In re Fixen* (D. C.) 96 Fed. 753; *In re Richard* (D. C.) 94 Fed. 636; *In re Smith* (D. C.) 92 Fed. 135; *In re Newberry* (D. C.) 97 Fed. 24; *In re Byrne*, Id. 763; *Robinson v. White*, Id. 34. Contra, *Mitchell v. McClure* (D. C.) 91 Fed. 621; *Burnett v. Mercantile Co.*, Id. 365; *In re Kelly*, Id. 504; *In re Rockwood*, Id. 363; *In re Buntrock Clothing Co.* (D. C.) 92 Fed. 886; *Heath v. Shaffer* (D. C.) 93 Fed. 647; *In re Abraham*, 35 C. C. A. 592, 93 Fed. 774.

A careful examination of the cases decided satisfies me that the section referred to (to wit, 23b), providing that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted," is a limitation upon the jurisdiction of cir-

cuit courts of the United States, and does not affect the jurisdiction in bankruptcy conferred upon the district courts by other clauses of the act, and that a court of bankruptcy has jurisdiction of a suit by a trustee to recover property alleged to have been conveyed or transferred by the bankrupt in fraud of his creditors, notwithstanding that the trustee and the bankrupt and the defendants are all citizens of the same state. In reaching this conclusion, I do not wish to be understood as casting any doubt upon the jurisdiction of the courts of the state to entertain jurisdiction and try suits for any cause of action whatever brought by the trustee of a bankrupt against parties who fraudulently or otherwise were in possession of the bankrupt's estate, or were indebted to the bankrupt. I am clearly of the opinion that courts of this state are invested with complete and plenary jurisdiction over fraudulent transfers and conveyances concurrent with this court, and that whichever of the two courts first took cognizance of the case had the right to finally and conclusively dispose of the same. In the case at bar, Cox, trustee of Gilbert, bankrupt, chose to institute his bill in equity in this forum, and this court has therefore acquired jurisdiction. *Vide Ex parte Christy*, 3 How. 292, 11 L. Ed. 603; *Atkinson v. Purdy*, Fed. Cas. No. 616; *McLean v. Bank*, Fed. Cas. No. 8,885; *Burbank v. Bigelow*, 92 U. S. 179, 23 L. Ed. 542; *Woolridge v. McKenna* (C. C.) 8 Fed. 650; *Olney v. Tanner* (D. C.) 10 Fed. 101; *In re Anderson* (D. C.) 23 Fed. 482; *Bachman v. Packard*, Fed. Cas. No. 709; *Main v. Glen*, Fed. Cas. No. 8,973; *Hallack v. Tritch*, Fed. Cas. No. 5,956; *Loveland, Bankr.* p. 490; *Black, Bankr.* p. 123; *Lea v. George M. West Co.*, 1 Nat. Bankr. N. 264, 91 Fed. 237, affirmed in United States supreme court, 1 Nat. Bankr. N. 409, 19 Sup. Ct. 836, 43 L. Ed. 1098; *In re John A. Etheridge Furniture Co.*, 1 Nat. Bankr. N. 112, 92 Fed. 329; *In re Bruss Ritter Co.*, 1 Nat. Bankr. N. 58, 90 Fed. 651; *In re O'Connor*, 1 Nat. Bankr. N. 381-384, 95 Fed. 943; *In re McKee*, 1 Nat. Bankr. N. 139.

As has been well said by Judge Severens in *Re Newberry* (D. C.) 97 Fed. 24:

"An anomalous state of things would be presented if the bankruptcy court, which is charged with duty of prompt action in collecting and distributing the estate of the bankrupt, should be compelled to await and be balked by the pendency of proceedings in another court having jurisdiction entirely foreign to its own, and in no manner subject to it."

It is further insisted by respondents that the complainant, as trustee, if he has any right to the stock of goods described, has a plain, clear, and adequate remedy at law, and cannot invoke the equitable jurisdiction of this court to enforce his right. Section 723, Rev. St. U. S., provides "that suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law." The construction placed on this statute by the supreme court of the United States is as follows: "It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity." *Boyce v. Grundy*, 3 Pet. 215, 7 L. Ed. 655; *Watson v. Sutherland*, 5 Wall. 74, 18 L. Ed. 580. But the foregoing stat-

ute, which is merely declaratory as a rule of common law, is no more binding than the following well-established rules governing the proceedings in equity. Equity has always had jurisdiction of subjects like fraud, misrepresentation, concealment, specific performance, and cancellation of instruments, of all of which equity has jurisdiction per se, and the rule of inadequate legal remedy does not apply. 2 Am. & Eng. Enc. Law, p. 201. Equity always has jurisdiction of fraud, misrepresentation, and concealment, and it does not depend upon discovery. *Jones v. Bolles*, 9 Wall. 364, 19 L. Ed. 734. Courts of equity will aid a creditor by removing a fraudulent incumbrance or a conveyance of his debtor's property. *Hagan v. Walker*, 14 How. 29, 14 L. Ed. 312. In *Clements v. Moore*, 6 Wall. 299, 18 L. Ed. 786, the same being a creditors' bill in the district court to set aside a fraudulent transfer of a stock of goods, it was held "that equity is the appropriate remedy, being more flexible and capable of administering justice than can be done under the rules of law." Vide, also, *Hudgins v. Kemp*, 20 How. 45, 15 L. Ed. 853; *Venable v. Bank*, 2 Pet. 107, 7 L. Ed. 364. In former bankruptcy acts, equitable jurisdiction of the court was invoked in the following cases: *Stucky v. Bank*, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640; *Grant v. Bank*, 97 U. S. 80, 24 L. Ed. 971; *Rogers v. Palmer*, 102 U. S. 263, 26 L. Ed. 164; *Auffmordt v. Rasin*, 102 U. S. 620, 26 L. Ed. 262; *Barbour v. Priest*, 103 U. S. 293, 26 L. Ed. 478; *Dutcher v. Wright*, 94 U. S. 553, 24 L. Ed. 130; *Phipps v. Sedgwick*, 95 U. S. 3, 24 L. Ed. 591; *Neblett v. MacFarland*, 92 U. S. 101, 23 L. Ed. 471; *Goodenow v. Milliken*, Fed. Cas. No. 5,535; *Harmanson v. Bain*, Fed. Cas. No. 6,072; *People v. Brennan*, 12 N. B. R. 567, 3 Hun, 666. The jurisdiction is not confined to fraudulent conveyances of real estate, but it extends as well to fraudulent sales of personal property. 5 Enc. Pl. & Prac. p. 405; *Carr v. Parker*, 10 Mo. App. 364. In the matter of alienation of personal property by any means which is in fraud of creditors, courts of equity and courts of law have concurrent jurisdiction. *Smith, Eq. Rem. Cred.* p. 62; *Atkins v. Dick*, 14 Pet. 114, 10 L. Ed. 378. In a bill filed by a trustee like this, the bankrupt is not a necessary party. The bankrupt is not a necessary party to a suit to avoid a fraudulent transfer. *Buffington v. Harvey*, 95 U. S. 99, 24 L. Ed. 381; *Benton v. Allen (C. C.)* 2 Fed. 448; *Harding v. Crosby*, Fed. Cas. No. 6,050; *Smith, Eq. Rem. Cred.* p. 82.

The complainant asks that a receiver be appointed. Mr. Smith, in his most excellent work on *Equitable Remedies of Creditors* (page 315), says:

"It is common practice in equitable proceedings, either in creditors' bills, or bills in the nature of creditors' bills, and supplemental proceedings, to appoint a receiver, when the property is of such a nature as to render it necessary or to facilitate the action of the court. The appointment is peculiarly appropriate if the transfer consists of personal property, where the possession is an important factor of ownership, and where concealment or removal is so easily accomplished."

The supreme court of North Carolina in *Ellett v. Newman*, 92 N. C. 523, in a case involving personal property, very similar to the case at bar, uses the following language:

"The authority of the court to preserve property, the subject of litigation, pending the action, until final judgment, and then to apply it, as justice may require, is too manifest to admit of question, and such authority should be exercised when it appears that there is reasonable ground to believe that the plaintiff may recover, and the interference of the court is necessary to protect the property in question pending the controversy." Vide *Parker v. Grammer*, 62 N. C. 28, 32; *Craycroft v. Morehead*, 67 N. C. 422; *Morris v. Willard*, 84 N. C. 293; *Levenson v. Elson*, 88 N. C. 182; *Twitty v. Logan*, 80 N. C. 69; *Cone v. Combs* (C. C.) 18 Fed. 576; *Shepherd v. Pepper*, 133 U. S. 626, 10 Sup. Ct. 438, 33 L. Ed. 706.

In the case at bar it appears that this is a stock of merchandise, subject to deterioration and fluctuation in price; that no inventory of the property has been taken, and until this is done no correct estimate and value can be placed thereon; that the respondents owe \$8,000 to the Wachoria National Bank of Winston; and that their property is listed at a little more than \$9,000, nearly all of which is personal property. In view of these facts, in the judgment of the court, it is proper that a receiver should be appointed until the equities of all parties interested should be determined by a final decree. It is therefore ordered, adjudged, and decreed that the injunction issued by this court December 16, 1899, be continued till the final hearing of this cause. The respondents are hereby enjoined and restrained from interfering in any manner with the stock of goods described in the bill of complaint, the same being the identical stock of goods alleged to have been purchased by respondents of Gilbert, bankrupt. Samuel F. Vance, of Winston, is hereby designated and appointed as temporary receiver to take into his possession and control said stock of goods described in the bill of complainant. The said John D. Wall and T. W. Huske will immediately, upon demand of S. F. Vance, receiver as aforesaid, deliver to S. F. Vance, as receiver, immediate possession of the entire stock of goods described in plaintiff's bill, and now in the possession of Wall & Huske, together with all books, accounts, and papers in any wise appertaining or relating to the said stock of goods formally belonging to W. H. Gilbert, bankrupt. Upon taking possession of said stock of goods, the said S. F. Vance, receiver, will, as early as practicable, sell the same, either at public or private sale, upon such terms as he may deem best for the interest of the creditors and claimants to the said property; the funds realized therefrom to be deposited with the People's National Bank at Winston, N. C., till all bona fide claims and liens of those holding same are hereafter established. Before entering upon the discharge of his duties as receiver, the said S. F. Vance will enter into bond, with good and sufficient sureties, the said bond to be approved by the clerk of this court at Greenboro, in the sum of \$20,000, conditioned that he will faithfully discharge the duties of his office as receiver, and will account to the proper parties for the funds received by him in such capacity. This cause is retained for further orders.

## LAKE ONTARIO FISH CO. v. UNITED STATES.

(Circuit Court, N. D. New York. February 14, 1900.)

## 1. CUSTOMS DUTIES—FISH.

Fish caught in a bay on Lake Ontario, in Canadian waters, by citizens of Canada, notwithstanding such citizens were employed by a corporation of New York, are not within Act Cong. July 24, 1897, par. 555, placing on the free list fish caught in the Great Lakes by citizens of the United States.

## 2. SAME—RATE.

Act Cong. July 24, 1897, par. 259, providing that the duty on fresh-water fish, not specially provided for in the act, shall be a quarter of a cent a pound, does not apply to skinned fish, which are provided for in paragraph 261, relating to "fish, skinned or boned."

## 3. SAME—FREE LIST.

Act Cong. July 24, 1897, par. 626, relating to oils, and putting on the free list, after enumerating a large number of oils, "spermæti, whale and other fish oils of American fisheries, and all fish and other products of such fisheries," will not be construed to admit free of duty "all fish and other products of American fisheries," since paragraphs 258-261 provide specifically for the duty on such fish.

This is an appeal by the Lake Ontario Fish Company from a decision of the board of general appraisers, which sustained the action of the collector of the port of Cape Vincent, N. Y., in assessing duty upon fish imported by the said company.

Watson M. Rogers, for importer.

Charles H. Brown, U. S. Atty.

COXE, District Judge. In December, 1897, the Lake Ontario Fish Company, a corporation, organized under the laws of the state of New York, imported into this country a quantity of skinned fish at the port of Cape Vincent within this district. The collector assessed duty at the rate of 1½ cents per pound, under the provisions of paragraph 261 of the act of July 24, 1897, which reads as follows: "Fish, fresh, smoked, dried, salted, pickled, frozen, packed in ice, or otherwise prepared for preservation, not specially provided for in this act, three-fourths of one cent per pound; fish, skinned or boned, one and one-fourth cents per pound; mackerel, halibut or salmon, fresh, pickled or salted, one cent per pound." The importer protested, insisting that said merchandise should be admitted free of duty under paragraph 555 of the free list, which is as follows: "Fish, fresh, frozen, or packed in ice, caught in the Great Lakes or other fresh waters by citizens of the United States." The protest further insisted that, if dutiable at all, the merchandise should be assessed at the rate of one-fourth of one cent per pound under the provisions of paragraph 259 of the act, which provides: "Fresh-water fish not specially provided for in this act, one-fourth of one cent per pound." Counsel for the importer, in the brief submitted, also refers to paragraph 626 of the free list, relating to "oils." After enumerating a large number of oils it contains these words, "and also spermæti, whale, and other fish oils of American fisheries, and all fish and other products, of such fisheries; petroleum, crude or refined," etc.

It was conceded upon the argument that the importer is a New

York corporation with a capital of \$100,000, the shareholders being citizens of the United States; that it is engaged in the business of catching fish; that it owns ice houses and docks in Canadian waters; and that it supplies the fishermen employed by it with devices, nets and other equipments, and pays them a percentage upon the fish taken by them. The fish in question were caught in the Bay of Quinte, an arm of Lake Ontario, in Canadian waters, by citizens of Canada.

It is argued that the importer, being a New York corporation, is a citizen of the United States; that a corporation can only act through agents, and the fish in question, being caught by its employes, were constructively caught by it. Light is thrown upon the proper construction of paragraph 555 by comparison with a similar paragraph (571) of the tariff act of 1890, which provided for the free entry of "fish, the product of American fisheries, and fresh or frozen fish (except salmon) caught in fresh waters by American vessels, or with nets or other devices owned by citizens of the United States." The nets and devices being owned by the importer, it is probable that fish taken in such nets would be entitled to free entry if the paragraph of the previous act were in force. The change from the language there used to the language of paragraph 555 is significant. Fish entitled to free entry must now be caught by citizens of the United States. Fish caught by aliens are not caught by citizens of the United States because citizens employ such aliens. The citizen must be present and actually engaged in catching the fish.

Paragraph 259 provides for a duty upon fresh-water fish not specially provided for in the act, but as the fish imported were skinned fish they certainly were provided for under the specific language "fish, skinned or boned," found in paragraph 261.

Regarding the contention that the merchandise might have been admitted free under the general paragraph of the free list relating to "oils," it is enough to say, first, that the protest makes no mention of this paragraph, and, second, that the paragraph cannot be construed, in view of the specific provisions found in paragraphs 258 to 261 inclusive, to admit free of duty "all fish and other products of American fisheries." The doctrine of *ejusdem generis* disposes of this contention. Without attempting to construe the language last quoted, it is manifest that it was not the intention of the lawmakers thereby to nullify the preceding provisions of the act. The decision of the board is affirmed.

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#### UNITED STATES v. ROESSLER & HASSLACHER CHEMICAL CO.

(Circuit Court of Appeals, Second Circuit. February 6, 1900.)

#### CUSTOMS DUTIES—CLASSIFICATION—ZINC DUST.

Zinc dust, used in dyeing, is entitled to free entry, under paragraph 386 of the tariff act of 1894, as an article in a crude state, used in dyeing, not specially provided for, and is not dutiable under section 3, as a non-enumerated manufactured article, nor under paragraph 174 and section 4, as assimilated to zinc in pigs and blocks.



Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a decision of the circuit court, Southern district of New York, which reversed a decision of the board of general appraisers reversing a decision of the collector of the port of New York touching the assessment for duty of certain imported merchandise, which, under the tariff act of 1894, was zinc dust. The collector assessed duty thereon at 20 per centum ad valorem, under the provisions of section 8 of said act, as an "article manufactured, in whole or in part, not provided for," etc. The board of general appraisers held that under the similitude clause (section 4 of said act) it was dutiable at one cent a pound, as similar to "zinc in blocks or pigs." Paragraph 174. In what respect the board found it to be similar does not appear. The finding reads, in the disjunctive: "It is \* \* \* similar in material, quality, or the use to which it may be applied to zinc in blocks or pigs." This statement does not indicate in which of the three named respects similarity was found to exist. The circuit court held that the article was free of duty, under paragraph 386,—"Articles in a crude state used in dyeing or tanning not specially provided for in this act."

D. Frank Lloyd, for the United States.

Albert Comstock, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We concur with the judge who tried the cause in the circuit court that this zinc dust is an article in a crude state, used in dyeing, for the reasons given in his opinion. Coming thus within the enumeration of a paragraph on the free list, the provisions of sections 3 and 4 do not apply to it.

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FARBENFABRIKEN OF ELBERFELD CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 16, 1900.)

No. 2,872.

CUSTOMS DUTIES—CLASSIFICATION—COAL-TAR DYES.

The term "artificial alizarin," as used in tariff acts, has acquired a definite meaning, by which it is limited to such dyestuffs as are derived from anthracin; and colors known as alizarin blacks and browns, which are not so derived, although they respond fully to the alizarin tests, are not within paragraph 469 of the free list of the tariff act of 1897, but are dutiable under paragraph 15, as coal-tar dyes or colors not specially provided for.

Appeal by the importers from a decision of the board of general appraisers which affirmed the classification for duty by the collector of the merchandise in question.

Dickerson & Brown, for importers.

Charles D. Baker, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The merchandise in question comprises certain colors known as alizarin blacks and browns, classified for duty at 30 per cent. ad valorem under the provisions of paragraph 15 of the act of 1897, as "coal-tar dyes or colors, not specially provided for in this act," and claimed to be free under

paragraph 469 of said act, as "alizarin, natural or artificial, and dyes derived from alizarin or from anthracin." The evidence shows that the blacks in question are not derived from anthracin, and do not contain the anthracin nucleus; that the browns do contain the anthracin nucleus, but are not made from anthracin. Both dyes respond fully to the tests applied to alizarin colors. The single question of law presented is whether this paragraph of the free list applies to such dyes or colors. Counsel for the importers contends that these dyes are included within the term "artificial alizarin." His reasoning is that, as artificial alizarin is "a dye derived from anthracin," it is therefore free as such. He contends that, in order to give any effect to the word "artificial," it must be held to include other colors, such as those in question, which, while not natural alizarin, or the artificial alizarin derived from anthracin, yet are alizarin in the sense that they respond to all the alizarin tests. The answer to this contention is found in the fact that in the literature of the subject, the various tariff acts, and the discussions of the question by the courts, it conclusively appears that the term "artificial alizarin" has acquired a definite, fixed meaning, by which it is limited to such dyestuffs as are derived from dioxyanthraquinone, which is derived from anthracin. There is no longer any such article as natural alizarin. There being no question of commercial designation in this case, the mere fact that the dyes may correspond in test to artificial alizarin is not sufficient to make them artificial alizarin in fact. Another aspect of this question is discussed in *Pickhardt v. Merritt*, 10 Sup. Ct. 80, 33 L. Ed. 353, where it is conceded that such dyes are not artificial alizarin. The decision of the board of general appraisers is therefore affirmed.

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FARBENFABRIKEN OF ELBERFELD CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 16, 1900.)

No. 2,871.

CUSTOMS DUTIES—CLASSIFICATION—COAL-TAR DYES.

Coal-tar colors or dyes which are not derived from anthracin are not "artificial alizarin," within the meaning of paragraph 368 of the free list of the tariff act of 1894, although they respond to all the alizarin tests, but are dutiable under paragraph 14, as "coal-tar colors or dyes, by whatever name known, and not specially provided for."

Appeal by the importers from a decision of the board of general appraisers which affirmed the classification for duty by the collector of the merchandise in question.

Dickerson & Brown, for importers.

Charles D. Baker, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The merchandise in question comprises certain colors, assessed for duty at 25 per cent. ad valorem under the provisions of paragraph 14 of the act of 1894, as "coal-tar colors or dyes, by whatever name known, and not specially

provided for in this act," and claimed to be exempt from duty under paragraph 368 of said act, as "alizarin, natural or artificial." These dyes are claimed to be artificial alizarin in the sense that while they are not derived from alizarin or anthracin, and are not chemically alizarin, they are known generally as alizarin colors, and correspond to the tests applied to determine alizarin colors. But counsel for the government shows that in the literature relating to these colors, and by repeated decisions of the courts, the term "artificial alizarin" has been applied to designate only dyes or colors derived from dioxyanthraquinone, a product of coal tar, and that no other color responding to the same tests, but not derived from anthracin, was intended by congress to be included within said term. *U. S. v. Sehlbach*, 33 C. C. A. 277, 90 Fed. 799; *Cochrane v. Fabrik*, 111 U. S. 293, 4 Sup. Ct. 455, 28 L. Ed. 433. The question of commercial designation discussed in *Selbach v. U. S. (C. C.)* 78 Fed. 803, does not arise under this tariff act. In view of this well-understood meaning during such a long period, I think congress must be presumed to have intended to say, not that any and all colors which responded to the alizarin tests, so-called, should be admitted free of duty, but that only those dyestuffs or colors derived from anthracin should be thus admitted. This question is further discussed in *Farbenfabriken of Elberfeld Co. v. U. S. (No. 2,872)* 99 Fed. 553. The decision of the board of general appraisers is affirmed.

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SCHIFF et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 30, 1900.)

No. 41.

CUSTOMS DUTIES—STRAW BRAIDS—FREE LIST.

"Gold straw braids" and "silver straw braids," composed mostly of hemp fiber, the remainder being metal, cotton, and glue, are not entitled to free entry, under Act Cong. Oct. 1, 1890, par. 518, which puts on the free list braids, plaits, laces, and similar manufactures, "composed of straw, chip, grass, palm leaf, willow, osier or rattan," suitable for making or ornamenting hats, bonnets, and hoods, but are assessable under paragraph 215, as manufactures in part of metal, not specially provided for.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a decision of the circuit court, Southern district of New York, affirming a decision of the board of general appraisers which affirmed the classification of certain merchandise for customs duty by the collector of the port of New York.

Albert Comstock, for appellant.

Henry C. Platt, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The merchandise was imported under the tariff act of 1890. It consisted of goods invoiced as "gold straw braids" and "silver straw braids," composed of hemp fiber to the

extent of from five-sixths to nine-tenths of their value, the remainder being metal, cotton, and glue. Duty was assessed on them at 45 per cent., under paragraph 215, as manufactures in part of metal, not specially provided for. The importers protested, claiming free entry, under paragraph 518. It will be well to note the earlier provisions of tariff acts touching the articles enumerated in this last-mentioned paragraph. The act of 1883 provided as follows:

"Par. 448. Hats and so forth, materials for: Braids, plaits, flats, laces, trimmings, tissues, willow sheets and squares, used for making hats, bonnets and hoods, composed of straw, chip, grass, palm leaf, willow, hair, whalebone or any other substance or material not specially enumerated or provided for in this act, twenty per centum ad valorem."

By a special act passed February 18, 1890, congress struck out the last-quoted paragraph, and inserted in place thereof the following:

"Par. 448. Braids, plaits, flats, willow sheets and squares, fit only for use in making or ornamenting hats, bonnets and hoods, composed of straw, chip, grass, palm leaf, willow, hair, whalebone or any vegetable material, not specially enumerated or provided for, twenty per centum ad valorem."

Next came the act of October 1, 1890, containing the paragraph under which the importers in the case at bar contend that their goods should be classified. It reads as follows, being part of the free list:

"Par. 518. Braids, plaits, laces and similar manufactures, composed of straw, chips, grass, palm leaf, willow, osier or rattan, suitable for making or ornamenting hats, bonnets and hoods."

It will be observed that the changes in the language used by congress have been in the direction of restricting the number of articles which the so-called "hat-material" paragraph should comprise. And that restriction is found to apply to the component materials. The braids of the hat-material paragraph of the act of 1883 might be composed, not only of straw, chip, or grass, but of "any other substance or material." By the amendatory act of 1890, these general words were changed to "any vegetable material," and in the act of October 1, 1890, the general phrase was wholly eliminated, and the braids included in the paragraph were reduced to such only as were "composed of straw, chips, grass," and the other specially enumerated vegetable substances. By this we do not mean to hold that the presence of any other material in admixture with one or more of the enumerated materials will take the braid out of this paragraph. Under the principle enunciated in *Arthur's Ex'rs v. Butterfield*, 125 U. S. 70, 8 Sup. Ct. 714, 31 L. Ed. 643, and *Herrman v. Robertson*, 152 U. S. 521, 14 Sup. Ct. 686, 38 L. Ed. 538, we affirmed in *U. S. v. Rheims*, 33 C. C. A. 687, 89 Fed. 1020, a decision of the circuit court holding that certain braids, composed principally of straw, were within this paragraph, although they contained cotton, 28 per cent. in quantity, and 25 per cent. in value. But, in order to come within the terms of the paragraph as now amended, it is necessary that the predominant and characteristic component shall be one of those specifically enumerated in the paragraph, and the words of enumeration should not be distorted so as to cover other vegetable substances, not fairly within the definition of those

words in common acceptation. Hemp fiber seems not to be within the dictionary definitions of any of those words cited in appellant's brief, and it certainly would not, in common speech, be included in the phrase, "straw, chip or grass." We have here no question of commercial designation. The tariff act does not lay duty upon "straw braid,"—a term which might have a technical meaning in trade and commerce,—but upon "braids composed of straw," etc., and there is no evidence that the words "straw," "chip," or "grass," when applied to the raw material, have any peculiar commercial meaning. The decision of the circuit court is affirmed.

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RACINE et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 28, 1890.)

No. 2,838.

CUSTOMS DUTIES—CONSTRUCTION OF STATUTE—WATCHES.

The first part of paragraph 191 of the tariff act of 1897, imposing upon "watch movements, whether imported in cases, or not," a specific duty, based on the number of jewels, in addition to an ad valorem duty, applies only to the movements; and, when imported in cases, such cases are dutiable separately, under the succeeding part of the paragraph.

Appeal by the importers from a decision of the board of general appraisers which affirmed the action of the collector in assessing duty upon the importations in question.

William B. Coughtry, for importers.

Henry C. Platt, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The merchandise in question consists of certain watches, which were classified for duty by the collector upon the cases and movements separately,—at 40 per cent. on the cases, and at 25 per cent. and the specific duty on the movements,—under the provisions of paragraph 191 of the act of 1897. The importers protested, claiming that the article was dutiable as an entirety at 25 per cent., and the specific duty as "watch movements in a case." Said paragraph provides as follows:

"191. Watch movements, whether imported in cases or not, if having not more than seven jewels, thirty-five cents each; if having more than seven jewels and not more than eleven jewels, fifty cents each; if having more than eleven jewels and not more than fifteen jewels, seventy-five cents each; if having more than fifteen jewels and not more than seventeen jewels, one dollar and twenty-five cents each; if having more than seventeen jewels, three dollars each, and in addition thereto, on all the foregoing, twenty-five per centum ad valorem; watch cases and parts of watches, including watch dials, chronometers, box or ship, and parts thereof, clocks and parts thereof, not otherwise provided for in this act, whether separately packed or otherwise, not composed wholly or in part of china, porcelain, parian, bisque or earthenware, forty per centum ad valorem; all jewels for use in the manufacture of watches or clocks, ten per centum ad valorem."

The construction of this paragraph is not entirely clear; but in view of the fact that in every prior tariff act watches have been held to be dutiable, eo nomine, at the same rate as watch movements, and that

there is no other reference to watches in the present tariff act, I think the construction contended for by counsel for the United States is the correct one. He claims that each provision relating to jewels refers necessarily and grammatically only to watch movements, and that the following provision—"and in addition thereto, on all the foregoing, twenty-five per centum ad valorem"—necessarily refers, also, only to these various classes of movements, and not to the cases. In that event, inasmuch as the case would have lost its identity if treated as a part of the watch movement, as contended by counsel for the importers, there would be no duty whatever upon the value of the case. In short, the true construction should be as though it read, "Watch movements, if having not more than seven jewels, thirty-five cents each," etc., and there were added at the end of the first portion of the paragraph the statement, "This shall apply to watch movements whether they are imported in cases or not." The decision of the board of general appraisers is affirmed.

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UNITED STATES v. FOPPES.

(Circuit Court, S. D. New York. December 23, 1899.)

No. 2,958.

CUSTOMS DUTIES—REEDS.

Reeds not cut into lengths, but stripped of enamel so as to transform them from rattan into reed, leaving the inner portion intact, are free under Act 1897, par. 700, as "reeds unmanufactured."

Appeal by the United States from a decision of the board of general appraisers which reversed the action of the collector in assessing duty upon the merchandise in question.

Charles D. Baker, Asst. U. S. Atty.

Edward Hartley, for importer.

TOWNSEND, District Judge (orally). The articles in question were reeds assessed for duty under paragraph 206 of the act of 1897 as "reeds manufactured from rattans," and claimed by the importers in their protest to be free as "reeds unmanufactured," under paragraph 700 of said act. The action of Judge Lacombe in the case of *Foppes v. Magone* (C. C.) 48 Fed. 570, in directing a verdict for the importers disposes of the question presented herein. The articles are not cut in lengths, and have only been so stripped of enamel as to transform them from rattan into a reed, leaving the inner portion intact. The decision of the board of general appraisers is affirmed.

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PITT et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 23, 1899.)

No. 2,802.

CUSTOMS DUTIES—ANTIQUE FURNITURE.

Furniture which is free under Act 1894, par. 426, as antiquities produced prior to the year 1700, is not dutiable where imported at 1 o'clock in the afternoon of July 24, 1897, under the provisions of Act 1897, par. 83, that section having no application to goods free of duty.

Appeal by Pitt & Scott from a decision of the board of general appraisers which affirmed the action of the collector in assessing duty upon the importations in question.

William B. Coughtry, for importers.

Henry C. Platt, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The articles in question comprise certain furniture, claimed to be free, under paragraph 426 of the act of 1894, as antiquities produced prior to the year 1700. The single question presented is whether the articles, imported at 1 o'clock in the afternoon of July 24, 1897, were liable for duty under the provisions of the act of 1897. The claim of the government rests upon the provisions of section 33 of said act. It is manifest that this section has no application to goods free of duty, and therefore the decision of the board of general appraisers is reversed.

UNITED STATES v. TWO HUNDRED AND TWENTY PATENTED  
MACHINES.

(District Court, E. D. Pennsylvania. February 5, 1900.)

No. 4.

INTERNAL REVENUE—FORFEITURE—MACHINERY LEASED BY CIGAR MANUFACTURER.

Under Rev. St. § 3400, providing that a cigar manufacturer who violates the provisions of the internal revenue law relating to his business shall, in addition to other penalties, forfeit to the United States all machinery, tools, etc., "which shall be found in his possession or in his manufactory, and used in his business as such manufacturer," the fact that machinery used by a manufacturer guilty of a violation of the law was leased from a third person, who was ignorant of such violation, will not prevent its forfeiture, but the owner must be held to have acted with the knowledge that the property would be subject to forfeiture if the business was unlawfully conducted, and to have taken the risk.

This was an information for forfeiture of machines used by a cigar manufacturer for violations of the internal revenue law, which was resisted by interveners claiming ownership of such machines.

James M. Beck, U. S. Atty., and Francis F. Kane, Asst. U. S. Atty.  
H. M. North, for claimant for rent.

McPHERSON, District Judge. In July, 1899, the firm of William M. Jacobs & Co. was carrying on the business of manufacturing cigars in Lancaster, Pa., and was using for that purpose 220 patented machines known as "suction tables" and "bunching machines." Upon the 10th day of that month the collector of internal revenue for the Ninth collection district seized these machines, alleging that the firm had violated the laws regulating the manufacture of cigars. Shortly afterwards the district attorney filed an information in this court seeking to condemn the machines for three separate violations of section 3400 of the Revised Statutes. That section reads as follows:

"Every manufacturer of cigars who removes or sells any cigars without payment of the special tax as a cigar manufacturer, or without having given bond as such, or without the proper stamps denoting the tax thereon; or who makes false or fraudulent entries of the manufacture or sale of any cigars; or makes false or fraudulent entries of the purchase or sale of leaf-tobacco, tobacco-stems, or other material used in the manufacture of cigars; or who affixes any false, forged, spurious, fraudulent or counterfeit stamp, or imitation of any stamp required by law, to any box containing any cigars; shall, in addition to the penalties elsewhere provided in this title for such offences, forfeit to the United States all raw material and manufactured or partly manufactured tobacco and cigars, and all machinery, tools, implements, apparatus, fixtures, boxes, barrels, and all other materials which shall be found in his possession or in his manufactory, and used in his business as such manufacturer, together with his estate or interest in the building or factory and the lot or tract of ground on which such building or factory is located and all appurtenances thereunto belonging."

The illegal acts charged in the information were that William M. Jacobs & Co. had removed cigars without affixing proper stamps, had affixed counterfeit stamps to certain boxes containing cigars, and had made false and fraudulent entries of the manufacture and sale of cigars, and of the purchase and sale of leaf tobacco, and tobacco stems, and other materials used in the manufacture of cigars, in the books required by law to be kept by the firm. Two applications to intervene and defend were made,—one by the John R. Williams Company, claiming to be the legal and bona fide owner of the machines; and the other by J. L. Steinmetz, who is the owner and lessor of the building in which the manufacture was carried on, and has a claim for rent, which he desires to pursue by distraint upon the apparatus in controversy. Both interveners unite in asking that a forfeiture be refused, and that the seizure be set aside, averring that the machines were only leased to the firm at an annual rental, and that the title to the property remains in the John R. Williams Company; averring, further, that the lessor company has no knowledge or information concerning the truth of the facts charged by the government as causes of forfeiture, but that, if they are true, the illegal acts of the firm were done without the knowledge, information, or consent of the legal owner of the machines. The firm of Jacobs & Co. has filed no answer denying the charges, and their truth is conceded by all parties concerned.

It remains, therefore, to consider whether the fact that the John R. Williams Company (assuming that company to be the legal owner) knew nothing of the unlawful acts of Jacobs & Co., and did not consent thereto, is sufficient to prevent the forfeiture asked for by the government. In my opinion, this is scarcely a disputable question. The language of section 3400 expressly declares that, if the prohibited acts are done by any manufacturer of cigars, he shall forfeit to the United States all machinery, tools, implements, apparatus, fixtures, boxes, barrels, and all other materials, which shall be found in his possession, or in his manufactory. It seems to me that this language is too plain to admit of doubt. It was argued by the interveners that the section means no more than this: that the offending manufacturer shall only forfeit such property of his own as was used in his business, and may be found in his possession; but I do not regard the argument as sound. If it should be allowed to prevail, the



mere device of hiring the apparatus necessary to carry on his business would enable the manufacturer to protect it from seizure by the government, and would permit him to carry on an illegal business with limited liability.

If the owner of such apparatus chooses to lease it to, or in any other way to put it into the hands of, a person engaged in the manufacture of cigars, he must be regarded as transferring the possession with the knowledge that the apparatus may be put to an unlawful use, and may, therefore, be liable to the penalty of forfeiture. He takes the risk, therefore, that the manufacturer will conduct the business in accordance with law; and, if the risk falls out against him, he cannot be heard to set up his own ignorance of the manufacturer's illegal conduct, or his own innocence of unlawful intent. A pertinent analogy, I think, may be found in the case of an owner of personal property who puts it upon the premises of a tenant. Such an owner is bound to know that the law permits the distraint of property upon the premises (if it does not fall within certain excepted classes) for the nonpayment of rent, and he cannot, therefore, be heard to complain that he did not know either that the tenant's rent was unpaid, or that his own property might be applied to pay another man's debt.

Under the facts now before the court, I think that a similar conclusion must be reached. The John R. Williams Company must be charged with the knowledge that the laws of the United States permitted all property found upon the premises of an offending manufacturer of cigars, and used in that business, to be forfeited; and must be held to have committed their machines to the possession of Jacobs & Co. with the knowledge that they might be put to an unlawful use, and might, therefore, be seized and forfeited by the government. The unlawful use being conceded, nothing remains for the court except to declare that the risk has fallen out against the legal owners of the machines, and that they must abide by the consequences. No case has been cited that has applied the particular section now being considered, but there are decisions under other sections in which a similar principle has been distinctly declared. *Dobbins' Distillery v. U. S.*, 96 U. S. 395, 24 L. Ed. 637; *U. S. v. Two Bay Mules* (D. C.) 36 Fed. 84; *U. S. v. Two Barrels Whisky*, 37 C. C. A. 518, 96 Fed. 479. In the last case the forfeiture was refused upon the ground that the owner of the offending property was not responsible for the fact that it was in the possession of the violator of the law. Upon the facts there proved, the owner was as innocent as if his property had been stolen from him, and then put to the illegal use. Here there is the vital difference that the machines in controversy were deliberately put into the possession of the manufacturer, who was thus enabled to violate the law in the use of the property, and actually did put it to an unlawful use. The defense set up by the interveners is overruled, and a decree of forfeiture will be entered.

**McLOUGHLIN et al. v. TUCK et al.**

(Circuit Court, S. D. New York. January 17, 1900.)

**COPYRIGHT—ENJOINING ILLEGAL USE OF COPYRIGHT NOTICE—JURISDICTION OF CIRCUIT COURTS.**

The jurisdiction of a circuit court of the United States to enjoin the issuing, publishing, or selling of articles marked or imported in violation of the copyright laws, is derived solely from Rev. St. § 4963, as amended by Act March 3, 1897 (29 Stat. c. 392), which, by its terms, does not apply to any importation or sale of such articles brought into the United States prior to its passage.

On Motion to Require Witness to Answer Question.

A. Bell Malcomson, for the motion.

Louis C. Raegener, opposed.

LACOMBE, Circuit Judge. This is a suit in equity praying injunction against improper use of copyright notice. This court has jurisdiction to entertain such suit only by virtue of the amendment to section 4963, Rev. St. U. S., which was contained in the act of March 3, 1897. That act, however, expressly provides that it "shall not apply to any importation or sale of such goods or articles brought into the United States prior to the passage hereof"; i. e. prior to March 3, 1897. Inasmuch as the bill does not aver that the acts complained of are concerned with goods or articles brought here subsequent to that date, it would seem that the bill does not aver facts sufficient to give the court jurisdiction of this suit for injunction by the persons complaining. However that may be, it appears from the record that the particular question is put to the witness touching goods shipped to this country in 1896. As to any impressing, issuing, selling, or importing of such goods with improper copyright notice, this court manifestly has no jurisdiction to maintain this suit, and therefore has no jurisdiction to require the witness to answer. Motion denied.

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**DUFF v. DAVIS GLASS CO.**

(Circuit Court, Western District of Pennsylvania. July 8, 1899.)

No. 7.

**PATENTS—INFRINGEMENT—GAS PRODUCERS.**

The Duff reissued patent, No. 11,523 (original No. 517,271), for an improvement in gas producers, was not anticipated by anything in the prior art, and the invention described is of a high order of merit. Also held infringed as to claims 1 and 2.

In Equity. This was a suit in equity for infringement of a patent. On final hearing.

Bakewell & Bakewell, for complainant.

E. S. Craig, John H. Roney, and J. Snowden Bell, for respondent.

ACHESON, Circuit Judge. The bill charges the defendant with infringement of reissued letters patent No. 11,523, dated January

28, 1896, for an improvement in gas producers, granted to the complainant as assignee of the inventor, Edward James Duff, to whom the original letters patent, No. 517,271, were issued on March 27, 1894. The original specification is embodied in the specification of the reissued patent, and the first and second claims of the reissue are identical with the claims of the original patent. The reissued patent contains a new claim, numbered 3. Under the proofs, however, it will not be necessary for the court to consider any question touching the validity or infringement of this new claim; for, if the defendant infringes the reissued patent at all, the device complained of is clearly covered by the first and second claims. Those claims are as follows:

(1) A gas producer provided with a water-sealed bottom trough, and a casing located in the lower portion of the producer, provided with an inlet for air from a blower, and with a cover of gratings inclined from the sides of the casing upward to a middle angular ridge, and free spaces between the said casing and the sides of the producer for the residues to pass from the gratings of the said casing to the water trough, substantially as and for the purposes set forth. (2) A gas producer of rectangular section, provided with a water-sealed bottom trough and transverse casing extending from side to side of the producer and across the center thereof, the said casing being provided with an inlet for air from a blower, and with a cover having vertical openings therein, said cover being inclined upward from its opposite sides to a middle angular ridge, and free spaces on the opposite sides between the casing and the sides of the producer, all substantially as and for the purposes set forth.

The distinguishing features of the gas producer described in the patent in suit are a bottom casing or chamber, into which the blast of air and steam is delivered; a top or cover for this casing or chamber, consisting of outwardly inclined gratings having openings to distribute the blast under the body of the fuel, and forming also guiding surfaces, down which the residual ashes will slide towards the exterior of the producer, and free spaces between the lower edges of the inclined gratings and the walls of the producer, through which the ashes will descend into a water trough which seals the bottom of the producer, and from which trough the removal of the ashes is effected without making any opening into the producer, and without any interruption of the air blast. These features are covered by the first and second claims of this patent. I have carefully examined the prior patents in evidence in connection with the testimony relating thereto of the several witnesses, and I have reached the conclusion that in none of them is the combination of either the first or second claim of the patent in suit to be found. Anticipation of either of these claims has not been shown. The improvement of the patent in suit is one of a high order of merit. The proof is full and convincing that by reason of its automatic and continuous method of operation, in point of economy, and for good results generally, the Duff gas producer of this patent is superior to any previously known gas producer. That the improvement is patentably new and useful is most clearly established. It only remains, then, to inquire whether infringement is shown. Here the case is free from any real difficulty. In all essential particulars the plaintiff's gas producer and the gas producer of the defendant are alike. The defendant has appropriated all the val-

uable features of the patented device, and has combined the constituents in the same way. It is true that the patent in suit shows inclined gratings having plain surfaces, whereas in the defendant's structure the downward surfaces in outline are zigzag, or are formed in steps. This change, however, is purely formal. In principle the two constructions are identical. The mode of operation and the result are the same. This very clearly appears from the evidence, and especially from the testimony of the practical witness H. L. Dixon. Let a decree be drawn in favor of the complainant as respects the first and second claims of the patent.

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**L. E. WATERMAN CO. v. VASSAR COLLEGE.**

(Circuit Court, S. D. New York. January 28, 1900.)

**PATENTS—VALIDITY—FOUNTAIN PENS.**

The Waterman patent, No. 604,690, for a fountain pen, held valid on demurrer to a bill for infringement.

This is a suit in equity for infringement of a patent. On demurrer to bill.

Walter S. Logan, for plaintiff.

William B. Whitney, for defendant.

**WHEELER**, District Judge. This cause has been heard upon demurrer to a bill of complaint, in usual form, for infringement of patent No. 604,690, dated May 24, 1898, and granted to Lewis E. Waterman for a fountain pen. The patent is long and intricate, with 26 claims for various forms of conical and somewhat elastic joints, in different places and connections where tight joints are required in such pens. If such a joint, or the mere use of such a joint, in a fountain pen, was all of the invention described in the patent, there would undoubtedly be an entire want of patentable novelty. Such joints have long been in well-known use in many ways, and in some ways in fountain pens. This does not fully show, however, that there may not be patentable invention in arranging such joints with, and adapting them to, the other parts of such pens, where so much of the utility depends upon the perfection of the joints. *Potts & Co. v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275. It is suggested that an examination of the many patents on the parts of these pens would show such joints so in use about the parts as to demonstrate clearly the want of patentability of this invention. But this would be more than belongs to the court, and unsafe. Demurrer overruled, defendant to answer over by March rule day.

NATIONAL CASH-REGISTER CO. v. NAVY CASH-REGISTER CO. et al.  
(Circuit Court, N. D. Illinois, N. D. January 28, 1900.)

No. 25,851.

1. PATENTS—INFRINGEMENT—CASH REGISTERS.

The Ritty and Birch patent, No. 271,363, for a cash register, held infringed.

2. SAME—PRELIMINARY INJUNCTION—EXPIRATION OF PATENT.

A suit for infringement was instituted, and an application for a preliminary injunction made, three months before the expiration of complainant's patent, but the record was not perfected so as to enable the court to pass upon the motion until eight days before such expiration. Held that, although good ground for relief was shown, an injunction would be denied upon the filing of an adequate bond by defendant covering such damages and costs, both past and future, as might be awarded to complainant on final hearing.

This was a suit for infringement of a patent. On motion for preliminary injunction.

Edward Rector, for complainant.

Offield, Towle & Linthicum and Thos. W. Flynn, for defendants.

KOHLSAAT, District Judge. The bill herein was filed November 1, 1899. It seeks to enjoin the alleged infringement by defendants of the Ritty and Birch patent, No. 271,363, issued January 30, 1883. This patent expires on the 30th of this month. A motion for a preliminary injunction was made before this court on November 3, 1899, and, by reason of the inability of the court to grant an early hearing, the matter was referred to a master in chancery to take proofs, and report the same, together with his conclusions thereon. The master filed his report herein on December 22, 1899, in which report the issuance of a preliminary injunction was recommended. On December 27, 1899, the exceptions of defendants to said report and recommendation were argued before the court, and on January 6, 1900, the exceptions were sustained, and the motion for a preliminary injunction denied, upon the ground of absence of formal proof of title. 99 Fed. 89. The merits of the application were not at that time passed upon by the court. Thereafter complainant filed further proofs, and obtained leave of court to renew its application for a preliminary injunction upon the record as amended. The motion upon the record, as supplemented by additional affidavits and papers, came on to be heard by the court on January 20, 1900, when, in addition to the objections theretofore raised, the defendants insisted upon proof to establish the corporate existence of complainant, which corporate existence was denied by answers filed by defendants on December 29, 1899, subsequent to the last hearing. On January 22, 1900, prima facie proof of the corporate existence of complainant was for the first time filed, so far as the record herein shows. Therefore, granting that, upon the record as it now stands, complainant has established its title to the patent in suit, that the patent is valid, and that it has been infringed by defendants, the motion for a preliminary injunction stands before the court as though made within eight days of the expiration of the patent.

The ground of objection heretofore raised to the proof of complainant's title, to wit, that no proper foundation was laid for the introduction of the certified copies of the patent-office records of the various assignments in the chain of title, has, in the opinion of the court, been met by the affidavits now on file showing the original existence of the various instruments of assignment, and that the same have been lost or mislaid, and are out of complainant's power to produce. The technical objections of defendants, relating to the insufficiency of the proof offered to establish this foundation for the introduction of secondary evidence, the court finds not well taken. The proof is *prima facie* sufficient.

There seems to be no doubt as to the validity of the patent in suit. It has been sustained by the circuit court for the Eastern district of Pennsylvania in *National Cash-Register Co. v. American Cash-Register Co.* (C. C.) 47 Fed. 212; and also by the federal supreme court in the suit of *National Cash-Register Co. v. Boston Cash Indicator & Recorder Co.*, 156 U. S. 502, 15 Sup. Ct. 434, 39 L. Ed. 511.

Upon the question of infringement, it is true that defendant's device is a decided advance upon that covered by complainant's patent. It enables the operator, by a system of segregated working bars, to combine figures with ease,—something that complainant's device accomplishes with considerable awkwardness and difficulty; and perhaps the courts would be justified in holding, in a proper case, that such improvement is novel and patentable. That, however, is not the matter involved here. Defendants have manufactured and placed upon the market, though in a limited way, a complete cash register, which complainant insists involves all the features of its patent. A comparison of the two machines shows that in complainant's device the rocking shaft is pivoted at the bottom, whereas in defendants' device it is pivoted at the top, and is termed a "bail." Other minor variations are disclosed, but the differences are merely in form, and not in principle. Each "bail" of defendants' system of rocking shafts is a substantial infringement of complainant's device. Certainly, neither the issuance of a patent upon defendants' device, nor the dividing of the rocking shaft, would avoid infringement. Neither would defendants' claim, that some portions of their combination are used to accomplish different ends from those accomplished by analogous portions of complainant's device, avoid infringement. Defendants' mechanism is certainly much nearer complainant's in manner of construction and operation than was that in the Boston company's machine. The fact of infringement must be held to be clearly made out.

Should, then, under all the circumstances of this case, an injunction be granted for the remaining four days of the life of complainant's patent? It has been shown herein that defendants, with full knowledge of the decisions of the courts above quoted, have been and are preparing to place their machine upon the market in competition with complainant's machines just as soon as the patent in suit has expired. Defendants have been for some time past perfecting their machine by experiments, and have placed a few of them upon the market,—one or two, as they claim; seven or eight;

or perhaps more, as claimed by complainant. Perhaps defendants have the perfect right, prior to January 30, 1900, to make arrangements to manufacture, after said date, machines containing complainant's device; but they have no right, prior to the expiration of complainant's patent, to assemble any machine containing such device, although they may lawfully have the different parts in their possession. The question, then, is, do all the facts and circumstances of this case bring it within the reasoning announced in *American Bell Tel. Co. v. Western Tel. Const. Co.* (C. C.) 58 Fed. 410, or within the reasoning of the court in *Overweight Counterbalance Elevator Co. v. Crane Elevator Co.* (C. C.) 96 Fed. 231, or do the special facts of this case place it without the reasoning of both of said cases? In my judgment, all the facts and circumstances of this case considered, the ruling in neither of said cases applies to the case at bar. There remain but four days now of the life of complainant's patent. To be sure, the bill was filed three months prior to the expiration of the patent, but the record was only in proper form to grant the injunction eight days before such expiration. In the *Elevator Cases*, but ten days of the life of the patent remained after the filing of the bill, and, under the practice of this court, it would have been practically impossible to bring on for hearing a motion for a preliminary injunction within that time. In the *Telephone Co. Case*, about three and one-half months of the life of the patent remained subsequent to the application for the preliminary injunction. In the case at bar, there is no doubt but that complainant is entitled to the protection of this court in the premises, but manifestly the relief which can be obtained by an injunction to cover a period of only four days will be but nominal, providing it is made to serve only its legitimate function. If the defendants are required to give a bond covering such damages and costs, both past and future, as may be decreed to complainant upon a final hearing of this cause, I am of the opinion that the complainant will derive therefrom all the relief which equity and justice would require, under the circumstances of this case. There is no such threatened irremediable injury shown in this case as demands the issuance of an injunction, providing defendants will file herein an adequate bond; but unless the defendants shall file a bond in this cause, within 24 hours, in the sum of \$2,000, conditioned upon the payment of costs and damages as above set forth, a preliminary injunction, as prayed, may issue.

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AMERICAN ELECTRICAL NOVELTY CO. v. NEWGOLD et al.

(Circuit Court, S. D. New York. January 13, 1900.)

**PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.**

A decision sustaining a patent in a case not contested is not such an adjudication as will entitle the complainant in a different suit to a preliminary injunction against infringement, where there is no proof of long acquiescence, and the validity of the patent is contested.

This is a suit in equity for infringement of a patent. On motion for preliminary injunction.

Thomas Ewing, Jr., for the motion.  
Arthur v. Briesen, opposed.

LACOMBE, Circuit Judge. The decision of Judge Wheeler (98 Fed. 895), being rendered in a case where there was no opposition, is not such an adjudication as will entitle complainant to a preliminary injunction in another suit, where there is no proof of long-continued public acquiescence, and where the validity of the patents, if construed broadly enough to cover defendant's device, is vigorously contested. Motion denied.

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PALMER et al. v. LANDPHERE.

(Circuit Court, D. Connecticut. January 29, 1900.)

PATENTS—INFRINGEMENT—SALE OF INFRINGING ARTICLE.

One who bought and resold at a profit the separate parts of an infringing machine, and was thereafter employed by the purchasers by the day to set up the complete machines, is within the rule that one who makes a profit for himself out of the infringing goods incurs liability as an infringer.

This is a suit in equity for infringement of patents. Hearing on plea.

Dickerson & Brown, for complainants.  
J. E. Maynadier, for defendant.

TOWNSEND, District Judge. Hearing on plea. Complainants own certain patents for machines for quilting fabrics, the validity of which has been sustained in suits of these complainants against Crefield Mills (C. C.) 57 Fed. 221, and against the Brown Manufacturing Co., 35 C. C. A. 86, 92 Fed. 925. The defendant herein was originally employed by complainants as a skilled workman in making quilting machines, and, having severed his relations with them, entered successively the employment of said two infringing concerns. The plea is as follows:

"I, C. Tyler Landphere, the defendant, by protestation, not confessing or acknowledging all or any part of the matters or things in said bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do plead thereto, and for plea say that I have never made, used, or sold machines embodying any material part of the invention described and claimed in any of the several letters patent counted upon in complainants' bill of complaint, nor have I had any concern whatever in making, using, or selling any machines embodying any material part of the invention described and claimed in any of the several letters patent counted upon in complainants' bill of complaint, further than this: That I have been employed at daily wages in the construction of sundry machines for sewing or quilting fabrics, but I am not now so employed, nor have I been for many months; and whether the said machines in the construction of which I labored as an ordinary workman, as aforesaid, embodied any material part or parts of the alleged invention secured to the complainants by letters patent of the United States I was not and am not aware. Furthermore, I am not, and have never been, interested, directly or indirectly, in any machine for sewing or quilting fabrics, nor in the profits derived from the use or sale of such a machine; and I do not, and never did, own any such machine in whole or in part."



From the testimony in support of the plea it appears that, after having left the employment of said infringing firms, he bought various parts of infringing machines "as a matter of speculation," which were stored at his mill; that he employed persons to replace certain parts which had been destroyed; that he sold these parts for a good profit to the California Cotton Company, to which he furnished every part of the infringing machines except the sewing machine. He further testified that he sold all the parts of a scroll quilting machine to the Cold Blast Feather Company; that he was thereafter employed by said companies at \$10 to \$15 a day, and that part of his duties consisted in setting up the completed infringing machines of which he had sold the parts. Upon these facts counsel for defendant claims that he was merely a skilled workman, who had a right thus to sell his services; that in no event could he be held except for contributory infringement; and that, under the decision in *Nickel Co. v. Worthington* (C. C.) 13 Fed. 393, he is not liable. Said decision has been distinguished, doubted, or directly disapproved in *Cahoone Barnet Mfg. Co. v. Rubber & Celluloid Harness Co.* (C. C.) 45 Fed. 582; *Cramer v. Fry* (C. C.) 68 Fed. 201; *Graham v. Earl*, 34 C. C. A. 267, 92 Fed. 155; *Cash-Register Co. v. Leland*, 37 C. C. A. 372, 94 Fed. 502, and by Mr. Walker in section 410 of his work on Patents. The question of liability of a mere skilled workman is not involved herein. The facts proved bring this defendant within the settled rule that any person who has made a separate profit to himself out of the sale of infringing goods, and even a servant who has derived a distinct and independent benefit from invasions of the patent, incurs a distinct separate liability. *Rob. Pat. § 920*; *Estes v. Worthington* (C. C.) 30 Fed. 465; *Graham v. Earl*, 27 C. C. A. 377, 82 Fed. 737, 742; *Cramer v. Fry* (C. C.) 68 Fed. 201, 207; *Featherstone v. Cycle Co.* (C. C.) 53 Fed. 110; *Fishel v. Lueckel* (C. C.) 53 Fed. 499; *Armstrong v. Soap Works* (C. C.) 53 Fed. 125; *Steiger v. Heidelberger* (C. C.) 4 Fed. 455, 18 Blatchf. 426; *Maltby v. Bobo*, 14 Blatchf. 53, Fed. Cas. No. 8,998. The plea is overruled.

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#### MUNICIPAL SIGNAL CO. V. NATIONAL ELECTRICAL MFG. CO.

(Circuit Court, D. Connecticut. January 19, 1900.)

#### PATENTS—SUITS FOR INFRINGEMENT—REHEARING.

A defendant in a suit for infringement is not entitled to a rehearing on the ground of newly-discovered evidence, where the existence of such evidence was disclosed by the file wrappers of the patents in suit.

On Motion for Rehearing. For former opinion, see 97 Fed. 810.

TOWNSEND, District Judge. Counsel for defendant has moved to reopen this case and introduce certain new evidence, comprising the file wrappers of the patents in suit, and of a certain abandoned application, and further testimony thereon. The ground on which this motion is based is a statement in a footnote of the replying brief of the counsel for the complainant, which was as follows:

"Applications for patents 687 and 686 were filed on the same day; application for patent 688, one week later. Application for 686 went through the patent office as 'Case B,' and that for 688 as 'Case C.' This would have appeared in the record, had defendant introduced evidence on which to ground its contention with respect to the relation between the patents in question."

This statement covered matter outside the record, and was not considered by the court in the disposition of the case. The only allegation in the motion of prior want of knowledge and due diligence is that the existence of said abandoned application was not known to defendant's counsel previous to the argument, and the file wrapper and contents thereof "could not, with reasonable diligence, have been presented to the court by defendant's counsel at the argument of this case." Counsel for defendant claims that the statements in said footnote put him on inquiry as to the existence of said abandoned application, and that the file wrappers of the patents in suit and further expert testimony are essential in order to explain said abandoned application. It appears, however, that, if the file wrappers of the patents in suit had been examined, they would have disclosed the facts alleged in said footnote. Counsel for defendant does not allege that he was ignorant of said file wrappers. The motion is therefore denied.

Counsel for defendant states that his rights on appeal are liable to be prejudiced by the following statement in the opinion of the court:

"The first claim need not be considered, because defendant's counsel admits that he does not wish to have the case disposed of on this technical point, because, if necessary, the defect may be remedied by joining the owner of the naked title to the patent, and because it sufficiently appears from the evidence that the defendant corporation has, since the acquisition of title to these patents by the complainant, maintained the apparatus alleged to infringe, through its employes, and that it threatens, by its circulars, to construct other similar apparatus in other cities."

Counsel for defendant in his reply brief did discuss said contention, which he had abandoned on the argument, and therefore is not to be deemed to have abandoned it on appeal.

#### UNITED STATES v. MORGAN.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1900.)

No. 811.

#### 1. SALVAGE—ACTIONS AGAINST UNITED STATES—JURISDICTION OF CIRCUIT COURT.

Act Cong. March 3, 1887 (24 Stat. 505), gives jurisdiction to the court of claims, inter alia, on any contract, express or implied, with the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable. Section 2 gives the federal district and circuit courts concurrent jurisdiction with the court of claims as to matters named in the preceding section, except that the district courts have jurisdiction not to exceed \$1,000, and the circuit courts between \$1,000 and \$10,000. *Held*, that a claim against the United States for salvage in the sum of \$10,000 is within the jurisdiction of the circuit court.

#### 2. SAME—TOWAGE—AMOUNT.

A lightship belonging to the United States government broke loose from her moorings, and was carried out into Chesapeake Bay. The sea was

described by many as being the highest ever known in Hampton Roads. A tug sighted the lightship, which hoisted a signal for assistance, described as a signal for a tow. The tug immediately answered the signal, but, owing to the gale of wind and heavy sea prevailing, was unable to approach her in the usual manner from the leeward, and pass a hawser, but had to go to the windward side, and use a heaving line. Three efforts to cast the line were made before it was caught, the tug, in the meantime, being in the trough of the sea, with the seas breaking over the man casting the line. Some three hours later the lightship was brought to the wharf. *Held*, that \$1,200 for salvage service, though on the border line of towage service, will not be disturbed as excessive.

### Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

This case comes up on appeal from a decree of the circuit court of the United States for the Eastern district of Virginia. The action below was brought by way of petition on the part of A. D. Morgan, master of steam tug Frank A. Lowe, against the United States. The cause of action is a claim for salvage of the lightship No. 49, the property of the United States. The form of pleading is in admiralty in personam. The amount claimed is \$10,000. The court below considered it a case of salvage, and awarded \$1,200 salvage. The case comes here on exceptions to the decree. The errors assigned are to the finding of the district court. This is an evident typographical mistake, the petition for allowance of appeal being to the circuit court. These alleged errors are: (1) That the petitioner was allowed to file his petition; (2) that the court erred in not sustaining an exception to the jurisdiction of the court; (3) that the court erred in requiring the respondent to answer the petition; (4, 5) that the court erred in holding it a case of salvage, and in allowing an award of \$1,200.

Edgar Allan, U. S. Atty.

Floyd Hughes, for appellee.

Before SIMONTON, Circuit Judge, and PAUL and BRAWLEY, District Judges.

SIMONTON, Circuit Judge. The vital question in this case is, had the court jurisdiction? The action is against the United States. It is a claim for salvage. The proceeding to recover salvage is in the circuit court, not in the district court, and it is in form a libel. The United States, a sovereign, cannot be sued, except by its own consent, and in the mode prescribed by congress. Act Cong. March 3, 1887 (24 Stat. 505), gives jurisdiction to the court of claims of "all claims founded upon the constitution of the United States, or any act of congress, except for pensions or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States, either in a court of law, equity or admiralty, if the United States were suable." By the second section of the act, the district and circuit courts of the United States are given concurrent jurisdiction with the court of claims as to all matters named in the preceding section, with the provision that the district courts have jurisdiction when the amount of the claim does not exceed \$1,000. And the circuit courts have jurisdiction when the amount of the claim exceeds \$1,000, and does not exceed \$10,000.

The first question is, is it a claim for salvage upon a contract, express or implied, or is it a claim for damages, liquidated or unliquidat

ed, in a case not sounding in tort, in respect of which claim the party would be entitled to redress against the United States in a court of admiralty, if the United States were suable? If it be either, the court has jurisdiction. Salvage is a reasonable reward for services rendered in saving property in danger of perishing from a maritime misadventure by parties under no obligation of duty, who voluntarily undertake the service. *Maude & P. Shipp*, 419; *Macl. Shipp*, 597; *The H. M. S. Thetis*, 3 Hagg. Adm. 14. It is a reward for service. And the service is rendered in the expectation of the reward. The compensation is supervised and controlled by the court of admiralty, even although there be an agreement as to the amount. *The Tornado*, 109 U. S. 110, 3 Sup. Ct. 78, 27 L. Ed. 874. But, it having been determined a case of salvage, the right to be compensated is recognized and assumed. It resembles the common-law contract for work and labor done. Only the compensation is allowed upon a liberal scale. Very frequently the compensation for saving property in maritime peril is given only *pro opere et labore*, as when it is reduced to a towage service, as in *The Emily B. Souder*, 15 Blatchf. 185, Fed. Cas. No. 4,458, clearly on the implied contract. In other words, the salvor renders the service upon the understanding and expectation that he will be rewarded for it, the amount of the award to be fixed by a court of admiralty, if the salvor and the owner of the property salvaged cannot agree.

A claim for salvage is secured by a lien, and the lien cannot arise except from a maritime contract or a maritime tort. Salvage, clearly, is not a tort. When the effort to save property exposed to perils of the sea is successfully performed, an obligation at once arises upon the part of the owner of the salvaged property to compensate the salvor for such service. The compensation is to be measured by the risk encountered and the heroism displayed in the successful enterprise. *The Oregon* (D. C.) 27 Fed. 872. The courts award such compensation in a liberal spirit, as well to reward the salvor as to encourage others in similar cases. *The Alphonso*, 1 Curt. 376, Fed. Cas. No. 17, 749. *The Sandringham* (D. C.) 10 Fed. 556; *The Suliote* (C. C.) 5 Fed. 99; *The Blaireaw*, 2 Cranch, 265, 2 L. Ed. 266. Salvage is said to be independent of contract. *Kenn. Civ. Salv.* p. 3. That is to say, notwithstanding any express contract made between the salvor and the owner of the property salvaged, the court will always exercise an equitable jurisdiction with respect to such an agreement, and will set it aside if inequitable in its origin. *The Waverley*, L. R. 3 Adm. & Ecc. 378. "The jurisdiction which the court exercises in salvage cases is of a peculiarly equitable character. The right to salvage may arise out of an actual contract, but it does not necessarily do so. It is a presumption of law arising out of the fact that the property has been saved; that the owner of the property, who has had the benefit of it, should remunerate those who have conferred the benefit on him, notwithstanding that he has not entered into any express contract on the subject." *In re Five Steel Barges*, 15 Prob. Div. 142. Whether, therefore, we treat a claim for salvage service as based upon an implied contract for compensation growing out of its successful event, or whether we treat it as among that class of claims "in respect of which the party would be entitled to redress

against the United States in a court of admiralty, if the United States were suable," we must conclude that the present case comes within the scope of the act of March 3, 1887. In *The Davis*, 10 Wall. 18, 19 L. Ed. 877, the question was made whether property of the United States on a salvaged vessel is liable for salvage. Mr. Justice Miller, speaking for the court, quoting the authorities, declares that there is no reasonable doubt on the subject. "We are quite satisfied," he says, "with the reasons on which the principle rests, and are of the opinion that when property of the government has been salvaged from destruction by salvors, or by those sacrifices which are compensated by a contribution in general average, justice and sound policy require that it should bear its share of the burden which the unanimous voice of maritime nations imposes on all other property in like condition." There is one exception with regard to the government, and that is that no proceeding in rem can be had in such a case. *Briggs v. The Lightboat*, 11 Allen, 157. And this on the ground of public policy. All the property of the government is held and used for public purposes. The possession of the government cannot be disturbed, as this might defeat the public purpose. *The Davis*, supra. In *The Viola* (C. C.) 52 Fed. 172, the district court of Pennsylvania took jurisdiction of and awarded salvage for a government lightship. The decree was affirmed in the circuit court of appeals of the Third circuit (5 C. C. A. 283, 55 Fed. 829). The question of jurisdiction was not raised. There is a close analogy in cases like this at bar and cases in which the government takes and uses private property for public purposes. These are the use of patents with the consent of the owner and "with the thought of compensation therefor." *U. S. v. Palmer*, 128 U. S. 262, 9 Sup. Ct. 104, 32 L. Ed. 442; *U. S. v. Berdan Firearms Mfg. Co.*, 156 U. S. 552, 15 Sup. Ct. 420, 39 L. Ed. 530. There an implied contract was construed to exist, and a suit thereon was entertained against the United States.

It might be objected that the suit is in admiralty, and that jurisdiction over cases of salvage is vested only in the district courts of the United States. *Housman v. The North Carolina*, 15 Pet. 40, 10 L. Ed. 653. But the act of congress gives jurisdiction to the court of claims of cases in which the party would be entitled to redress in a court of admiralty as well as in a court of law or equity. That court has uniformly entertained jurisdiction and awarded compensation in cases of salvage. *Gould v. U. S.*, 1 Ct. Cl. 184; *Bryan v. U. S.*, 6 Ct. Cl. 128, in which this point is decided; *McGowan v. U. S.*, 20 Ct. Cl. 147. The act of congress gives the circuit court, in cases of claims not exceeding \$10,000, precisely the same jurisdiction as the court of claims. It is true that the form of proceeding in the case at bar is the same as a libel in admiralty. But this is merely modal and formal. The essence of the pleading is a petition to be awarded compensation for valuable and highly meritorious services rendered the government in saving its property in maritime peril. The facts are stated in the terse and clear form adopted by admiralty courts for similar cases. We are of the opinion that the circuit court was not in error in permitting the petition to be filed, in requiring the respondent to answer, and in adjudicating the case.

The merits of the case require little discussion. The petitioner is master of the Frank A. Lowe, a steam tug 76.5 feet long, 16.7 feet beam, 7.9 feet deep, gross tonnage 52.67 tons, crew, all told, five men. Her value is about \$15,000. She was used in towing vessels in the Elizabeth and James rivers, Chesapeake Bay, and adjacent waters, and on the high seas. The regular station of the United States lightship No. 49 is off Smith's Island, marking the northern entrance of the capes of Virginia. She had two masts, with one sail on each, and a jib. Her crew were seven men in all, including her master. Her value was \$50,000. During a heavy gale from the northeast on the 26th of September, 1894, said lightship broke adrift from her moorings, and, after anchoring twice at intervals and losing all her anchors, said lightship was carried before the gale into Chesapeake Bay, and in past Thimble Light, a lighthouse station about three miles a little to the northward of east of Old Point Comfort. She passed Thimble Light in the afternoon of the 27th, and had set two of the three sails she carried, the other, the foresail, having been carried away in the gale, and her spare foresail not having been bent. The sails she had set were a jib and a mainsail, closereefed. The tide was running strong flood, and the wind, though it had slightly moderated, was still blowing a heavy gale from the E. N. E. The sea was described by many witnesses as being the highest ever known in Hampton Roads. The tug Lowe had gone out in the teeth of the gale to seek communication with a schooner, the Jane Burrell, which had broken from her anchorage in Hampton Roads, and had drifted against a steamship. The tug had not been able to get up to the schooner, and could only communicate with her by floating a bottle with a message therein. About 4 o'clock in the afternoon, Capt. Morgan, on the Lowe, sighted lightship No. 49 between Old Point and the bell buoy, a buoy situated a little more than half way between Old Point and the mouth of the Elizabeth river (as shown on the chart herewith filed as evidence in this cause), coming up before the wind and sea with a signal for assistance, consisting of a flag in the rigging. The master of the lightship, upon seeing the tug, had hoisted this signal. The tug immediately went to her assistance in answer to this signal, which master of the tug describes as a signal for a tow, but, owing to the gale of wind and heavy sea prevailing, was unable to approach her in the usual manner from the leeward and pass a hawser, but found it necessary to go the windward side and use a heaving line. Three efforts to cast this heaving line were made before it was caught on board the lightship, the tug, in the meantime, being in the trough of the sea, with the seas breaking over the man casting the line. A hawser from the tug was thus finally passed to the lightship between half past 4 and 5 o'clock on the afternoon of April 27th, and the lightship was then taken in tow and towed by the tug with some difficulty until she had gone up the river a little distance, but afterwards with little trouble, and brought to the buoy wharf at Portsmouth, where she arrived at 7:30. The circuit court, hearing all the testimony, awarded the tug \$1,200, as for a salvage service of low order of merit, on the border line of towage service, or, as the judge below expresses it, extraordinary towage. The

award is liberal in the extreme. Yet we cannot say that it is in violation of just principles, or a clear and palpable mistake, or a gross overallowance. Under these circumstances, the award will not be disturbed. The *Akaba*, 4 C. C. A. 281, 54 Fed. 198; *Transportation Co. v. Pearsall*, 33 C. C. A. 161, 90 Fed. 439; *The Excelsior*, 123 U. S. 40, 8 Sup. Ct. 33, 31 L. Ed. 75. The decree of the circuit court is affirmed, without costs.

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THE KIRK HILL.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1900.)

No. 309.

1. SHIPPING—CHARTER PARTIES—CLEAN BILLS OF LADING.

A British ship was chartered to carry cotton to Germany in November, when storms are likely to be encountered. For a distance amidships, and extending from side to side, was an upper deck house, supporting the officers' bridge, in which erection were gaps forward and aft of the bridge, where the main deck was left open. The covering over the midship part of such deck space had fore and aft passages on each side leading out, which were called "alleyways." At the front end of each alleyway was a door opening out on the open main deck. Bales of cotton were placed as close as possible on the outboard side of such passage, so as to leave a narrow gangway alongside the cotton for the passage of the crew and engineers. The spaces were covered over, but could not be permanently closed in, as the doors in the end have to be opened by the crew in passing in and out. The spaces could not be made water-tight, because they could not be covered by tarpaulin covers, and the doors had to stand the full impact of the seas which might sweep over the deck. *Held*, that the master of the ship was justified in refusing to give a clean bill of lading for the cotton stored in the alleyways, under the general rule that a clean bill of lading negatives any carriage except under deck.<sup>1</sup>

2. SAME—CONSTRUCTION OF CHARTER PARTY.

A charter party of a British ship provided that bills of lading were to be signed when presented, without prejudice to the charter party, for any portion of the cargo, and at any rate of freight. It also provided that the whole of the steamer, including cross bunkers, bridge, deck bunkers, alleyways, peaks, lazarettes, space under bridge, deck, etc., consistent with the steamer's seaworthiness, and all covered-over spaces on deck, should be placed at the disposal of the charterers, for their sole use. The English Board of Trade, in its official manual to surveyors, directs that permanent erections, with one or more openings in the sides or ends, not fitted with doors, or other permanently attached means of closing them, shall not be measured or included in the tonnage. The charter party gave the net registered tonnage, and guaranteed a certain number of cubic feet "of actual cargo space available for cotton in bales," in consideration whereof freight was to be paid at a certain sum per ton, net register, British measurement. *Held*, that the clause placing "at the disposal of the charterers" certain additional deck spaces did not impose on the master of the ship the duty to sign clean bills of lading for cotton stored in alleyways spaces on deck, which could not be permanently closed because of the crew being compelled to pass through such spaces.

Appeal from the District Court of the United States for the Eastern District of North Carolina.

Thomas Evans, for appellant.

Harrington Putnam, of Cowen, Wing, Putnam & Burlingham (George Rountree, on the brief), for appellee.

<sup>1</sup> As to bills of lading, see note to *The Dunbritton*, 19 C. C. A. 465.

Before SIMONTON, Circuit Judge, and PAUL and BRAWLEY, District Judges.

**BRAWLEY, District Judge.** The British steamship *Kirkhill*, of 2,347 tons net register, and guarantied to have at least ——— cubic feet of actual cargo space available for cotton in bales, was chartered September 13, 1897, to load a full and complete cargo of cotton from the port of Wilmington, N. C., to Hamburg, Bremen, Amsterdam, or Rotterdam. The ship commenced loading on October 16th, and in progress of loading a dispute arose as to whether the charterers had the right to load cargo in certain alleyways which at that time, as appears from the master's protest, were filled with coal for the voyage. At a later date, and before the loading was completed, the master removed the coal there stowed to the deck, and gave notice to the charterers that he would stow cotton there, but that he would only sign bills of lading for the alleyways cargo at the shippers' risk, as the cotton stowed in the alleyways would be necessarily exposed to the weather during the voyage, and might meet with some damage. To this proposal the charterers objected, and demanded a clean bill of lading for the part of the cargo to be stowed in the alleyways. Upon the refusal of the master to give such clean bills of lading, the ship was cleared for Bremen on November 5, 1897, and this libel was filed, alleging damage caused by the refusal to sign clean bills of lading for the proposed alleyways cargo. The district court held that the libelant had no right to demand a clean bill of lading for this portion of the cargo, and dismissed the libel.

The sole question for decision is whether the charterer was entitled to demand clean bills of lading for cotton which was to be carried in the alleyways spaces on deck. The record does not contain a precise description of the steamship *Kirkhill*, but the alleyways spaces were described in the argument before us by the proctor for appellee, and the description was accepted as substantially correct, and is about as follows: For a distance amidships, and extending from side to side, is an upper deck house which supports the officers' bridge. There are gaps in this deck erection forward and aft of the bridge, where the main deck is left quite open. The covering over the midship part of such deck space is for the protection of the engine room and the quarters for the men, with fore and aft passages on each side leading out. These are the alleyways. At the front end of such a passage or alleyway is a door of wood or iron opening out upon the open main deck, and, when cotton is stowed there, bales are placed as close as possible in the outboard side of such passage, so as to leave a narrow gangway alongside the cotton for the passage of the crew and engineers. Such spaces are covered over, but cannot be permanently closed in, as the doors at the end have to be opened by the crew in passing in and out. They cannot be made water-tight, because they cannot be covered, as are the hatches, by tarpaulin covers, which prevent possibility of leakage. These vertical doors at the front of the alleyways have to stand the full impact of the seas which may sweep over the deck.



The damage which might occur to cotton stowed there was described in the recent case of *The William Crane* (D. C.) 50 Fed. 444. In that case, on a voyage from Savannah to Baltimore, the steamer encountered a severe storm, and shipped a heavy sea on the starboard side near the bow, just forward of the bulkhead inclosing the starboard alleyway, and the wave boarded the vessel with such force that it flooded the forward main deck, broke down the bulkhead on the starboard side, wrenched off seven feet of wooden shutter next to it, and, crossing the ship, burst open the iron cargo ports and bulwarks on the port side, carrying away a portion of the port rail, flooding the starboard alleyway, and saturating the cotton so that it suffered damage to the extent of \$10 a bale. The district court was satisfied, by the testimony in that case, that this location in that vessel was "as safe for cotton as below the hatches of the main deck," these alleyway spaces being designed in the planning of the ship for carrying cargo, and that the established rule that a clean bill of lading imports that the goods are to be carried under deck was not applicable to "steamers navigating our inland and coastwise waters on short voyages."

There is a difference in the construction of American coastwise steamers and British cargo steamships, but the record does not enable us to point it out with precision. It is clear, however, that cotton stowed in alleyways, such as are above described, is subject to special dangers and hazards beyond the ordinary sea perils to cargo carried below and secured under deck. Especially is this the case with cotton shipped for a winter voyage on the North Atlantic in the month of November, when storms are likely to be encountered.

In *The Waldo*, Fed. Cas. No. 17,056, a portion of a cargo of potatoes was stowed on deck, and a clean bill of lading was given therefor. The ship was held liable for the damage to the deck cargo, although there was some proof that it was stowed on deck with the knowledge of the shipper; the court holding that there is a presumption in every contract of affreightment that the goods shall be secured under deck. "It is for a master, who would exempt himself from the risks of a deck passage, to remove that presumption. The ordinary and proper evidence would be a memorandum to that effect on the face of the bill of lading."

In *The Wellington*, Fed. Cas. No. 17,384, 635 barrels of apples were shipped from Vermilion, in the state of Ohio, to be delivered at the port of Milwaukee. One hundred and ninety-five barrels had been stowed on deck, and in the storm were jettisoned. A clean bill of lading had been given. Upon a libel to recover their value, the court says:

"I conclude, upon principle and authority both, that parol evidence of agreement or consent of the shipper that his goods may be stowed on deck cannot be received where a clean bill of lading is given, and full freight is charged, as in this case. Here was a clean bill of lading, a transfer of which would vest the title to 635 barrels in the purchasers. The master should have made a memorandum on the bill of lading, or have required the written consent of the shipper on the bill that the number of barrels not receivable under deck might be shipped on deck."

In some of the earlier cases in this country it was held by some of the state courts that proof of a well-known usage might be received to overcome the presumption from a clean bill of lading, but the weight of the best authorities is that a clean bill of lading negatives any carriage except under deck. Such was the rule in New York, where Nelson, C. J., says in *Creery v. Holly*, 14 Wend. 26:

"It is true, in this case, that nothing is said in the bill of lading as to the manner of stowing away the goods, whether on or under the deck, but the case concedes that the legal import of the contract, as well as the understanding of the usage of merchants, imposes upon the master the duty of putting them under deck, unless otherwise stipulated; and, if such is the judgment of the law upon the face of the instrument, parol evidence is as inadmissible to alter it as if the duty was stated in express terms."

The case of *Lenox v. Insurance Co.*, 3 Johns. Cas. 178, was an action against the underwriters upon goods partly shipped on deck and partly below for loss sustained by the deck lading having been thrown overboard for the common safety. The court (Chancellor Kent being then chief justice) held that the loss of the lading on deck could not be charged as general average. "An insurance does not reach goods on deck unless expressly mentioned. They are not considered as part of the cargo in which the other shippers are interested. The owners of the cargo under cover ought not, therefore, to contribute to the jettison of goods on deck."

The subject had full consideration in *The Delaware*, 14 Wall. 596, 20 L. Ed. 783, where some pig iron shipped from Portland, Or., to San Francisco, was stowed on deck and jettisoned in a storm. A clean bill of lading was given therefor, and the defense was that, by a verbal agreement between the shippers and the master of the ship, the iron was stowed on deck. The court held that parol evidence of this agreement was inadmissible, and, after a full review of the authorities, Justice Clifford says: "It is the settled law in this court that a clean bill of lading imports that the goods are to be safely and properly stowed under deck." Such is the law in England. *Stev. Stowage* (7th Ed.) pp. 164-174; *Shipping Co. v. Dixon*, 12 App. Cas. 11; *The Oquendo*, 3 Asp. 558. The reason for the rule is obvious. Bills of lading are documents which pass from hand to hand. They enter largely into the commercial business of the world, and the strict rights of the holders must be absolutely maintained, or they will lose a material part of their value as instruments of commerce. As a clean bill of lading imports a carriage under deck,—that is, in the part constructed for the carriage of cargo,—a stowage in any place less safe would work a fraud upon the purchaser or insurer unless the consent to such stowage is expressed in a form to be available as evidence under the general rules of law, and the proper way is to note it upon the bill of lading itself; for, once issued and passing into other hands, its terms cannot be qualified by any provisions in the charter party which, though the original contract, is thereafter *res inter alios*.

It cannot be doubted that cotton stowed in the alleyways, as above described, would be in a more perilous situation than if stowed under deck. Outside the extra peril from accidental fire communicated by seamen and firemen passing along the alleyways, it is so

nearly certain that the ship would experience gales and heavy seas in a voyage through the North Atlantic to the port of Bremen in that season of the year that the master could not be excused if he failed to act on the assumption that they would occur, and, in case of peril necessitating a jettison, it would be unreasonable not to assume that cotton so stowed, being within easy reach of the crew, would be jettisoned, and it would be a fraud upon the underwriter if the bill of lading failed to give the information necessary to estimate the risk, and calculate the premiums accordingly. If such damage occurred, the holder of an unqualified bill of lading could, in all fairness, hold the ship responsible for emitting a misleading document of title.

It is contended by the appellees that in *The Delaware*, 14 Wall. 579, 20 L. Ed. 779, and in *Lawrence v. Minturn*, 17 How. 100, 15 L. Ed. 58, the vessels were sailing ships, and that the expression "on deck" has reference only to open decks, and that those cases cannot properly apply to steamships which have covered spaces securely constructed on deck. We have given due consideration to this contention, but our opinion is that cotton stowed in the alleyway spaces, above described, would, for reasons already stated, be subject to perils other and greater than if stowed below deck; and, as this cargo was destined to a Continental port, it may be well to refer to some of the provisions of the Continental codes as furnishing reasons for precaution by the master. Some of the earlier authorities are cited by Mr. Justice Curtis in *Lawrence v. Minturn*, 17 How. 100, 15 L. Ed. 58. The codes of France, Holland, and Germany prohibit the carriage of goods on deck without the consent of the shipper, and a late and high authority (*Desjardins*) thus discusses the question:

"But whether it concerns this house or the poop, even built into the ship and covered like it, the law makes no distinction. This mode of lading resembles much loading on deck, and it is not like loading into the interior of the vessel. It has almost all of the inconveniences of the former, and has not the advantages of the latter. Goods stowed in the interior, as M. Bedarride well explains, are protected by the sides of the ship. They can be damaged by seawater, but will not be carried away unless the ship itself, broken in, or foundering, perishes. Placed in the poop, goods are much more exposed to the invasion of seas. They may even be carried away with the poop, as has often been seen. Finally, such goods are right under the hands of the crew, and are the first they will get rid of, if there is a necessity for a jettison. To load in the poop is to load on deck (*Charger dans la dunette c'est charger sur le tillac*)." *Traité de Droit Maritime*, tome 2, par. 431 (Paris, 1880).

Another commentator says:

"Should the provisions which forbid loading on deck be understood as likewise forbidding loading in the poop or in the deck house of the vessel? The doubt arises from the fact that these goods are then under cover. But, in my opinion, that does not suffice. Deck house and poop in reality rise up on the deck; and that which article 229 appears to require is that, unless there is a contrary agreement, the lading should take place in the body of the ship, where the goods are sheltered, without compromising its stability." *Valroger, Droit Maritime*, tome 1, par. 391 (Paris, 1883).

The main contention of the appellee is that the charter party in this case is a complete contract of affreightment, and that, therefore, its terms bound the ship to its fulfillment, and that the master

had no power to change or modify its terms. The fourth and ninth clauses of the charter party are cited in support of this contention. They are as follows:

"(4) Bills of lading to be signed as and when presented, without prejudice to this charter party, for any portion of the cargo, and at any rate of freight, and when signed, if the marks and number of bale and of packages agree with the mate's receipts, shall (in the absence of fraud or obvious error) be conclusive evidence of the quantity of cargo shipped."

"(9) The whole of the said steamer, including cross bunkers, bridge, deck bunkers (if any), alleyways, peaks, lazarettes, space under bridge, deck, poop, deck room, consistent with the steamer's seaworthiness, and all covered-over spaces on deck, together with such other spaces where steamer has previously carried cargo, or would carry cargo, if she were to load entirely for the owner's benefit, with the exception only of the ordinary side bunkers, engine, and boiler house, engine room, captain's and officers' cabins, and necessary room for the accommodation of the crew, shall be placed at the disposal of the charterers, for their sole use, and no other goods shall be taken on board without their written permission. All wooden bulkheads and shifting boards to be taken down and carried on deck. The owners to furnish the charterers with a complete diagram of the steamer, showing the correct net measurement of every compartment. Any difference in the amount of freight between the bills of lading (and drafts for disbursements referred to below) and this charter party to be settled at port of lading before sailing; if in favor of vessel, by cash at current rate of exchange, less insurance; if in favor of charterers, by usual draft of master, payable three days after arrival at port of discharge, or sixty days after date, whichever occurs first, to the order of the charterers or advancers; and the agents, with the consent of the owners, do hereby authorize the master to sign such drafts, and said drafts shall be a lien against the freight, taking precedence of all other claims."

Construing provisions of a charter party similar to clause 4, Justice Fenner, in *Gomila v. Adams*, 36 La. Ann. 221, says:

"It is clear to our minds that this clause had no reference to anything but the rate of freight. It simply said to the charterers: 'You are bound, it is true, to pay me the rate of freight agreed upon between ourselves, but you may make contracts with shippers at any rate you please, and insert it in their bills of lading, and we will sign them as presented, provided you pay the difference if the freight is less, and we will pay you if it is greater, than that agreed between us.'"

Judge Brown, in *The Sprott* (D. C.) 70 Fed. 329, construing these words, says: "This means as lawfully and rightly presented under the charter provisions,"—quoting *The Tongoy* (D. C.) 55 Fed. 329, where the master, before signing bills of lading which he claimed were incorrect, indorsed on them that a certain amount of cargo was in dispute.

The shippers accepted the bills under protest, and then libeled the vessel. Judge Toulmin, hearing the case upon the merits, dismissed the libel, and says:

"The contention on the part of the libelants here is that under the contract in this case the master was bound to sign any bills of lading presented by the shippers in good faith, whether the quantity of lumber specified in the bills of lading had been actually received or not. [With this contention he did not agree.] My opinion is that under this clause in the charter party \* \* \* he is not compelled to sign bills of lading without reserve."

We are of opinion that this clause of the charter party should not be construed so literally as to require the master to sign any bill of lading that may be presented. Bills of lading become documents of title, which pass from hand to hand, and should state the

truth of the transaction. There should be no misrepresentation of the quantity of goods received, and no suppression of any material fact as to the terms upon which they are to be transported, and any excepted perils or qualifications of liability should be clearly stated; for, while the charter party, where there is one, constitutes the contract, the bill of lading is excellent evidence as to its terms, which should be expressly and correctly incorporated therein. "Unless the bill of lading contains a special stipulation to that effect, the master is not authorized to stow the goods sent on board as cargo on deck; as when he signs the bill of lading, if in common form, he contracts to convey the merchandise safely in the usual mode of conveyance, which, in the absence of proof of a contrary usage in the particular trade, requires that the goods shall be safely stowed under deck." The Delaware, 14 Wall. 604, 20 L. Ed. 784.

We do not think that the ninth clause of the charter party, which placed "the whole of said steamer," including cross bunkers, bridge, deck, bunkers, alleyways, peaks, deck, poop, etc., "at the disposal of the charterers," imposed upon the owners the duty of stowing goods there upon like terms with goods stowed under deck. These spaces are not parts of the ship's hold, and the usual terms, "the whole reach and burden of the ship," would not include such deck spaces. The *Kirkhill* is a British ship, and in the official manual to surveyors, issued by the board of trade, it is directed that "poops, bridges, or any other permanent erections, with one or more openings in the sides or ends not fitted with doors or other permanently attached means of closing them, should not be measured and included in the tonnage." Instructions Relating to Measurements of Ships, p. 6 (London, 1898). See, also, White, Merchants' Shipping Act, 1894, p. 466, § 85.

The first clause of the charter party gave the net registered tonnage, and guarantied a certain number of cubic feet "of actual cargo space available for cotton in bales, in consideration whereof freight shall be paid as follows: Thirty-six shillings and six pence per ton net register, British measurement." The ninth clause simply placed "at the disposal of the charterers" certain additional deck spaces. It did not require that the charterers should stow cotton in such places on deck under liability for dead freight if they failed to do so, but, these deck spaces being simply "at the disposal of the charterers," it seems to us that it would be unreasonable to impose upon the shipowner the same measure of liability for cotton stowed there which the law imposes when cotton is stowed under deck, and that the master was clearly within his right when he refused to give a bill of lading, except "at shipper's risk," so that an innocent holder would be clearly advised that the cotton was not under deck, which a clean bill of lading would import. In a recent case in the house of lords, it appeared that 25 bales were carried on deck and were jettisoned, the bills of lading for part of the same shipment contained the words "under deck," but as to 25 bales these words were omitted. It was claimed that by the usage in New Orleans steamers trading to Liverpool were in the habit of carrying cotton on deck. Lord Halsbury, chancellor, said:

"It appears to me that there is no real difference between the bills of lading. 'Expressio eorum quæ tacite insunt nihil operatur;' and I think it is clear, therefore, that this cotton was carried under a contract that it should be stowed under deck. The exception in the bills of lading of 'jettison' cannot avail the shipowners, who broke their contract in stowing the cotton upon deck, and thereby directly caused the loss to the merchants. That this would be the general law was not, indeed, disputed, but it was said that a practice prevailed at Liverpool, so extensively practiced that it must have been known to the plaintiffs, of loading cotton upon deck. But the very same evidence which established the practice established also that the shipowners paid for any damage resulting from the practice. Now, as they could only be called upon to pay as for a breach of their contract, it follows that the supposed practice established no more than this: that a great many people in Liverpool were in the habit of acting in breach of the contract into which they had entered, and were in the habit of paying damages when injury resulted from such breach. How such a practice can be supposed to affect the contractual relations of merchant and shipper I am wholly at a loss to understand, or how the generality of such a practice could alter the legal rights of the parties more than a single example it is equally difficult to discover. Every carrier by land, as by water, when he breaks his contract, and causes damages thereby, is liable to be called upon to make good the damage; but how such a liability, and constant submission to damages for such liability, can license the supposed breach, is a problem that has never been solved." *Shipping Co. v. Dixon* [1886] 12 App. Cas. 11, 16.

It is well settled that an ordinary policy of marine insurance does not cover goods carried on deck. 2 *Joyce, Ins.* § 1726. The decree of the district court is affirmed.

#### THE JANE GREY.

(District Court, D. Washington, N. D. January 17, 1900.)

**1. SHIPPING—CARRIERS OF PASSENGERS—ESTOPPEL TO DENY RESPONSIBILITY AS OWNER.**

A large mercantile corporation, one of whose stockholders and directors was the owner of a vessel, advertised through the newspapers and by means of signs placed on the vessel while in port that she was operated by the corporation, and would be dispatched by it on a voyage for the carriage of freight and passengers, the standing of the corporation presumably influencing passengers and shippers to some extent to patronize the vessel. On the voyage the vessel was lost, together with her cargo and many of her passengers. *Held*, that the corporation could not escape liability as an owner by showing that it in fact had no interest in the vessel nor her voyage.

**2. SAME—LIABILITY OF OWNERS—FAULT OF VESSEL OR MASTER AND CREW.**

Evidence considered, and *held* to show that the loss of a schooner, which foundered without due stress of weather, was due either to some fault in the vessel or on the part of her master and crew, which gave a legal claim for compensation against the owners to the surviving passengers and the representatives of those who were lost.

**3. SAME—LIMITATION OF LIABILITY.**

The failure of a sailing vessel to carry a sufficient supply of life preservers for her passengers, which is not required by act of congress nor by custom, cannot be charged as a fault against the owners, who intrusted her equipment entirely to a competent master, which will deprive such owners of the right to the limitation of liability provided by Rev. St. § 4283.

**4. SAME—LOSS OF CARGO AND PASSENGERS' EFFECTS—EXEMPTION FROM LIABILITY UNDER HARTER ACT.**

Where, before entering upon a voyage, a ship was surveyed by three competent and experienced men, employed respectively by the owners and

the insurers, and was by all pronounced staunch and seaworthy, and the owners employed men of skill and experience to overhaul the vessel and make all needed repairs, to supply and equip her for the voyage, and stow the cargo, and also an experienced master and crew, and no neglect or mistake in such particulars is shown, the owners must be held to have exercised due diligence to make the vessel seaworthy, and properly manned, equipped, and supplied, and to be relieved from all liability on account of loss of property, by section 8 of the Harter act.

5. SAME—CONSTRUCTION OF STATUTE—PENDING FREIGHT.

The interest of the owners in a "vessel and her freight then pending," within the meaning of Rev. St. § 4283, limiting their liability in certain cases, is intended to include their entire interest or investment in the adventure, and they are not entitled to make any deduction from the gross amount of freight and passage money pending on account of any expenses incurred for the voyage.

In Admiralty. This was a proceeding by the owners of the schooner Jane Grey for limitation of their liability growing out of the sinking of the vessel during a voyage. On final rehearing.

Stratton & Powell and White, Munday & Fulton, for petitioners.

J. M. Wiestling, Bausman, Kelleher & Emery, and John A. Haight, for cross libelants.

HANFORD, District Judge. Mr. John G. Pacey, as owner of the American schooner Jane Grey, which foundered at sea on the morning of May 22, 1898, and certain of his business associates, commenced this proceeding in this court, pursuant to the provisions of the statutes limiting the liability of owners of vessels for damages resulting from marine disasters. In their petition they aver that the Jane Grey filled with water and sank in the Pacific Ocean, and became a total loss, and that 34 of the passengers and 3 of the crew on board were drowned, and that "said accident happened, and the loss, damage, injury, and destruction above set forth were occasioned, done, and incurred without fault or privity or knowledge of your petitioners, or any of them, and was due solely to the perils of the sea." The petition also avers as the reason for joining other persons with the owner of the schooner in the petition that a number of actions to recover damages have been commenced, in which all the petitioners are charged as being joint owners of the Jane Grey, and jointly liable for damages alleged to have been sustained. The object of the petitioners in this proceeding is to obtain an injunction to prevent the prosecution of the several damage suits which have been commenced as aforesaid, and to have a decree declaring the petitioners to be entirely exempt from all liability, or, if the court shall determine that any legal liability exists to render compensation for losses or injuries on account of said disaster, that the petitioners, and each of them, after paying into court for the benefit of persons entitled to such compensation the amount of pending freight, may be exempted from further liability. Pursuant to the rules governing such proceedings, the court appointed an appraiser, who, after receiving evidence, ascertained and reported to the court that the amount of pending freight for the voyage was the sum of \$4,392.18, that being the gross amount of freight and passage money for the voyage; and in his report to the court

said appraiser shows that he refused to make any deductions for expenditures in supplying and equipping the vessel for the voyage, and for wages paid to the captain and crew. The petitioners filed exceptions to said report, and, without waiving the same, filed a stipulation by which they became bound to pay said amount into court whenever the court shall so order. Six of the surviving passengers, and the widows and heirs of several whose lives were lost, have appeared in opposition to the petition, and have filed cross libels, in which they charge that the disaster and the consequent losses of life and property and personal injuries were occasioned by the wrongful conduct of the petitioners in knowingly sending the Jane Grey on said voyage when she was rotten, weak, and unseaworthy, and without boats or equipment necessary for the safety of her passengers, and very much overloaded; and each of said cross libelants prays for a decree against the petitioners jointly for full damages and costs. The court has heretofore overruled exceptions to the several cross libels in which damages are demanded for lives lost (see 95 Fed. 693), and since said ruling a large amount of testimony has been taken relative to the facts of the disaster, and the condition and appearance of the vessel, the nature and quantity of her cargo, and the manner in which it was stowed, and the case has been argued and submitted upon the questions raised by the pleadings, which are:

First. Whether the petitioners, other than Mr. Pacey, are liable as owners.

Second. Whether the loss of the vessel and the resulting injury happened in consequence of any fault in the vessel, or neglect of duty on the part of her owners, master, or crew.

Third. Whether the losses and injuries were occasioned or incurred without the privity or knowledge of the owner or owners, within the meaning of the terms used in section 4283, Rev. St. U. S., which reads as follows:

"Sec. 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

Fourth. Whether the owner or owners exercised due diligence, before the Jane Grey started on her voyage, to make said vessel in all respects seaworthy, and properly manned, equipped, and supplied within the meaning of the terms used in the third section of the act of congress commonly called the "Harter Act" (2 Supp. Rev. St. U. S. p. 81), which reads as follows:

"Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God,



or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."

Fifth. If there is any legal liability, and if the owner or owners are entitled to the benefit of the limitations prescribed by the statutes, whether any deductions shall be made from the gross amount of freight and passage money for the voyage on account of the expenses of the voyage.

1. It is certainly established by a fair preponderance of the evidence that Mr. Pacey was, in law and in fact, the sole owner of the Jane Grey. Mr. Pacey was, however, a stockholder, trustee, and one of the managing officers of a mercantile corporation, and with his knowledge and consent, and the knowledge and consent of the other trustees and managing officers, said corporation advertised extensively through the daily newspapers and other mediums, and by a sign conspicuously displayed on the rigging of the Jane Grey while she was at the dock receiving her cargo, at and before the time of the sale of passage tickets to the passengers who went upon her, that said corporation was operating said vessel, and would dispatch her as a carrier of freight and passengers from Seattle to Kotzebue Sound. The evidence is direct and positive that the corporation did not, in fact, control the operation of the vessel, and was not interested in the venture, and that the representations made to the public by means of said advertisements were merely intended to attract public attention to the corporation as a dealer handling large stocks of general merchandise. The advertisements certainly were calculated to influence people to take passage on the Jane Grey in preference to other vessels bound for Kotzebue Sound, and it may be presumed that all of her passengers were to some extent influenced, as they would naturally be, upon being solicited by or on behalf of a large and flourishing business house; and it is, therefore, too late, after sending the vessel upon the very voyage which she was advertised to make, with a large company of passengers, who were thus influenced to go upon her, for the advertiser to change to a more favorable position with respect to its liability by offering true information at variance with representations previously made. I hold, therefore, that the corporation is estopped, and it cannot be permitted to dispute liability as an owner of the vessel for the voyage. There is no evidence upon which to base a finding that the other petitioners were, as individuals, interested in the venture, nor that any of the passengers were induced to go on the Jane Grey by any representations from which it might have been inferred that said petitioners were individually responsible in any way for the operation of the vessel. Therefore Mr. MacDougall and Mr. Southwick are entitled to have a decree exempting them from personal liability.

2. The cause of the loss of the Jane Grey cannot be determined with certainty. Probably the truth as to the cause of the disaster will never be known until the great ocean shall reveal the secrets buried in its depths. The vessel was comparatively new, and yet

she had made long voyages from the Atlantic to the Pacific Ocean, had crossed the Pacific, and had navigated the Arctic Seas in the business of whaling, for which she was built; so that by actual service she had been proved to be staunch, strong, and seaworthy. In the month of March, 1898, she was docked at San Francisco, and was newly caulked and painted, and at the same time she was inspected by two competent marine surveyors representing different insurance companies, who found her to be sound, and in good condition, and each made a report upon her to that effect. Upon her arrival at Seattle she was examined by a shipbuilder employed for that purpose by Mr. Pacey, who relied upon his report that she was sound, and in good condition, in completing his purchase of her. Just previous to being dispatched on her last voyage, she was overhauled generally, and equipped for the voyage, under the direction of a captain who was reputed to be a man of experience and good judgment, and who, according to the undisputed testimony, was allowed to have everything done to fit her for her contemplated voyage that he deemed to be necessary. According to the undisputed evidence, the cargo, which consisted of coal, flour, lumber, miners' implements, provisions, and miners' outfits, and some machinery, was carefully stowed under the captain's directions, by the mate and crew, who were competent for that work. Besides her freight, there was placed in the bottom of her hold 40 to 50 tons of rock ballast, which was planked over and made secure. The cargo placed on top of this flooring was sufficient to fill the space to her deck beams. There were also in the hold two large water tanks, resting upon the bottom, which contained 1,200 gallons of water. The vessel had capacity to carry 160 tons of freight, but on this voyage her whole burden, including passengers, crew, stores, water, cargo, ballast, and a new house, built for the accommodation of passengers, on the forward part of her main deck, did not exceed 140 tons, less than 20 tons of which was above her deck. She was also inspected by two experienced mariners at the instance of passengers who must have been encouraged by the reports made to them, for they trusted their lives and property to her seaworthiness by going upon the voyage in her.

The Jane Grey was designed for a whaler. Her model was medium sharp below the water line, but she was tender sided; that is, intended to roll easily, to facilitate the work of hoisting on board whale blubber from the sea. Her natural crankiness was increased by her deck load and the new house, but she was not top-heavy. The deck load consisted of two steam launches placed upon her quarter-deck, the weight of which, with the machinery therein, amounted in the aggregate to a little less than  $1\frac{1}{2}$  tons; 18 barrels of water, weighing a little more than  $3\frac{1}{2}$  tons; 1 ton of coal, and a boiler weighing about  $\frac{1}{2}$  ton; and 1 crate of cabbage weighing 100 pounds,—all of which were placed on the main deck a midship, or nearly so; one ship's boat hung on the davits at the stern, and on top of the forward house one ship's boat, a dory, and lumber and materials for four other boats, weighing in the aggregate less than half a ton; two cases coal oil, weighing about 100 pounds;

600 pounds of fresh beef; a circular saw and odd pieces of machinery and gas pipe,—all of which was only of trifling consequence as regards its effect either as to weight or bulk. The bulwarks were built up about  $3\frac{1}{2}$  feet high above the deck, and the forward cabin was extended about  $3\frac{1}{2}$  feet above the top of the bulwarks. The after cabin was the usual construction; that is to say, the floor was below the level of the main deck, and the roof formed a poop deck. Considering all the testimony as to the construction of the vessel and the manner in which she was ballasted and stowed, it is clear that, while she would roll easily, she ought not to have capsized. If she was listed over by pressure of the wind upon her sails, or by the force of the sea striking her, she ought to have righted up again easily, unless she was held down by the wind upon her sails, or her cargo shifted. If her cargo or ballast moved, the captain, mate, and others of the survivors whose testimony has been taken, failed to hear any sound or feel any jar indicating such an occurrence. The evidence is equally convincing that the Jane Grey was staunch and sound, her pump was in good working order, and was tried regularly every hour during the night before she foundered, without showing any indication that she was leaking. In an open sea, without any injury to her hull, a vessel in her condition ought not to have suddenly opened her seams, and become water-logged; and, if she did, she would naturally sink straight down, instead of laying over on her side. As to what did actually happen, the testimony shows that, after being towed from Seattle to Port Townsend, the Jane Grey sailed down the Straits of Fuca and out to sea, passing Cape Flattery on the morning of Saturday, May 21st, with a stiff sailing breeze, or moderate gale, drawing out of the straits, and encountered a heavy sea rolling in. With the wind and sea coming from opposite directions she labored heavily, but proved her seaworthiness by riding the waves successfully. The waves did not break over her, as only a dead swell was rolling, but a great deal of water came upon her deck through the hawse pipes, scuppers, and seams of her bulwarks, flooding the passenger cabin situated on the forward part of her main deck. Finding that the lower bunks in that cabin were flooded, the captain put the vessel on a course before the wind, so that she would come up level, and then stopped her hawse pipes, but, as the water still came in through the bulwarks, he attempted to beat his way back to Neah Bay, intending to wait for better weather, and caulk the bulwarks; but the vessel was unable to make headway towards Neah Bay because the wind was adverse, and, on account of crankiness, the vessel would not lay up when closehauled, so as to sail to windward. After several hours of fruitless efforts, the attempt to run back to Neah Bay was abandoned, and the vessel was again turned upon her course, steering west-southwest, and she continued on that course until 8 o'clock in the evening. At that time, as the vessel was laboring heavily, and most of the passengers were sick, the captain decided to heave to. All sails were taken in except her foresail, and she was headed to the wind. Leaving the vessel in that position, the captain went to bed at 9 o'clock, and did not come

on deck again until a few minutes before the vessel went down, about 2 o'clock the next morning. The mate was on watch from 8 o'clock until 12 o'clock, when he also retired, leaving only two seamen on deck. The conditions as to the wind and sea and the action of the vessel continued about the same until about 1:30 o'clock on the morning of the 22d, at which time, according to the testimony of the seaman Carlson, the only man on deck who has survived to tell of the occurrence, the vessel was heading south-southwest, when a squall came from the southeast, which caused her to list over on her starboard side. Carlson strapped the wheel, to keep it steady, and went forward, and lowered the peak of the foresail, but, instead of righting herself, the vessel lay 'dead in the water. According to the mate's testimony, he was awakened about this time by the cook, who informed him that water was coming in the door of the after cabin; and the first thing he did was to get up and shut the door. Then he seemed to realize that something was wrong, and he went on deck, and ordered one of the seamen to "hard up his helm," and then he called the captain. According to the captain's testimony, when he came on deck the vessel was laying over with her lee rail under water. He at once called all hands on deck, and ordered the foresail lowered, and it was lowered very quickly. He next ordered the men to set the forestay sail, and that was done. Still the vessel did not lift, nor respond to her helm, but gradually settled in the water. The captain then ordered the men to set the jib, and in attempting to obey this order the halyard parted. By this time the captain realized that the vessel was lost, and he ordered the boats cut loose, and made what efforts he could to save the lives of the people on board. The vessel never straightened up, but continued listing more and more to starboard, settling gradually, so that, when last observed by the witnesses, her topmasts were bobbing up and down in the water. She went out of sight in about 10 minutes after the captain gave the order to cut the boats loose. Twenty-seven of those on board saved themselves by getting into one of the steam launches, which was not provided with oars, rowlocks, or other means of propulsion; but by means of paddles which they made out of pieces of lumber which they picked up, and an improvised sail, made out of a piece of canvass found in the boat, they finally made their way to the shore of Vancouver Island.

The argument made on behalf of the petitioners is based upon the theory that the heavy cross seas which the Jane Grey encountered strained her timbers so as to cause a large opening to be made in her planking below deck, so that she filled with water rapidly, and that her loss is due to that cause. This theory is inconsistent with the testimony showing that the vessel was staunch, sound, and newly-caulked; and also inconsistent with the fact that she did not go straight down, but laid over on her side, which a vessel loaded and ballasted as she was would not have done if she had become waterlogged through an opening below her deck. The theory of the cross libelants is that the vessel was capsized by reason of having insufficient ballast, and being loaded on deck so as to make

her top-heavy. Against this theory we have convincing evidence that the vessel was well ballasted, she was not overloaded on deck, and she successfully buffeted with wind and sea for nearly 24 hours without being capsized; and in the end she did not capsize, nor behave like a top-heavy vessel, but merely listed over when the squall struck her, and then gradually settled down as a vessel would if she were knocked over and pressed down until she filled with water through the openings in the deck. The theory which seems to me to be best supported by the evidence is that the Jane Grey was lost because of negligence and bad seamanship of her captain and crew. When she was hove to, instead of taking in her large foresail, and setting her forestay sail and her jib, so as to hold her steadily with her head to the wind, all the head sails and the mainsail were taken in, and she was left drifting without steerage way, and with only one sail,—the foresail. If the testimony of the seaman Carlson is accepted as true,—and there is nothing against it, except that in other respects his testimony is not accurate,—the vessel was struck by a squall from the southeast when she was heading south-southwest with her foresail closehauled. With a vessel in that position, the wind coming abeam would naturally do what was done to the Jane Grey; that is, lay her over on her starboard side, and hold her down. The wind would not be so directly abeam as to give her any headway; on the contrary, it would set her back, so that her helm would not be of any assistance in righting her. It certainly was not vigilance on the part of the captain for him to go to bed at 9 o'clock the first night at sea, in heavy weather, trusting the vessel so entirely to the care of his mate and seamen; and he was unreasonably slow in getting out of the cabin after the squall struck. It is probable that before his first order to lower the foresail could be executed the vessel was down so that the sea rushed into her after-cabin door, and that the weight of the water flowing in held her down after she had been relieved from the pressure of the wind on her foresail. This supposition is supported by the testimony of Mr. Livingston, a passenger who had a bunk in the after cabin, who testifies that, before he came out of the cabin he was standing in water up above his knees considerably, and that the water was rushing in. In giving his testimony on cross-examination, the captain at first stated that the vessel filled through her cabin, but immediately afterwards, in answer to a leading question, he stated that it is now his opinion that she filled from below, and that he always thought so. It is not unlikely that this captain would assent to any theory which would relieve him from responsibility for losing the vessel by bad seamanship. According to all the testimony, there was only a moderate gale of wind, and, although the waves were rolling high, they were not breaking, and the sea did not at any time break over the vessel; so her loss cannot be attributed to extreme severity of a storm, which a vessel in seaworthy condition, and handled by her officers and crew with ordinary good seamanship, should not have overcome. Therefore, whether we adopt the theory that the vessel was lost by reason of a defect in the planking or timbers, which caused an opening, and let the sea in below

her deck, or the theory that she rolled over because she did not have sufficient ballast, and was loaded on deck so as to make her top-heavy, or, the most plausible one of all,—that is, that the disaster is due to a want of vigilance, or blundering, on the part of the captain and crew,—we are led to the same conclusion, and that is that there was some fault in the vessel, or on the part of those in charge of her; and by reason of that fault, whatever it may be, the injured passengers who have survived, and the wives and children of those who are lost, have a legal claim for compensation.

3. The evidence is direct and positive to the effect that neither Mr. Pacey, nor any of the managing officers of the MacDougall & Southwick Company, knew, or had reason to suspect, that the vessel was not as she appeared to be; that is, sound and seaworthy throughout, properly ballasted, stowed, equipped, and manned for the voyage. They do not know what caused the disaster, and they cannot be blamed for not knowing, because, after studying the voluminous testimony, and giving due heed to the arguments of counsel, and considering all the facts brought to my attention, I do not know what caused the disaster, and the witnesses do not pretend to know. In the argument the owners are censured for neglecting to provide life-boats, rafts, and life-preservers. I find from the evidence that it would have been nearly, if not quite, impossible for the Jane Grey to have carried a better supply of boats. It is true that the two launches were owned by passengers, but the objection to their being considered part of the equipment of the vessel for the voyage is a mere quibble. As a matter of fact, the survivors who were actually rescued by the use of one of those steam launches did not, at the time of extreme peril, stop to inquire who owned the boat, nor refuse to seek safety in her because she had not been provided by the owners of the Jane Grey specifically for use as a lifeboat. The seaman Carlson testifies that the ship's boats were in such a bad condition as to be unfit for use, but he is contradicted in this regard by other witnesses, and his testimony in other respects is certainly inaccurate. For instance, he fixes the day of departure of the Jane Grey from Seattle on Tuesday, and says that she sailed out of the Straits the following Saturday night, and that she went down on Monday morning; while the truth is, she left Seattle Thursday, sailed out of the Straits Saturday morning, and went down on Sunday morning. And again, he testifies that the captain was on deck one hour before the vessel began to sink, while it is proved by all the other testimony bearing on the point, including the captain's own admissions, that he went to bed at 9 o'clock and did not again come out of the cabin until the vessel was in a helpless condition. I therefore reject the testimony of Mr. Carlson as to the condition of the boats. If there was any neglect to furnish the boats with oars and rowlocks, that is a mere matter of detail in the manner of the use of the equipments which were furnished by the owners. The testimony shows that there were plenty of oars on board the schooner, and rowlocks; and, if they were not placed convenient for use in an emergency, the captain and crew alone are to blame for such neglect.

With the boards and materials for boat construction which were loose on top of the forward house, and which, afloat, were just as useful as life rafts, any additional floating structures would have been a useless incumbrance. An act of congress requires all steam vessels employed in carrying passengers to keep on board and accessible a supply of life-preservers. Just why this should be required of steam vessels and not be applicable to sailing vessels engaged in carrying passengers I do not know, but congress has discriminated, and has failed to enact a law requiring sailing vessels to carry life-preservers. The testimony shows also that it is not customary for sailing vessels to carry life-preservers. In view of these facts, it would be unfair, and contrary to the spirit of the law, to deprive the owners of the benefit of the statute for failure to supply the vessel with life-preservers. Knowledge of a defect in the equipment of the vessel in this respect cannot be imputed to them, when neither the statute nor custom requires sailing vessels to carry life-preservers as a part of the equipment necessary to fit them for service as carriers of passengers. I consider that, for the safety of her passengers, the vessel ought to have carried a sufficient number of life-preservers, and her captain should have made a requisition for them, although there is no statutory requirement; but, as the owners depended upon the captain to see that the equipment of the vessel for the voyage was complete in every particular, they are exempt from personal liability for his neglect in this regard, the same as they are exempt from liability for his conduct in permitting the vessel to go adrift on a stormy night, with only two sailors on watch. It is my conclusion that the loss of the vessel occurred without the privity or knowledge of her owner, or of the managing officers of said corporation; and, having stipulated to pay the amount of pending freight, according to the report of the appraiser appointed by this court, they are entitled to the benefit of section 4283, Rev. St., which exempts them from liability for any greater amount.

4. Having employed men of experience and skill in such work to overhaul the vessel, make what repairs were found to be needed, and supply and equip her for the voyage and stow the cargo, and there being no evidence of neglect or mistake in these particulars on the part of the owners or their employés, I must find that they did exercise due diligence to make the vessel seaworthy, and properly manned, equipped, and supplied. Therefore there is no liability for loss of property. The Harter act exempts the vessel, her owners, agents, and charterers from all liability.

5. All that is available for distribution to compensate the sufferers by loss of the Jane Grey is the amount of pending freight, the vessel herself being a total loss. The phrase "freight then pending," as used in the statute, has been construed to include freight prepaid for the carriage of merchandise, and passage money, and it has been decided by the highest authority that the phrase should not be taken in a narrow sense as meaning only the freight to be earned by a successful conclusion of the voyage. The Main v. Williams, 152 U. S. 122-133, 14 Sup. Ct. 488, 38 L. Ed. 384. The

petitioners, however, by filing exceptions to the report of the appraisers appointed to ascertain the amount of the value of the vessel and her freight then pending, have raised a question as to their right to subtract from the freight then pending the amount of their expenditures in sending the vessel on her voyage. Their bill of items includes wages advanced to the captain and crew, a bill for towing the vessel from Seattle to Port Townsend, money paid to stevedores for stowing the cargo, and the price of stores and dishes supplied for the voyage. Also money which they have disbursed since the loss of the vessel, including the fees of a notary public for the protest respecting the loss of the ship, the cost of telegrams conveying information of the loss, and various sums which they paid for the comfort or benefit of the survivors. It seems to me that they might with equal propriety subtract all their other expenses connected with the purchase and fitting out of the vessel, and commissions paid to soliciting agents for inducing passengers to purchase tickets. If they can subtract the cost of supplies and dishes furnished for the voyage, they might as well include the value of the sails, rigging, anchors, cable, and hull of the ship. In the case above cited the supreme court of the United States has declared that the real object of the act limiting the liability of shipowners "was to limit the liability of vessel owners to their interest in the adventure. Hence, in assessing the value of the ship, the custom has been to include all that belongs to the ship, and may be presumed to be the property of the owner; not merely the hull, together with the boats, tackle, apparel, and furniture, but all the appurtenances, comprising whatever is on board for the object of the voyage, belonging to the owners, whether such object be warfare, the conveyance of passengers, goods, or the fisheries." The owner is required to suffer the entire loss of all that he has invested in the ship and on account of the voyage, and all that he has received for freight and passage money, and all the ship would have earned by completing the voyage; and upon condition of his yielding whatever may be saved out of the wreck and freight pending for the benefit of the shippers and passengers he is exempted from personal liability to them for "any loss, damage, or injury by collision, or for any act, matter, or thing lost, damage or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners." Except for the statute, the liability of the owner to passengers and shippers for damages in consequence of the negligence of the captain or misbehavior of the crew would be limited only by the amount of loss and by his ability to respond. As a basis for making a pro rata distribution of the fund, I fix the amount of damages awarded to each of the cross libelants who are survivors of the wreck at the sum of \$1,000, and to the cross libelants who are suing as widows and heirs of passengers who were lost with the vessel the sum of \$5,000 for each life so lost. The fund will be distributed pro rata, and on this basis will pay 12.2 per cent. of the damages awarded. The usual taxable costs will be awarded to the cross libelants.



## KUNKEL v. BROWN.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1900.)

No. 340.

**1. JURISDICTION OF FEDERAL COURTS—AMOUNT IN DISPUTE.**

The amount in dispute, in an action for jurisdictional purposes in a federal court, is determined by the amount claimed by the plaintiff in his pleading, in good faith, although such claim is made under a mistake of fact, as subsequently shown by the evidence.<sup>1</sup>

**2. APPEAL—REVIEW—FINDINGS OF FACT.**

Where an action at law in the circuit court is, by written stipulation of the parties, tried to the court without a jury, a finding of fact made by the court, if there is any evidence to sustain it, is conclusive on the circuit court of appeals.

In Error to the Circuit Court of the United States for the District of Maryland.

Milton G. Urner and W. P. Maulsby, Jr., for plaintiff in error.

George Weems Williams and Philip B. Watts, for defendant in error.

Before SIMONTON, Circuit Judge, and PAUL and BRAWLEY, District Judges.

**SIMONTON, Circuit Judge.** This case comes up on writ of error to the circuit court of the United States for the district of Maryland. The action was brought by George R. Brown against Mary E. Kunkel. The cause of action is the statutory liability of the said Mary E. Kunkel as stockholder in the Western Farm Mortgage Company. This corporation was created under the laws of the state of Kansas, and by the laws of Kansas each stockholder, in case of the insolvency of a corporation, is liable to the creditors of the corporation in the amount due on his stock, and an additional amount equal to the stock owned by him.

The plaintiff in his declaration alleges that he is a judgment creditor of the corporation; that it is insolvent; that the defendant owns the amount of \$2,200 of its stock, wherefore he is entitled to have from her, for the par value thereof, \$2,200; that he has demanded of her the same; and that she has not paid it, and wholly neglects and refuses so to do; wherefore he claims \$2,500. To this declaration defendant demurred. The demurrer was overruled. She then filed sixteen pleas on 31st July, 1897. To eleven of these demurrers were sustained, and issue was joined on five. On 28th April, 1898, defendant filed seven amended pleas and two additional pleas. These were replied to, and issues joined. On 2d May, 1899, the defendant filed five special additional pleas. The third, fourth, and fifth of them for the first time set up the defense most insisted upon. They allege, in substance, that the defendant owned 20 shares only in the Western Farm Mortgage Company; that the value of these was \$100 per share;

<sup>1</sup> Jurisdiction of circuit court, as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stirling Shoe Co. v. Roper*, 36 C. C. A. 459.

that her liability could not exceed \$2,000; and so she pleads to the jurisdiction of the court. On motion of plaintiff, these three pleas were not received. The defendant then moved to dismiss the plaintiff's suit, accompanying his motion with six exhibits, one of them going to show that the plaintiff had sued the defendant in a court of the city of Baltimore on the same cause of action, alleging that she owned 20 shares of stock, and not 22, as now alleged. The other exhibits tend to show that the recognized counsel of plaintiff had ample means of knowing, and, in fact, did know, that the defendant owned only 20 shares of stock. This motion was overruled in the court below. The cause was submitted by written stipulation to the court, without the intervention of a jury, and a verdict was found for plaintiff in the sum of \$1,458.60 and costs. Exceptions were taken, a writ of error was sued out, and the case is here on seven assignments of error. They are, in substance, these: That the plaintiff in error (defendant below) is liable only to the amount of stock held by her; that she held stock in amount \$2,000; that this is the utmost extent of her liability, and that the court had no jurisdiction over her in this case; that there is a fatal variance in the allegation in the declaration that she owned \$2,200 worth of stock, the proof being that she owned only \$2,000 worth; that the court erred in admitting certain depositions *de bene esse*, the notice of which fixed the 20th July as the day for taking them, while the return of the notary public showed that they were taken on 19th, the day before. The motion was made to suppress these depositions, but was refused by the court under its rule 32, par. 2:

"Exceptions to the execution, and return of a commission or deposition shall be made before the jury is sworn in the case, otherwise they will be considered as waived. If a commission shall have been returned and opened, and notice thereof given to the opposing party fifteen days before the commencement of the term, exceptions to the execution and return thereof shall be filed on or before the second day of the term, or shall be considered as waived. Exceptions so filed shall be heard before the jury is sworn, and may be heard at any time previously by direction of the court."

The court, cognizant of the circumstances, applied the rule. We see no error.

The question in the case is that to the jurisdiction. In a case of this kind, in which the jurisdiction depends on the diversity of citizenship, the amount in controversy must exceed \$2,000, exclusive of interest and costs. In order to determine the question of jurisdiction, we must look to the record. *Ex parte Smith*, 94 U. S. 455, 24 L. Ed. 165. It will be determined from the face of the pleadings. *Vance v. W. A. Vandercook Co.*, 170 U. S. 472, 18 Sup. Ct. 645, 42 L. Ed. 1111. In *Barry v. Edmunds*, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729, it was held that a suit cannot properly be dismissed by a circuit court of the United States as not substantially involving a controversy within the jurisdiction of the court, unless the facts made to appear on the record create a legal certainty of that conclusion. See, also, *Scott v. Donald*, 165 U. S. 58, 17 Sup. Ct. 265, 41 L. Ed. 632. So, in these cases, when the action was in tort, and the damages were laid at a sum exceeding the jurisdictional amount, the suits were sustained, although the property by which the tort was inflicted was small in

value. It is true that in some actions *ex contractu*, in which the amount recoverable is liquidated by the terms of the agreement, and this is disclosed on the record, this will settle the question of jurisdiction, notwithstanding the claim of the plaintiff for a much larger sum as damages. But this must be ascertained from the face of the pleadings, as in *Vance v. W. A. Vandercook Co.*, *supra*. So, also, if it be discovered that the plaintiff in bad faith, improperly or collusively, made a case simply to secure the jurisdiction of the federal court, on such discovery the suit will be dismissed, notwithstanding that on the face of the pleadings the court has jurisdiction. *Williams v. Nottawa Tp.*, 104 U. S. 209, 26 L. Ed. 719. But, with this exception, the nature of the case, as stated in the pleadings, must determine whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States. *Vance v. W. A. Vandercook Co.*, *supra*.

Now, examining these pleadings, it appears that the plaintiff sued upon a demand of \$2,200, an amount sufficient to secure the jurisdiction. When the testimony was taken, it appeared that he was mistaken as to the amount of his claim, and that his recovery could not exceed \$2,000. This he admitted at the trial. "It is not, however, the amount a plaintiff is able to prove he is entitled to that determines the amount in dispute for the purposes of jurisdiction; for otherwise the failure of the plaintiff to recover would oust the court of jurisdiction. The amount in dispute, or the matter in controversy, which determines the jurisdiction of the circuit court, in suits for the recovery of money only, is the amount demanded by the plaintiff in good faith." *Peeler's Adm'x v. Lathrop*, 1 C. C. A. 99, 48 Fed. 786, 2 U. S. App. 40. And this ruling is sanctioned in *Wilson v. Daniel*, 3 Dall., at page 405, 1 L. Ed. 656.

"It is the prevailing opinion that we are not to regard the verdict or judgment as the rule for ascertaining the value of the matter in dispute between the parties. \* \* \* To ascertain, then, the matter in dispute, we must recur to the foundation of the original controversy,—to the matter in dispute when the action was instituted. The descriptive words of the law point emphatically to this criterion, and, in common understanding, the thing demanded, \* \* \* and not the thing found, constitutes the matter in dispute between the parties."

In *Schunk v. Moline, Milburn & Stoddart Co.*, 147 U. S. 500, 13 Sup. Ct. 416, 37 L. Ed. 255, the plaintiff in his petition set up a claim for \$2,194.13. The right to recover this was challenged by demurrer. After quoting *Gaines v. Fuentes*, 92 U. S. 10, 23 L. Ed. 524, that "a controversy was involved, in the sense of the statute, whenever any property or claim of the parties capable of pecuniary estimation was the subject of litigation, and was presented by the pleadings for judicial determination," the court goes on:

"Within the letter of the statute, there was therefore a controversy between citizens of different states in which the matter in dispute was over the sum or value of \$2,000. It matters not that, by the showing in the petition, part of this sum was not yet due. Plaintiff insisted that it had a right to recover all. That was its claim, and the claim that was disputed by defendant. \* \* \* Although there might be a perfect defense to the suit for, at least, the amount not yet due [in this case, \$1,664.04], yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute. \* \* \* In short, the fact of a valid defense to a cause of action, al-

though apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in advance that that defense will be presented by the defendant, or, if presented, sustained by the court? We do not mean that a claim evidently fictitious, and alleged simply to create a jurisdictional amount, is sufficient to give jurisdiction."

A fortiori, if in his declaration the plaintiff bona fide claims over \$2,000, and the testimony shows that he cannot sustain the claim to the amount of \$2,000, this will not defeat the jurisdiction or stop the machinery of the court, which has been put in operation to ascertain the fact.

This is the law, and is decisive in this case, unless it appear that the plaintiff fraudulently or falsely overstated his cause of action in order to secure the jurisdiction of the court below. The court below, to whom the case was submitted, a jury having been waived, found this fact:

"That the allegation in plaintiff's narr. that the defendant was the owner, at the dates therein mentioned, of stock in said company of the par value of \$2,200, was not colorable, and had not been so stated for the purpose of creating a case within the jurisdiction of this court, but was the result of a bona fide mistake."

This is conclusive.

"It is objected," say the court in *Ryan v. Carter*, 93 U. S. 81, 23 L. Ed. 808, "that some of these facts were not warranted by the evidence, but this is not the subject of inquiry here. If the parties chose to adopt this mode of trial 'by the court without a jury,' they are concluded by the propositions of fact which the evidence in the opinion of that court establishes. Whether general or special, the finding has the same effect as the verdict of a jury, and its sufficiency to sustain the judgment is the only matter for review in this court." *City of St. Louis v. Rutz*, 138 U. S. 226, 11 Sup. Ct. 337, 34 L. Ed. 941. It is true that exceptions to alleged findings of facts, because unsupported by evidence, present questions of law reviewable in courts of error. *Laing v. Rigney*, 160 U. S. 540, 16 Sup. Ct. 336, 40 L. Ed. 525. But findings of fact made by the court below are binding on the supreme court when there is any evidence to support them. *Runkle v. Burnham*, 153 U. S. 216, 14 Sup. Ct. 837, 38 L. Ed. 694. In the case before us there is some conflict of evidence. This has been solved by the court below. Reviewing that evidence for ourselves, we concur in its finding. The judgment of the circuit court is affirmed.

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#### LEHIGH VAL. R. CO. v. RAINEY et al.

(Circuit Court, E. D. Pennsylvania. February 19, 1900.)

No. 88.

#### REMOVAL OF CAUSES—JURISDICTION ACQUIRED BY FEDERAL COURT.

While the jurisdiction acquired by a federal court over a suit removed from a state court is, in a limited sense, derivative, so that such court acquires no jurisdiction where the state court had none over the subject-matter, yet, where the state court had jurisdiction of the cause of action stated in the declaration, the fact that the defendant, after removal, pleads

a defense of which the state court could not have taken cognizance, because based on a statute which the courts of the United States are alone empowered to administer, does not deprive the federal court of jurisdiction.

### On Plea to Jurisdiction.

Francis I. Gowen, for plaintiff.

Crispiano Andrade, Jr., for defendants.

DALLAS, Circuit Judge. This is an action to recover \$5,919.98, alleged to be due by the defendants to the plaintiff for transportation of coal from Clearfield, Pa., to Perth Amboy, N. J. It was originally brought in a state court, and, on defendants' petition, was removed into this court, upon the ground that a federal question was involved. At the time of removal the plaintiff's statement of claim had been filed, but no defense had been in any manner interposed. Since the removal the defendants have, by plea, challenged the jurisdiction of this court. This plea has been demurred to, and upon the issue joined on the demurrer the question presented has been argued, and is now for decision.

It may be conceded "that, where a cause is removed from a state court, the jurisdiction of the federal court over that particular suit is in a certain limited sense a derivative jurisdiction, so that if the state court have no jurisdiction over the subject-matter or the parties the federal court can have none, although it might, by some other suit originally brought or removed, acquire jurisdiction over the controversy between the parties." *Fidelity Trust Co. v. Gill Car Co.* (C. C.) 25 Fed. 737. But I cannot agree that the state court had no jurisdiction of this suit. It unquestionably had jurisdiction of the subject-matter of the claim. The only point made is that it could not entertain the affirmative defense which is set out in this plea. It was because this defense involves a federal question that the case was transferred to a federal tribunal, whose power to decide it, if the action had been there brought in the first instance, is impliedly admitted, and could not be denied. Can it be, then, that the defendants, by raising that question after removal, may oust the jurisdiction which they have themselves invoked as being the only legitimate one? The authorities cited by the learned counsel of the defendants do not, I think, call for an affirmative reply to this inquiry. In *Swift v. Railroad Co.* (C. C.) 58 Fed. 861, it was, it is true, said:

"The courts of the United States, upon removed cases, have no wider jurisdiction than have the courts of the state from which they were removed. The removal simply transfers the hearing from the state to the national tribunal, but does not enlarge the right of the court to hear the cause. The right to question the reasonableness of an interstate commerce rate is a matter of primary, as well as of exclusive, jurisdiction in the federal courts. It does not reside in the jurisdiction of the state courts, or of the federal courts, acquired by the fact of diverse citizenship."

This, however, was said with reference to a suit directly upon the interstate commerce act, and nothing was decided but that, inasmuch as the cause of action declared upon was not maintainable in the state court, it could not be maintained in the federal court to which the case had been removed. There, the state court had no jurisdiction of the action; here, the only lack of jurisdiction alleged is that the de-

fense proposed to be made is one of which the state court could not have taken cognizance. So, too, in the case of Fidelity Trust Co. v. Gill Car Co., *supra*, the demurrer was to the bill, and the ground of the judgment appears to have been that, because there was in the state court an entire absence of jurisdiction of the subject-matter of the suit, it could not be regarded as having been "rightly brought," and was, in effect, "no suit in court, any more than if the proceeding had been commenced in a moot court." It was not adjudged that, in a suit which had been rightly brought in a state court, the federal court is, upon removal, without authority to entertain a defense based upon a statute which the courts of the United States are alone empowered to administer. The demurrer is sustained.

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WARD et al. v. CONGRESS CONST. CO.

(Circuit Court of Appeals, Seventh Circuit. February 9, 1900.)

No. 646.

1. UNITED STATES—RIGHT ACQUIRED IN PROPERTY—*LIS PENDENS*.

While the United States cannot be sued, or its property rights affected by a judgment, without the express authority of congress, where it acquires property from a party to a pending suit its rights in such property are subject to the result of the litigation, the same as would be those of an individual.

2. JUDGMENTS—MATTERS CONCLUDED—RIGHTS ACQUIRED *PENDENTE LITE*.

Where a third party acquires the right to occupy and use for a specified purpose property which is the subject of litigation, by agreement with both parties to the suit, his right to such occupation and use cannot be affected by the judgment in which such litigation results.

3. REMOVAL OF CAUSES—SUITS REMOVABLE.

Where, after the rendition of a decree in a suit in equity in a state court enjoining the erection of buildings on certain grounds, a motion was filed by the complainant for an order restraining a third person, who was not a party to the suit, from violating the decree, and notice of such motion was served upon him, the proceeding, in the absence of objection on his part to its form, is equivalent to the filing of a supplemental bill bringing him in as a defendant, and is essentially a new suit, which he may remove to a federal court, where ground for removal exists.

4. SAME—ACTION TO ENJOIN BUILDING OF POST OFFICE.

A corporation, in the performance of a contract made with the secretary of the treasury for the building of an addition to a post office authorized by an act of congress, is a person acting by authority of a revenue officer of the United States, given under color of his office; and a suit in a state court against the corporation to enjoin the building of such addition is removable into the circuit court of the United States, under Rev. St. § 643.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

George P. Merrick and S. S. Gregory, for appellants.

S. H. Bethea, for appellee.

Before WOODS and JENKINS, Circuit Judges, and SEAMAN, District Judge.

WOODS, Circuit Judge. The superior court of Cook county, Ill., in which the proceeding was begun, issued an order of injunction commanding the appellee, the Congress Construction Company, to

"desist and refrain from digging any trench or ditch in Lake Park, in the city of Chicago, and \* \* \* from proceeding with the construction of an addition to the temporary post office or any other building in said Lake Park until the further order of the court." The case having been transferred by writ of certiorari to the circuit court of the United States for the Northern district of Illinois, that court denied a motion to remand the cause to the state court, and on November 7, 1899, sustained a motion to dissolve the injunction. The appeal is from that order. No question is made of the sufficiency of the petition for the writ of certiorari, if, upon the facts disclosed, the case was removable.

The underlying question, aside from that of the jurisdiction of the court below over the subject-matter, is whether the United States and the construction company, which was acting by the employment and under the authority of the treasury department, were bound by a decree of the superior court of Cook county entered on September 14, 1896, in a suit wherein A. Montgomery Ward and George R. Thorne were the complainants, and the city of Chicago, North Chicago Railway Company, Chicago & West Division Railway Company, West Chicago Street-Railway Company, Baltimore & Ohio Railroad Company, Illinois Central Railroad Company, Charles T. Yerkes, De Witt C. Creiger, mayor, William A. Purdy, and Lawrence McGann were the defendants. That decree forbade the erection upon grounds described, including those now in question, of any and all buildings or structures, except those required of the Illinois Central Railroad Company by an ordinance of the city passed on October 21, 1895; but, by express proviso, nothing in the decree was to be construed to prohibit or restrain "the use, occupation, repair, or necessary enlargement" of the Art Institute, at the foot of Adams street; "and, provided, further, that the building now used as a temporary post office by the United States government shall remain where the same is now located, opposite the foot of Washington street, and it, together with all necessary repairs of the same, shall be permitted to remain and to be used as the temporary post office until a permanent post office shall be completed and occupied on the site bounded by Clark, Adams, Dearborn, and Jackson streets, in said city." The suit in which that decree was rendered was commenced in 1890, and while it was pending, in 1895, the federal authorities obtained of the city and the owners of the property fronting upon the park whatever right was granted for the erection of the temporary post office at its present site. The contention of the appellant is that, though the United States was not, and could not have been, made a party to the suit, it was let into possession by the city of Chicago, which was a party defendant, and, by the law of privity and *lis pendens*, is bound by the decree subsequently rendered, and is entitled to occupy and maintain in proper repair "the building now used," but not, as in the case of the Art Institute it was expressly provided, to make an addition or enlargement. To this contention the response of the appellee is—First, that the United States did not acquire and does not hold possession under the city of Chicago, but under the appellants

themselves; and, second, that in any event the United States ought not to be bound by the decree. The latter proposition is based on the authority of *Stanley v. Schwalby*, 162 U. S. 255, 16 Sup. Ct. 754, 40 L. Ed. 960. It was there declared to be "a fundamental principle of public law, \* \* \* that no suit can be maintained against the United States, or against their property, in any court, without express authority of congress"; and it was accordingly held that "neither the secretary of war, nor the attorney general, nor any subordinate of either," had "been authorized to waive the exemption of the United States from judicial process, or to submit the United States or their property to the jurisdiction of the court." But it by no means follows, and we think it not true, that, if the United States shall choose to acquire of one of the parties to a suit an interest in or possession of property already in litigation, it will not, as would an individual purchaser in a like case, take the interest or possession subject to the result of the litigation.

The first proposition, modified to conform to the facts, presents a more interesting and important question. The actual possession of Lake Park was held by the city of Chicago, but under conditions and restrictions which forbade the presence there of all buildings or structures which would interfere with the view from adjacent properties. The owners of those properties, it is settled, had such an interest as enabled them to maintain suits to enjoin the construction or compel the removal of forbidden structures; and in recognition of that fact the United States, after the giving of the consent of the city, refused to proceed with the erection of the temporary post office until the consent of the interested property owners was obtained. That consent was given in writing by all but Ward, who represented the appellants, and by him through his attorney, and thereafter, with his knowledge, and without objection from him, the building was erected, but, on account of the lack of a larger appropriation, upon a smaller scale than originally planned; and the addition now proposed, it is conceded, if erected, would not extend beyond the limits of the original plan, as shown by the drawings in existence when the consent to the erection of the building was given. There is, however, no direct evidence that Ward or others in like interest saw or knew of the drawings or plans, though they could hardly have been ignorant that such plans were customary. It is fairly inferable that they and he had little concern on the subject, and anticipated the erection of such structure as was then supposed or thereafter should be found to be necessary. In respect to the alleged estoppel by the decree of the state court, it is, therefore, not the ordinary case of a third party acquiring from one of the parties to a pending suit an interest in or possession of the disputed land. The possession in this instance was taken with the consent of both parties to the litigation,—the city, representing the fee, and the appellant Ward, representing the easement, if it may be so called, for the supposed vindication of which he instituted this proceeding. No precedent has been cited, but we are of opinion that when both parties to a suit consent to the putting of a third person into possession for a specified purpose,



or to the acquirement by that person of a particular interest in the property which is the subject of a pending litigation, the result of the litigation will not affect the right, interest, or possession so obtained and held. One who gets his right from both parties can be under no obligation to observe the course of the litigation, and if, without his participation, the final decree, in an attempt to declare his right, shall define it inaccurately, he will not be bound thereby, and, in a dispute with either party, will be at liberty to assert the right actually acquired. It follows that, if the decree of the superior court should be construed to forbid any enlargement of the temporary post office as it stood when the decree was entered, the restriction is without effect, and if the consent of the plaintiffs in error, as originally given, was broad enough to include additions to the present structure, they may be erected. That such was the original intention and understanding, we have no doubt. If nothing was said on the subject, that intention nevertheless should be imputed, because nothing else could have been reasonable. Chicago is not, and was not expected to be, stationary; and from the fact that the arrangement was merely temporary, yet likely to continue for a number of years, it must have been contemplated that, to begin with, the building should be made as small as practicable, and whenever necessary should be enlarged.

There remains the question of jurisdiction. Was the case removable from the state court to the federal court? The proceeding seems to have been begun by a notice entitled in the case already mentioned, of *A. Montgomery Ward et al. v. City of Chicago et al.*, signed by the solicitor of the complainants and addressed to Gustave Ehrhardt, president, Fred A. Britton, secretary, and G. K. Williams, superintendent, of the Congress Construction Company, whereby they were notified that on September 16, 1899, at an hour and place stated, in the room occupied as a court room by Judge Brentano, the solicitor would ask a rule against them, and each of them, to show cause why they should not be attached for contempt of court for violation of the decree and injunction in that cause, and that at the same time he (the solicitor) would ask that they, and each of them, be ordered to desist and refrain from digging any trench, erecting any building, or placing any obstruction whatever on Lake Park, according to the decree of said court, and upon the said motion would read the affidavit of George Gascoigne, a copy of which was served with the notice. Thereafter, on the day named, without appearance for or representation of the construction company or the United States, the court entered the injunction, which, after the transfer, the court below dissolved. Upon the docketing of the case in the court below, and after entry of the motions to remand and to dissolve the injunction, the parties joined in a stipulation containing the provision "that upon the hearing of these motions the issues involved in said petition shall be limited strictly to the restraining order of September 16, 1899, and that the decision of said issues growing out of said order of September 16, 1899, shall in no wise affect said original decree," etc. It was therefore simply a case of injunction obtained upon a motion which

served the purpose of a supplemental bill designed to bring before the court an omitted party, who, before the rendition of the decree, could have been brought in only by amendment of the bill. Story, Eq. Pl. §§ 334, 335. But a party thus brought in, who was in no way bound by the original decree, it is evident, must be deemed to have the same right to ask a removal as if he had been made a party at first; and, indeed, a better right, since there can arise no question of the separability of his interests from those of the original defendants. It may be that the motion and the notice in this case were not regular or adequate substitutes for a supplemental bill and subpoena, but the appellee was not bound to dispute their sufficiency before applying for a removal, and whatever question in relation thereto might have been raised in the court below probably was waived by the agreement of the parties to limit the hearing in that court "to the restraining order of September 16, 1899." In its essence, the proceeding was a new suit or new application for an injunction against a new party, rather than an ancillary proceeding for contempt of the original injunction against a party bound thereby.

Touching this question a number of decisions have been cited, or have come under observation. In *Chapman v. Barger*, 4 Dill. 557, Fed. Cas. No. 2,603, after a judgment in favor of the plaintiff in ejectment, the defendant, as permitted by the statute of Iowa, filed a petition for betterments, and thereupon the plaintiff presented a petition for the removal of the cause. The ruling of the court (Judge Dillon presiding) was that the motion of the defendant was "essentially a part of, and ancillary to, the main suit." "The main suit," it was added, "is at an end, and a judgment has been rendered therein in the state court. That judgment must remain in the state court. It cannot be brought here. The petition of the occupying claimant (whose rights are wholly statutory) is a dependence on the main suit, and cannot be separately removed."

In *Webber v. Humphreys*, 5 Dill. 223, Fed. Cas. No. 17,326, a motion, under the Missouri statute, for execution against a stockholder after return of execution against a corporation *nulla bona*, was held not to be a "suit at law or in equity," within the meaning of the statute providing for the removal of causes, and therefore not removable. Reference is made in the opinion to the preceding case, and to *West v. Aurora City*, 6 Wall. 139, 18 L. Ed. 819, and the court says:

"This is not an independent suit. It is a mere sequence, dependency, or supplemental proceeding, based on the statute, as a means of enforcing the judgment of the state court. \* \* \* As well might it be attempted to remove proceedings under an execution upon a judgment in a state court."

In *Salem & L. R. Co. v. Boston & L. R. Co.*, Fed. Cas. No. 12,249, decided in 1857, Judge Curtis held that a petition for a writ of certiorari to remove a cause must state facts to enable the court to determine whether the case is within the provisions of the act under which removal is sought.

In *West v. Aurora City*, 6 Wall. 139, 18 L. Ed. 819, the plaintiffs in the original action, upon the filing of a counterclaim by the de-

endants, dismissed their complaint, and sought a removal of the case on the theory that by dismissing their action they became defendants to an action on the counterclaim, and, being nonresidents of the state, were entitled to a removal. The circuit court remanded the case, and that ruling the supreme court affirmed, concluding its opinion with this dictum:

"A suit removable from a state court must be a suit regularly commenced by a citizen of the state in which the suit is brought, by process served upon a defendant who is a citizen of another state, and who, if he does not elect to remove, is bound to submit to the jurisdiction of the state court."

In *Bank v. Turnbull*, 16 Wall. 190, 21 L. Ed. 296, execution on a judgment in a state court, to which *Turnbull & Co.* were not parties, had been levied upon goods which *Turnbull & Co.* claimed to be theirs; and, the state court having on their motion ordered an issue in which they should be deemed to be the plaintiffs to determine the title, they obtained of the United States circuit court an order for the removal of the cause. The supreme court (Justice Strong dissenting) held that, conceding it to be a suit, the proceeding was merely auxiliary to the original action, and not removable.

In *Barrow v. Hunton*, 99 U. S. 80, 25 L. Ed. 407, it was held that an action of nullity in Louisiana, wherein it was sought to nullify a judgment for reasons of form, was auxiliary to the principal action, and not removable. In the opinion is found this important expression:

"The character of the cases themselves is always open to examination for the purpose of determining whether, *ratione materiae*, the courts of the United States are competent to take jurisdiction thereof. State rules on the subject cannot deprive them of it."

In *Bondurant v. Watson*, 103 U. S. 281, 26 L. Ed. 447, a suit by A. to enjoin the levying of an execution on a judgment in favor of B. against C. upon A.'s land was declared removable; and *Bank v. Turnbull*, 16 Wall. 190, 21 L. Ed. 296, was declared not in point, the court saying:

"That was a statutory proceeding to try in a summary way the title to personal property seized on execution. It was nothing more than a method prescribed by the law to enable the court to direct and control its own process, and, as decided by this court, was merely auxiliary to, and a graft upon, the original action."

The definition of a suit quoted from the opinion in *West v. Aurora City* was good enough for the purposes of that case, but a better one was given by Chief Justice Marshall in *Weston v. City Council of Charleston*, 2 Pet. 464, 7 L. Ed. 486, where he said:

"The term is certainly a very comprehensive one, and is said to apply to any proceeding in a court of justice by which an individual pursues that remedy in the court of justice which the law affords him. The modes of proceeding may be various, but, if the right is litigated between the parties in a court of justice, the proceeding by which the decision is sought is a suit."

This definition is approved in *Holmes v. Jennison*, 14 Pet. 540, 10 L. Ed. 579; *Case of Sewing-Mach. Cos.*, 18 Wall. 553, 585, 21 L. Ed. 914; *Kohl v. U. S.*, 91 U. S. 367, 375, 23 L. Ed. 449; *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 135, 26 L. Ed. 96; *Upshur Co. v. Rich*, 135 U. S. 467, 474, 10 Sup. Ct. 651, 34 L. Ed. 196, and cases

there cited; *Wilson v. Seligman*, 144 U. S. 41, 12 Sup. Ct. 541, 36 L. Ed. 338; *Mooney v. Manufacturing Co.*, 34 U. S. App. 581, 18 C. C. A. 421, 72 Fed. 32. See, also, *Iron Co. v. Bates* (C. C.) 56 Fed. 737; *In re The Jarnecke Ditch* (C. C.) 69 Fed. 161, and other cases cited in 2 Notes, U. S. Rep. 557. In *McCullough v. Large* (C. C.) 20 Fed. 309, it was held that a rule upon a United States internal revenue collector, granted by a state court upon the petition of the sheriff, to show cause why an attachment should not issue against him for contempt of the process of the court, in refusing to permit the sheriff to enter a bonded warehouse and seize in execution whiskeys held therein for internal revenue tax, was a civil suit removable into the United States circuit court under section 643 of the Revised Statutes.

While the proceeding now in question evidently was intended to be auxiliary to the decree of the state court, and was so in form, yet in fact, *ratione materiæ*, it was not of that character. It was brought against a corporation or its officers, who were not parties to that decree, nor bound thereby by reason of privity to the defendants or any of them; and the order of injunction entered can be regarded only as an attempt to bind a new party which was not affected by the original order. Whether, under the state practice, it was regular and permissible, after final decree against the original defendants, to bring in a new party by motion, as was done in this instance, and obtain against it a preliminary injunction, as if it had been named a defendant in the bill, as already suggested, need not be considered, and the party so brought in was not bound to inquire. The company might have waived service, and on being brought into the case as it was, and finding the court asserting jurisdiction over it, it had the same right to ask a removal as it would have had if it had been named originally in the bill, and brought in by process duly served before the decree against the other parties. As against it, there had been no decree, and the motion for an injunction was a new proceeding.

The right of removal is rested by counsel upon section 643 of the Revised Statutes, which provides as follows:

"When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office, or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law \* \* \* the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the circuit court," etc.

The record shows a contract made by the secretary of the treasury with the Congress Construction Company for the building of the proposed addition to the post office in pursuance of the acts of July 1, 1898, and March 3, 1899 (30 Stat. 597, 1074), by which appropriations were made for the construction thereof. The provision in section 643 for the removal of causes has been liberally construed, as, for manifest reasons, it should be. In *Warner v. Fowler*, 4 Blatchf. 311, 29 Fed. Cas. 255, where the action was against a post-

master for refusal to deliver a letter to the plaintiff, the action was held to be removable; and the decision was cited with approval in *U. S. v. James*, 13 Blatchf. 207, 26 Fed. Cas. 577. These cases, it is true, were decided at circuit; but they seem to be justified by the decision of the supreme court in *U. S. v. Bromley*, 12 How. 88, 13 L. Ed. 905, where, in an action of debt, founded on the tenth section of the post office law of March 3, 1845 (5 Stat. 736), that act was held to be a revenue law of the United States. The case of *U. S. v. Norton*, 91 U. S. 569, 23 L. Ed. 454, is cited to the contrary, but that was a criminal case, in which the question was whether in a prosecution under the act of May 17, 1864 (13 Stat. 76), for the establishment of the postal money-order system, the limitation of two years prescribed by the act of April 30, 1790 (1 Stat. 119, § 32), should be applied, or the limitation of five years prescribed by the act of March 26, 1804 (2 Stat. 290, § 3), concerning "crimes arising under the revenue laws of the United States"; and, in accord with the rule of strict construction in favor of liberty, it was held that the money order law was not a revenue law, within the meaning of the act of March 26, 1804. But in the opinion the cases of *U. S. v. Bromley* and *U. S. v. Fowler*, supra, were referred to, and declared "clearly distinguishable, with respect to the grounds upon which the judgment proceeded." Our conclusion is that the jurisdiction of the court below was complete, and that its order dissolving the injunction should be affirmed.

SEAMAN, District Judge (concurring). The application to enjoin the work of enlarging the temporary post-office building rests on no substantial ground, and the order thereupon of the court below is clearly sustainable if a case was presented for its removal from the superior court of Cook county. Unquestionably the jurisdiction of the United States court to that end must be conferred by statute, but "the right and duty of the national government to have its constitution and laws interpreted and applied by its own judicial tribunals," and to thus protect its officers and agents lawfully engaged in the execution of its enactments, is well established. *Mayor v. Cooper*, 6 Wall. 247, 253, 18 L. Ed. 851; *Tennessee v. Davis*, 100 U. S. 257, 265, 25 L. Ed. 648. Such removal from a state court is not in the nature of appellate jurisdiction, but a mode of acquiring original jurisdiction of a cause within federal cognizance. *Railway Co. v. Whitton's Adm'r*, 13 Wall. 270, 287, 20 L. Ed. 571. The operations against which the injunctive order of the state court was directed were conducted under the authority of the secretary of the treasury, in purported execution of the acts of congress providing for an addition to the post-office building. It is true that no invasion of private rights of occupancy was thereby authorized, and that none could be authorized except through legal condemnation, but such rights were clearly determinable in the federal courts, if the statute so provided; and I concur in the opinion that section 643 of the Revised Statutes is applicable to the case at bar, and that removal was proper. The tests are (1) that the secretary of the treasury, by whom the work was ordered, was an officer ad-

ministering the revenue laws of the United States, acting "under color of his office," and not that the act in question related to "the raising of revenues" (vide *U. S. v. James*, 13 Blatchf. 207, Fed. Cas. No. 15,464; and (2) that new proceedings were pending in a state court against such action, wherein hearing was open to such officer and his agents. Both tests are satisfied, within the authorities cited in the opinion.

It is therefore ordered that the decree below be affirmed.

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HUGGINS et al. v. DALEY.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1900.)

No. 325.

1. OIL LEASES—CONSTRUCTION—RIGHTS GRANTED.

By a course of decision in West Virginia which has established a rule of property, it is settled that an oil and gas lease in which the sole compensation to the lessor is a share of the product is not a grant of property in the oil or in the land until oil is actually produced, but merely of the right of possession for the purpose of exploration and development; and there is always an implied, if not an expressed, covenant for diligent search and operation.

2. SAME—RULES OF CONSTRUCTION.

A different rule of construction obtains as to oil and gas leases from that applied to ordinary leases or to other mining leases, and owing to the peculiar nature of the mineral, and the danger of loss to the owner from drainage by surrounding wells, such leases are construed most strongly in favor of the lessor.

3. SAME—CONDITIONS PRECEDENT—RIGHT OF FORFEITURE.

Where an oil and gas lease by which the lessor is to be compensated solely by a share of the product contains a proviso requiring the lessee to commence and complete a well on the property within a specified time, such proviso and the time of its performance are of the essence of the contract, and it constitutes a condition precedent to the vesting of any estate in the lessee, without regard to the grammatical construction of the instrument. When the lessee makes no attempt to comply with such provision, and evidences no intention to do so, at the expiration of the time stipulated the lease becomes forfeitable, at the option of the lessor, although by its terms it is for a definite term of years; and, being in possession, the exercise of such option is sufficiently evidenced by the lessor's execution of a new lease to another party.

4. SAME—CONSTRUCTION—EFFECT OF PENALTY FOR NONPERFORMANCE OF CONDITION.

A provision in an oil and gas lease, by the terms of which the lessor is to be compensated solely by a share of the product, that, in case of the failure of the lessee to comply with a condition requiring him to complete a well on the property within a stipulated time, he shall pay a forfeiture of \$50, must be construed as providing a penalty intended to secure the performance of such condition, and not as an alternative condition; and where the lessee makes no attempt to fulfill the condition, and has no intention of doing so, he cannot, by a tender of the penalty, retain the lease in force until the expiration of its term, and thus secure an option on the property for speculative purposes. When, by his failure to comply with the condition, further performance of the contract becomes optional on his part, it is also optional on the part of the lessor.

Appeal from the Circuit Court of the United States for the District of West Virginia.

**In Equity.**

**B. M. Ambler and A. Dewey Follett, for appellants.**

**V. B. Archer, for appellee.**

**Before SIMONTON, Circuit Judge, and PAUL and BRAWLEY, District Judges.**

**BRAWLEY, District Judge.** This is an appeal from the circuit court of the United States for the district of West Virginia. The appellee filed a bill in equity alleging that one A. P. Hodges had obtained from F. P. Marshall a lease for oil and gas upon a certain tract of 50 acres of land situated in Ritchie county, W. Va., which had been assigned to him, and that subsequently said Marshall had leased the identical premises to J. J. and J. B. Huggins; and the prayer of the bill was that the said Huggins' and their associates should be restrained in prosecuting the work for developing said leasehold for oil, and that a receiver be appointed to take possession of said leasehold premises and operate the same, and that a decree should be entered canceling said lease as a cloud upon the title of the appellee.

Marshall was an illiterate farmer, the owner in fee of the tract of land described; and on March 12, 1897, he entered into an agreement, under seal, of which the substantial parts are as follows:

In consideration of one dollar paid by Hodges, the lessee, the lessor "does hereby grant, demise, and let unto the said lessee all the oil and gas in and under the following described tract of land, and also said tract of land for the purpose of operating thereon for oil and gas, with the right to use water therefrom, and all rights and privileges necessary or convenient for conducting said operations and the transportation of oil and gas, and waiving all rights to claim or hold any of the property or improvements placed or erected in and upon said land by the lessee as fixtures or as part of the reality."

Then follows the description of the land. The habendum clause is as follows:

"To have the same unto and for the use of the lessee, his executors, administrators, and assigns, for the term of 5 years from the date thereof, and as much longer as oil or gas is found in paying quantities thereon, not exceeding the term of 35 years from the date thereof; yielding and paying to the lessor the one-seventh part or share of all the oil produced and saved on the premises."

Then follows a further description of the method of delivering the oil into tanks, and a reservation of gas for the personal use of the lessor, and a proviso which is in the following terms:

"Provided, however, that a well shall be commenced upon the above-described premises within 30, and completed within 90, days from the date hereof; and, in case of failure to commence and complete said well as aforesaid, the lessee shall pay to the lessor a forfeiture of \$50."

This lease was not recorded until April 8, 1898. At the same time was recorded an assignment of a half interest in said lease by Hodges to Daley, dated April 2, 1897, and acknowledged on April 4, 1898, and the assignment of the remaining half interest, dated April 2, 1898, and acknowledged April 4, 1898. The lease from Marshall to J. J. and J. B. Huggins was executed November 6, 1897, and recorded January 31, 1898.

Much testimony was taken tending to show that at the time of the execution of the lease Marshall was under the impression that the lease was only for 90 days, and that he believed that the words "5 years" had been stricken from the printed form of the lease, and "90 days" written therein; and in the copy of the lease which was given to him by Hodges the words "5 years" were stricken out, and "90 days" substituted, but it appears that the substitution was not in the handwriting of Hodges. The proviso was in the handwriting of Hodges; the remainder of the lease being printed, with the exception of some interlineations. There was also testimony to the effect that Daley was a partner of Hodges, and that Hodges had taken the lease for the benefit of the Cairo Oil Company, and impeaching the bona fides of the assignment to Daley. The conclusions reached by us do not require the determination of these questions, if, indeed, they are properly before us. It is undisputed that nothing was done by Hodges towards boring the well. It is clear from the testimony that he had no intention at any time to bore the well within the 90 days stipulated, and that he had not the means to do so if he had any such intention. In November following the execution of the lease to Hodges, the appellants leased from one Moore the land adjoining Marshall's for the purpose of operating for oil, and began to bore a well within 100 feet of Marshall's line, and about the same time they leased the land of Marshall for the purpose of operating for oil. At the time they took this lease they had knowledge that Hodges had some claim upon the land, and Marshall exhibited to them what purported to be a copy of the Hodges' lease. In this copy, as above stated, the words "5 years" had been stricken out, and "90 days" substituted; and after submitting the copy to a lawyer, and being informed that the lease had no further validity, they commenced operations upon the Marshall land, and expended about \$3,600 in the boring of a well. About the time they struck pay sand, and after the well upon the Moore land was flowing oil, on April 15, 1898, Daley filed his bill for injunction. Their lease had been recorded January 31st, and some time between that day and the filing of the bill, but after they had commenced operations, Daley came upon the land, and informed them that he had some claim thereto; but the Hodges' lease and assignment to Daley was not recorded until April 8th, 10 days before the filing of the bill.

The question for decision is whether the proviso in the Hodges lease constituted a condition precedent, and whether the failure of Hodges to do anything towards the boring of the well did not prevent the vesting of any rights under that lease. By the terms of that instrument the lessor granted to the lessee all the oil and gas in and under the land described, "and also the said tract of land for the purpose of operating thereon for oil and gas." By a course of decisions it is well settled in West Virginia that a lease of this character is not a grant of property in the oil or in the land, but merely a grant of possession for the purpose of searching for and procuring oil. The title is inchoate, and for the purpose of exploration only until the oil is found. If it is not found, no estate vests



in the lessee; and, where the sole compensation to the landlord is a share of what is produced, there is always an implied covenant for diligent search and operation. There is, perhaps, no other business in which prompt performance is so essential to the rights of the parties, or delays so likely to prove injurious,—no other class of contracts in which time is so much of the essence. There is no other branch of mining where greater damage is done by delay. Coal and precious metals lie either in horizontal veins or in pockets. They remain where they are until removed. Oil and gas are the most uncertain, fluctuating, volatile, and fugitive of all mining properties. They lie far below the surface, beyond the control of human will, and beyond the reach of any legal process, whence they may flow unrestrained if the owner of adjoining land bores a well down to the strata which holds them; and there is no law which can provide adequate, or indeed any, compensation for such results. This is a matter of common knowledge, and "courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction." *Greenl. Ev.* § 6. It furnished the ground upon which the plaintiff in this case asks the court, through a receiver, to bore the well which the lessee was required to bore within 90 days from the date of execution of the instrument under which he claims. The only consideration which moved the lessor to grant the lease was the prospective royalties from oil and gas, which could come only if the lessee complied with the terms of this proviso that required the boring of a well; for, while the sum of one dollar is technically a valuable, it is only a nominal, consideration. If the contention of the plaintiff is correct, the lessee, Hodges, or his assigns, could have waited the full term of five years without expending one dollar or moving a hand for the development of the leased property, meantime tying the hands of the owner of the land, forbidding him to make arrangement with any other persons for the explorations which the lessee undertook to make, and perhaps suffering irreparable injury from the drainage of his oil and gas. This is the contract which a court of equity is asked to enforce. It is a short view of the range of equitable principles. There are no precise technical words which distinguish conditions precedent or subsequent. Whether they are one or the other is a matter of construction, to be solved by ascertaining the intention of the party creating the estate. They are not determined merely by the structure of the instrument, or the arrangement of the covenants. Where mutual covenants go to the whole consideration on both sides, they are mutual conditions,—the one precedent to the other. 4 Kent, Comm. 144. Where the undertaking on one side is, in terms, a condition to the stipulation on the other (that is, where the contract provides for the performance of some act or the happening of some event, and the obligations of the contract are made to depend on such performance or happening), the conditions are conditions precedent. The reason and the sense of the contemplated transaction as it must have been understood by the parties, and is to be collected from the whole contract, determines whether this is so or not, or it may be determined from the nature of the acts to be done, and

the order in which they must necessarily precede and follow each other in the progress of performance. But when the act of one is not necessary to the act of the other, though it would be convenient, useful, or beneficial, yet, as the want of it does not prevent performance, and the loss and inconvenience can be compensated in damages, performance of the one is not a condition precedent to performance by the other. The nonperformance on one side must go to the entire substance of the contract and to the whole consideration, so that it may safely be inferred as the intent and just construction of the contract that, if the act to be performed on the one side is not done, there is no consideration for the stipulation on the other side. *New Orleans v. Texas & P. Ry. Co.*, 171 U. S. 334, 18 Sup. Ct. 875, 43 L. Ed. 178. "When one act is to be done by one party before another act, which is the consideration of it, is to be done by the other, the covenants are dependent, and the other is not bound to perform until the first act has been done, because the first act is a condition precedent to performance of the other; and, in all cases where covenants are dependent, they are in the nature of conditions precedent, and must be performed in the order of time in which performance is provided for in the covenant; and, in determining whether covenants are dependent or independent, the intention of the parties and the good sense of the case will be regarded, rather than the technical sense of the words used." *Wood, Landl. & Ten.* § 312.

In construing this agreement in the light of all the facts surrounding contracts of this nature, and of the considerations moving the grantor in its execution, we have no difficulty in determining that the boring of a well by the grantee was the whole consideration of the lease, that nonperformance went to the entire substance of the contract, that the word "provided" is an apt word of condition, that the grantee did not, and at the time he procured the lease did not intend to, comply with the condition which was a condition precedent to the vesting of any title in the leased lands. In cases of conditions precedent, the consideration is the performance of the thing stipulated to be done, not the promise.

But it is contended by the appellee that the clause providing a forfeit of \$50 for failure to bore the well within 90 days provides full compensation for failure to perform the condition. As a matter of fact, the \$50 was not paid or legally tendered; but, inasmuch as the grantor had declared a purpose not to receive the forfeit money, it will be treated as if it had been tendered. The question whether a sum of money stipulated to be paid is a penalty or liquidated damages is sometimes difficult of determination, there being no criterion of universal application. It depends upon a construction of the whole instrument, the intention of the parties, the nature of the act to be performed, and the consequences which would naturally flow from its nonperformance. In many of the cases where oil leases have come before the courts, the doing of a certain thing, or the payment of rental in lieu thereof, is stipulated in the contract in a way that justifies the conclusion that the parties have provided exact and just compensation by way of liquidated damages

for failure of performance in contracts, where parties stipulate in the alternative, and are free to choose. But where consequences likely to follow nonperformance are not measureable by any exact pecuniary standard, and the probable damage is out of all proportion to the amount agreed to be paid, this sum should be considered a penalty; and such we hold it to be in this case, where the sum of \$50 is stated to be a forfeiture. It is in the nature of a security for the performance, and cannot be held to be liquidated damages for nonperformance.

In *French v. Macale*, 2 Dru. & War. 274, Lord St. Leonard thus states the doctrine which we hold to be applicable here:

"The general rule of equity is that if a thing be agreed upon to be done, though there is a penalty annexed to secure its performance, yet the very thing itself must be done."

And in *Dooley v. Watson*, 1 Gray, 414, Chief Justice Shaw says:

"Courts of equity have long since overruled the doctrine that a bond for the payment of money, conditioned to be void on the conveyance of land, is to be treated as a mere agreement to pay money. When the penalty appears to be intended merely as a security for the performance of the agreement, the principal object of the parties will be carried out."

If a party can show that he has done everything in his power, but, by unavoidable accident, by fraud, surprise, or ignorance not willful, has been prevented from executing his covenant literally, the courts will relieve him, especially where the case admits of compensation for his nonperformance, or the parties can be put in the same situation as if the condition had been performed; but no ground for equitable relief can be found in a case where the party has not only failed to perform the conditions upon which alone he obtained the execution of the contract, but where it is also clear that he never at any time intended to perform, or had the means to do so. "There is no more intrinsic sanctity in stipulations of contract than in other solemn acts of the parties, who are constantly interfered with by courts of equity upon broad principles of public policy, or the pure principles of natural justice. Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different or oppressive purpose, as it would be to allow him to substitute it for the principal obligation." Story, Eq. Jur. § 1316.

The principles announced by this court in *Foster v. Gas Co.*, 32 C. C. A. 560, 90 Fed. 178, govern and sustain the conclusion reached, although the precise point here determined was not involved. In that case the demise was for 10 years, and there was a covenant that a well should be completed within one year, and in case of failure the lessee was to pay 10 cents per acre per annum after the time for completing the well as specified. The lessee bored one well, which proved to be dry, and no further effort was made. The court says:

"The completion of the well saves the penalty. It does not amount to a fulfillment of the covenants. The consideration for this lease was the prospective rents and royalties the lessor would enjoy if the lessee, by diligent search could find oil and gas in paying quantities. If the lease failed to bind the

lessee to diligent search for oil or gas, it was without consideration, binding on neither party, and voidable at the pleasure of either."

Numerous cases were cited,—among them, those from West Virginia which this court held to lay down rules of property stating the controlling doctrine peculiar to mining leases in that state, which the federal courts would recognize and follow. This case fully establishes the doctrine that the consideration in leases of this character "evidently and clearly contemplates active operations upon the demised premises," and when, after one failure, no further effort is made, mere inaction on the part of the lessee may well be construed an abandonment of rights under his leases. The case of *Steelsmith v. Gartlan*, 45 W. Va. 27, 29 S. E. 978, 44 L. R. A. 107, was cited to sustain these conclusions. That was a lease to Knotts and Garber for oil purposes, providing certain royalties, with a stipulation that a well should be completed within one year; and the failure to do so rendered the lease null and void, unless the lessee should pay 25 cents per acre from and after the date stipulated for the completion of the well, when such payment should operate to extend the time for five years. No well was drilled, and the lessor, considering the lease forfeited, refused to accept the rent therefor. His lessee's executor, before the expiration of five years, executed a new lease to Gartlan, February 11, 1895, which required him to drill a well within one month, with stipulations for the payment of \$50 per month for any delay in completing the well. The term was for five years, and there was a stipulation that a failure to comply with any of its stipulations should render it void. Gartlan drilled a well, but, not finding oil or gas in paying quantities, removed his derrick and tools, and left the premises. The land was leased in October, 1896, to Steelsmith, who forthwith commenced operations, and filed a bill to cancel the Gartlan lease, and Knotts and Garber filed a cross bill. The court held that there being no provision for any further operations after the first well, when completed, was nonproductive, "the contract is at an end as to both parties as soon as such first well is abandoned as unsuccessful"; quoting *Oil Co. v. Fretts*, 152 Pa. St. 451; 25 Atl. 732:

"A vested title cannot ordinarily be lost by abandonment in a less time than fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. An oil lease stands on quite a different ground. The title is inchoate, and for the purpose of exploration only until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends whenever the unsuccessful search is abandoned."

The lessee in that case had complied with the covenant to bore a well, and the court says:

"He could not be compelled to put down another well, and, he not being bound, the lessor was not bound, either; for the only consideration left to him was the prospective oil royalties and gas rentals, which the lessee was in position to entirely defeat. Contracts unperformed, optional as to one of the parties, are optional as to both."

Again:

"Such leases are construed most strictly against the lessee, and favorable to the lessor. When a lease provides the mode, manner, and character of the search to be made, implications in regard thereto are excluded thereby, as re-

pugnant, and the demise, for the purpose of operating for oil and gas for the period of five years, is dependent on the discovery of oil and gas in the search provided for; and, if such search is unsuccessful, the demise falls therewith, as such discovery is a condition precedent to the continuance or vesting of the demise. The lessee's title, being inchoate and contingent, both as to the five-years limit and time thereafter, on the finding of oil and gas in paying quantities, did not become vested by reason of his putting down a nonproductive well."

While most of the cases cited have gone upon the ground of abandonment, the governing principle in all oil leases of the character under consideration is that the discovery and production of oil is a condition precedent to the continuance or vesting of any estate in the demised premises; that such leases vest no present title in the lessee, and if, at any time, the lessee has the option to suspend operations, the lease is no longer binding on the lessor because of want of mutuality; and, where the only consideration is prospective royalty to come from exploration and development, failure to explore and develop renders the agreement a mere nudum pactum, and works a forfeiture of the lease, for it is of the very essence of the contract that work should be done. And, the smaller the tract of land, the more imperative is the need for prompt and efficient drilling; for oil operations cumber the land, rendering it unavailable for agricultural purposes. The landowner is entitled to his royalty as promptly as it can be had. The danger of drainage from his small holding is increased by delay, and the resulting damage, not being susceptible of pecuniary measurement, is therefore not compensable. No such lease should be so construed as to enable the lessee who has paid no consideration to hold it merely for speculative purposes, without doing what he stipulated to do, and what was clearly in the contemplation of the lessor when he entered into the agreement. Leaving out the proviso which bound the lessee to diligent search and development, there is nothing in this lease which bound him to do anything whatever. The proof is clear that he never intended to drill the well within the time stipulated. This proviso was written by the lessee evidently for purposes of deception. He knew that the object of the lessor was to secure diligent search for oil, and he was "keeping the word of promise to the ear, and breaking it to the hope"; skillfully turning it into a mere speculative lease, binding the lessor and leaving himself free. It would be unconscionable to hold the lessor bound. "Law, as a science, would be unworthy of the name, if it did not, to some extent, provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity, on one side, and a gross violation of the principles of morals and conscience, on the other." Story, Eq. Jur. § 1316.

In *Oil Co. v. Marbury*, 91 U. S. 593, 23 L. Ed. 328, the facts were, to some extent, the converse of those here; but Mr. Justice Miller comments on the fluctuating character and value of this class of property, and asserts the injustice "of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit," and referring to the distinction between real estate, whose value is fixed, says:

"The class of property here considered is subject to the most rapid, frequent, and violent fluctuations in value of anything known as property, and requires prompt action in all who hold an option whether they will share its risks or stand clear of them, [and that] no delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably for himself whether he will abide by his bargain or rescind it is allowed in a court of equity."

In a case like this no judicial proceeding was necessary to avoid the lease. The landlord, never having been out of possession, cannot re-enter upon himself; and it was held in *Guffy v. Hukill*, 34 W. Va. 49, 11 S. E. 754, 8 L. R. A. 759, and in many other cases, that any unequivocally expressed election to avoid, as by giving a new lease, avoids the one preceding.

In *Iron Co. v. Trout*, 83 Va. 397, 2 S. E. 713, the court says:

"No lease of land for a rent for a return to the landlord out of the land which passes can be construed to be intended to enable the tenant merely to hold the lease for the purpose of speculation, without doing and performing in connection therewith what the lease contemplated. Such a construction would, indeed, make all such contracts a snare for the entrapment and injury of the unwary landowner. A man buying and paying for land may do with it as he likes,—work it or let it lie idle. But a tenant to whom land passes for a specified purpose has no such discretion. He must perform what he stipulated to do."

A recent author says:

"The trend of the decisions touching questions of forfeiture arising out of oil and gas leases has been almost uniformly in favor of the lessor. Generally it is the lessee who is favored, and, after a substantial compliance by him with the terms of the contract, equity will not regard a technical breach. But with mining leases it is otherwise. This is due principally to the nature of the business of mining, and more especially oil mining,—to the temptation offered a shrewd operator to purchase at a nominal price the right to develop lands, the owner of which is ignorant of their real value, and then to hold them indefinitely, neither working them himself, nor permitting another to do so." "But a lessee, where the instrument presents a semblance of inequity or unfairness, will find that he has a thorny road to travel before a court of equity will sanction his claims." Bryan, *Petroleum*, 143.

We are of opinion, upon the whole case, that the exploration for and development of oil and gas was the sole consideration for this lease; that the proviso requiring the boring of a well within 90 days was a condition precedent to the vesting of any interest in the lessee, and that the forfeiture of \$50 was intended merely as a penalty to secure the drilling of the well, and, if paid, would have been merely compensation to the landowner for the right of the lessee to possession during the 90 days, and such payment would not be so far a compliance with the conditions of the lease as to vest in the lessee a title in the leased premises for the period of five years; that after the expiration of 90 days from the date of the lease, there being no provision therein for any work to be done by the lessee in the development of the property, which was the sole consideration therefor, the lessor had the option to avoid it; that the inaction of the lessee during a period of 8 months, while operations were being commenced on adjoining land, calculated to drain the land of the lessor and irreparably injure him, fully justified his avoidance of the lease; and that the lease to Huggins and his associates was an unequivocal declaration of his intention to avoid it, and terminated

any inchoate right which Hodges could claim thereunder. The decree of the circuit court is reversed, and the case remanded, with instructions to restore the leased premises to the appellants, and that the receiver be directed to turn over to them any moneys in his hands as the result of his operations, after deducting whatever sum may have been actually and necessarily expended by him in the development of the same, and that the bill be dismissed, with costs.

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WOOD V. CITY OF MOBILE.

(Circuit Court, S. D. Alabama. February 8, 1900.)

No. 218.

JUDGMENTS—COLLATERAL ATTACK—GROUNDS.

A decree of a state court can only be collaterally attacked in a federal court when entirely void, either for want of legal organization of the court, or of jurisdiction over either the subject-matter or the parties. The fact that such decree is void on its face, because uncertain and incomplete, does not render it subject to collateral attack; but the remedy must be sought in the court which rendered it, by proceedings for its vacation or by appeal from the decree.

In Equity. On demurrer to bill.

Bestor & Gray and R. H. Clarke, for complainant.

B. B. Boone, City Atty., for defendant.

TOULMIN, District Judge. By the bill in this case the complainant claims to be the owner, as tenant in common with the defendant, of certain lands and other property, and of certain riparian rights appertaining and belonging to some of said lands, constituting a system of waterworks, known as the "Stein Waterworks." Complainant charges that on May 14, 1898, the defendant took exclusive actual possession of said waterworks, and all of said property, rights, and franchises, unlawfully and against complainant's will, ousting him of the possession of every part he then held as the owner in co-tenancy of an undivided share thereof; that the defendant has since had the exclusive possession of said property, and dealt with the same as if it were the sole rightful owner thereof, has continuously operated said waterworks and used said property, has appropriated to its own use all the income derived therefrom during the time, is still so using and operating the same and appropriating the income therefrom, and will continue so to do unless restrained by this court. Complainant further charges that the defendant has not kept the property in reasonable repair, and has allowed it to deteriorate and go to decay, and is continuing so to do, and will eventually dispose of or destroy or abandon all of the tangible property appertaining to said waterworks, unless restrained from so doing by this court. He alleges that the defendant rests its right to hold and use said property and said waterworks as it has done and is now doing upon certain legislative enactments and condemnation proceedings thereunder had in the probate court of

Mobile county, and in which proceedings said court made a final decree purporting to condemn complainant's interest in said property, rights, and franchises to the use of the defendant. Complainant charges that said final decree is altogether void, and confers no authority upon defendant to take, hold, and use complainant's interest in said waterworks and in said property, rights, and franchises. Complainant charges that he has been greatly damaged by the said acts of the defendant; that the defendant is insolvent, and unable to respond in damages to the complainant in a suit at law. The relief prayed for in the bill is, among other things, for an injunction restraining the defendant from injuring or impairing the efficiency of said waterworks and property, and from using the same, until the determination of a suit at law for the recovery of the said property and of this suit.

The bill is filed mainly to prevent waste. To sustain the bill, and to entitle the complainant to the relief sought, the decree of the probate court referred to must be altogether void, and subject to be collaterally attacked and impeached. The decree of a state court may be collaterally attacked in a federal court for want of jurisdiction over the subject-matter or of the defendant therein. But, for error not affecting the jurisdiction of the court, its validity cannot be questioned. *Swift v. Meyers* (C. C.) 37 Fed. 37; *Herron v. Dater*, 120 U. S. 477, 7 Sup. Ct. 620, 30 L. Ed. 748. In order to make a judgment void collaterally, either a legal organization of the tribunal, or jurisdiction over the subject-matter, or jurisdiction over the person must be wanting. When either of these defects is shown, the judgment and all rights and titles founded thereon are void, and may be collaterally attacked and impeached. But, where the court has jurisdiction over both the person and the subject-matter, it cannot be collaterally attacked. 12 Am. & Eng. Enc. Law (1st Ed.) p. 147. "It is very doubtful whether a judgment can be considered entirely void, except in the single case where there was a total want of jurisdiction to render it." 1 Black, Judgm. pp. 195, 170. It is not claimed by the complainant that said final decree of the probate court is void for want of jurisdiction in the court over the subject-matter of the proceedings in which the decree was made, which were condemnation proceedings under the laws of the state of Alabama, and it is not claimed that the court did not have jurisdiction over the parties to the proceedings. But it is claimed that the decree is void for many other reasons, specifically set forth in the bill, but not necessary to mention here, as they do not go to the organization of the court, the jurisdiction of the court over the subject-matter, or of the parties to the proceedings. It is claimed, substantially, that the application for and the decree of condemnation are void, because they are vague, uncertain, and incomplete. I consider the application in the condemnation proceedings sufficient, but the decree is uncertain and incomplete, void on its face, and of itself incapable of being executed; but my opinion is that it cannot be collaterally attacked on that ground. Assuming that the decree is void on its face, I think that there is an adequate remedy at law to have it set aside and vacated, either by direct proceedings



for that purpose or by appeal. Until it is set aside and vacated, it is binding on the parties to this suit. This bill, as far as it rests on the invalidity of the decree, cannot be sustained. The effect of a decree on this bill would be to declare the decree complained of altogether void. This court has no power in this proceeding to declare it void. But "all courts have the power to, and should, vacate any final order, decree, or judgment [rendered by them] at any time subsequent to its rendition, if the same is void on the face of the proceedings and record." "The probate court has the power, and it is its duty, to set aside and vacate an order or decree void on its face." *Johnson v. Johnson's Adm'r*, 40 Ala. 247; *Summersett v. Summersett's Adm'r*, Id. 596. The demurrers to the bill on the first, third, and fourth grounds assigned are sustained, and it is so ordered.

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## FOSTER v. ELK FORK OIL &amp; GAS CO. et al

(Circuit Court of Appeals, Fourth Circuit. February 6, 1900.)

No. 318.

## APPEAL—DECREE FOR COSTS.

In a suit in equity the matter of costs rests in the discretion of the court, and from a decree for costs in the courts of the United States no appeal lies except where they are made payable from a fund in court.

Appeal from the Circuit Court of the United States for the District of West Virginia.

A. Leo Weil, for appellant.

W. P. Hubbard, for appellees.

Before SIMONTON, Circuit Judge, and PAUL and BRAWLEY, District Judges.

SIMONTON, Circuit Judge. This case comes up on appeal from the circuit court of the United States for the district of West Virginia. In the decree of that court of December 22, 1898, exceptions to which have been heard in this court and determined at this term, certain questions were reserved. Among these was the payment of the costs of a reference before J. W. Ewing, master. On the 11th of April, 1899, the circuit court decided this question of costs, and required George E. Foster to pay them. To this decision exception was taken, an appeal was allowed, and it is now before this court. While it is the general rule that in a suit at law the losing party must pay costs (*Kittredge v. Race*, 92 U. S. 116, 23 L. Ed. 488), in equity costs are in the discretion of the court (*Daniell, Ch. Pl. & Prac.* 1462). In the courts of the United States an appeal does not lie from a decree for costs. *Fabrics Co. v. Smith*, 100 U. S. 110, 35 L. Ed. 458; *Paper-Bag Cases*, 105 U. S. 766, 26 L. Ed. 959. The exception is when the costs are made payable out of a fund in court. *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157. This is conclusive of the appeal in this case. The decree of the circuit court in this respect is affirmed.

## UNITED STATES v. PERALTA (GWIN, Intervener).

(District Court, N. D. California. January 29, 1900.)

No. 100.

**1. EQUITY—PLEADING—TREATING DEMURRER AS SPECIAL PLEA.**

Where a petition filed in an equity cause, praying certain action of the court, alleged to be necessary to enforce a prior decree entered in the cause, omits any reference to certain prior orders and decrees, a demurrer to such petition, which, among other grounds, avers such omission, and pleads such orders and decrees as a bar to the relief asked, in the absence of objection thereto may be treated, as to such matters, as a special plea; and the court, in passing thereon, will assume the truth of the facts alleged in the petition which are not controverted, and that the facts as to the matters which are controverted by the special demurrer or plea are as therein set forth.

**2. PUBLIC LANDS—SPANISH GRANTS—DECREE CONFIRMING TITLE.**

A decree of a district court of the United States affirming a decision of the board of land commissioners created by Act March 3, 1851, "to ascertain and settle private land claims in the state of California," which adjudged the validity of a claim under a Spanish and Mexican grant, while conclusive as to the title of the claimant,—having been affirmed by the supreme court,—was not final as to the boundaries of the grant, where it had not been surveyed, but under said act of 1851, and the amendatory and supplemental acts of 1860, 1864, and 1866, the court retained jurisdiction to require the survey, when made by the surveyor general, to be returned into court, and to confirm or direct the modification of such survey, and, when finally confirmed, to render a final decree fixing and determining the location and boundaries of the grant; and such decree, when unappealed from, and when carried into effect by the issuance of patents by the United States in conformity thereto, became final and conclusive as to such boundaries, and the court was deprived of further jurisdiction to modify the same.

**3. SAME—REVIEWING ACTION OF LAND DEPARTMENT.**

After the land department has issued patents to a Spanish and Mexican grant in conformity to a decree of court confirming the grant, and to a survey thereof approved and confirmed by the court, such court cannot entertain a petition to compel the issuance of patents in accordance with a different survey. The patent is the culmination of such proceedings, and, so long as it remains in force, conclusively determines the location and extent of the grant.<sup>1</sup>

Demurrer to petition for the enforcement of a judgment, and for an order to compel the United States to issue a patent.

On July 27, 1899, Mary E. H. Gwin, intervener herein, filed the following petition:

"The petition of Mary E. H. Gwin, intervening in this proceeding for her interest, by leave of the court first had and obtained, respectfully shows that heretofore, to wit, on the 21st day of January in the year 1852, Antonio Peralta, Vicente Peralta, Ignacio Peralta, and Domingo Peralta, claiming lands in California by virtue of a right and title derived from the Spanish and Mexican governments, presented to and filed with the board of United States land commissioners constituted under the act of congress entitled 'An act to ascertain and settle the private land claims in the state of California,' passed March 3, 1851, their claim for the lands of the rancho of San Antonio, in said

<sup>1</sup> As to conclusiveness of decisions of land department, see notes to Hartman v. Warren, 22 C. C. A. 38; Carson City Gold & Silver Min. Co. v. North Star Min. Co., 28 C. C. A. 344.

state, together with such documentary evidence and testimony of witnesses as the petitioners relied upon in support of their said claim; that thereupon the said board, when the case was ready for hearing, proceeded to, and did, examine such claim upon such evidence, and the evidence produced in behalf of the United States, and did decide upon the validity of the claim, and did certify its decision, with the reasons on which it was founded, in due time, to the then district attorney of the United States in and for the Northern district of California; that afterwards, and after due proceedings had in this court, this court, in land case No. 100, did review the said decision of said commissioners, and did affirm the validity of the claim of said petitioners, and did render judgment on the pleadings and evidence in the case by its decree duly given and made on the 28th day of January, in the year 1855; that afterwards, and on appeal by the United States, duly granted by this court, to the supreme court of the United States, that tribunal, by its decision duly given and made at the December term in the year 1856, did affirm the validity of the grant, and the claim of the said petitioners thereunder, and did remand the case to this court for further proceedings in accordance with its opinion. Your petitioner further shows that thereafter this court, by its decree duly given and made on the 30th day of November in the year 1859, filed December 1, 1859, duly amended its said decree to conform to the said decision and opinion of the supreme court. Your petitioner further shows that afterwards, and on the 23d day of July in the year 1866, the congress of the United States passed an act entitled 'An act to quiet land titles in the state of California;' that by the eighth section of said act it was provided that in the event that no survey of the said grant had been before the passage of said act requested by said confirmees, nor had any such survey been requested within ten months after its passage, the duty was devolved upon the surveyor general of the United States for California, as soon as practicable thereafter, to extend the lines of the public surveys over said grant, and to set off in full satisfaction of the grant the quantity of land confirmed in the said decree, as nearly as could be done in conformity with such decree. Your petitioner further shows that no survey of the grant of the San Antonio rancho confirmed in this proceeding had been requested by the confirmees or their assigns before the passage of said act, nor had any survey thereof been requested by them within ten months after the passage of said act, nor had any such survey been made, and it thereby became the duty of the surveyor general of the United States for California, as soon as practicable from the expiration of ten months from the passage of said act, to set off in full satisfaction of such grant, and according to the lines of the public surveys, the quantity of land confirmed in the final decree herein, as nearly as could be done in accordance with such decree; that afterwards, and on or about the 25th day of November in the year 1895, and as soon as practicable after the passage of the said act of July 23, 1896, the said surveyor general duly made, approved, and certified a plat of the survey of the said rancho of San Antonio, in accordance with, and in part execution of, the said decree of this court. Your petitioner here further shows that she is interested in the lands of the said rancho under the said claimants and confirmees, and that her title thereto was derived by mesne conveyances from the said confirmees, as will more fully appear by reference to the public official records of the counties of Contra Costa and Alameda, in the state of California, to which records she prays leave to refer, and makes them a part of this, her petition. Your petitioner further shows that thereafter the said plat of survey was, on or about the 2d day of September in the year 1896, presented to the honorable the commissioner of the general land office of the United States, at the city of Washington, District of Columbia, together with duly-certified copies of said several decrees, and an authentic certificate of such confirmation, by your petitioner, Mary E. H. Gwin, and one Francisco Sanjurjo, since deceased, together with a derangement of their respective titles thereunder from the said claimants, confirmees, Vicente, Domingo, Antonio, and Ignacio Peralta, with a request that he issue, or cause to be issued, to said claimants, confirmees, Vicente Peralta and others, a patent for the lands of the rancho, in accordance with such plat of survey, in due form of law. Your petitioner further shows that the said commissioner, whose duty it was to prepare, and cause to be properly signed and issued, upon re-

ceipt of such plat of survey and certificate of confirmation, a patent to the said claimants, confirmees, for the said lands, although often requested, has neglected and refused, and still does neglect and refuse, and did on the 22d day of January in the year 1898 expressly refuse, to prepare and issue, or cause to be issued, such patent, to the great damage of petitioner; that thereafter, and within due time, your petitioner here duly took and perfected an appeal from the said refusal and decision of the said commissioner to the honorable the secretary of the interior of the United States, which appeal was in due time heard and considered, and on the 5th day of July in the year 1898 the said refusal and decision by the said commissioner was by the honorable the said secretary expressly approved and affirmed, and he, the said secretary, refused, and does still refuse, to issue, or to order issued, a patent for the lands of the said rancho to the said claimants, confirmees, as aforesaid, or to any one for their use, or at all, to the great damage of your petitioner. Your petitioner further shows that the act of the said surveyor in making and certifying the said plat of survey was the act and deed of the said the United States; that the said plat was accepted by your petitioner on behalf of the said claimants, confirmees; that the same has never been appealed from, reversed, or set aside. And your petitioner prays leave to refer to the said plat of survey, now on file and of record in the proper land office of this district, and in the department of the interior of the United States, or to a certified copy thereof, and to make the same a part of this, her petition. Wherefore, your petitioner prays that the decree of this court so made and entered in this proceeding on the 30th day of November in the year 1859, and filed December 1, 1859, may be ordered to be executed; that the United States may, by the order and judgment of this court, be directed and required to cause to be made, signed, and issued to the said claimants, confirmees in the proceeding, its patent, in due form of law, for the lands of the rancho of San Antonio, or for so much and such parts thereof as have not heretofore been patented to them or any of them, by a day to be fixed in such order and judgment, and that in default thereof the United States show cause before this court, at a time and place to be fixed in such order and judgment, why she has not so made, signed, and issued, caused to be made, signed, and issued, such patent; and that your petitioner may have such further and other, or other and further, order and relief in the premises as may be just and agreeable to equity."

The United States of America, by and through its attorney, Frank L. Coombs, United States attorney for the Northern district of California, demurs to the petition of Mary E. H. Gwin, filed herein, and for cause of demurrer shows to the court the following:

"First. That the petition herein does not show from whom petitioner derives, or claims to derive, title to the lands or interests in controversy. Second. That it does not appear, and, as a matter of fact, is not true, that the decree of this court made on the 30th day of November, 1859, and referred to by petitioner, was and is the final decree of this court in and in relation to the matters and issues involved in this cause. Third. That the decree made by this court on the 30th day of November, 1859, and referred to as a final decree, with reference to the lines of said grant established thereby, and with reference to the surveys directed thereunder, but was subsequently thereto changed and modified with reference to said lines and surveys by other decrees, and especially by a decree of this court made on the 4th day of October, 1871, which was and is the final decree of this court, and the final order with reference to said lines and surveys. Fourth. That it does not appear from said petition that the act of congress of July 23, 1866, cited and referred to in said petition, empowered the surveyor general of the United States for California to do and perform the things, especially in reference to the plat and survey alleged to have been transmitted to the commissioner of the general land office in Washington. Fifth. That the map and survey made by the surveyor general of the United States for California as aforesaid was made contrary to and without authority of law, and without authority of this court, and in defiance of its order and decree, and especially in defiance and in contravention of its decree of October 4, 1871, in relation thereto, as fully appears by the records in this cause. Sixth. That it does not appear from the petition that there was not a request

made in conformity with law for a survey of the lands confirmed by the decree of October 4, 1871, and in conformity therewith, and it does not appear that the surveyor general aforesaid did not transmit, or cause to be transmitted, a proper map or survey of said lands in conformity with said decree; that it does not appear that any or all of the requirements of law in relation to such matters were not strictly complied with under and by virtue of said final decree of October 4, 1871. Seventh. That this court has no jurisdiction over these proceedings, having heretofore, to wit, on the 4th day of October, 1871, fully determined, by its decrees made and entered on said day, all of the matters in controversy pertaining to the validity of said grant and the survey and lines established thereunder, and for the further reason that, in conformity with said decree, patents have been issued to all of the claimants by the United States of America, and have been accepted by them, their heirs and assigns, for more than twenty years last past. Eighth. Further, that this court is without jurisdiction, for the reason that it appears from the proceedings herein that the particular lands claimed by the petitioner were determined in these proceedings to be lands held by the state of California by reason of its sovereignty, and were awarded in said decree to the particular interveners claiming under the said state of California, and were ordered therein not to be included in, but to be excluded from, the lines of said Rancho San Antonio, as the same were established by said final decree of confirmation. Ninth. The court is without jurisdiction for the reason that it appears upon the petition herein that petitioner presented her application and petition to the commissioner of the general land office, asking for an adjudication of her rights, and for a patent to the lands claimed by her, which, as appears by the petition herein, were determined upon by said commissioner, and, upon appeal being taken to the secretary of the interior of the United States by petitioner, the said decision of the commissioner was confirmed and approved. Tenth. That this court is without authority and jurisdiction, for the reason of the causes above alleged, to give the relief sought in this petition, or to order and direct that a patent, or any patent at all, be issued by the government of the United States of America, or by any of its agents acting thereunder, to said lands, or any part thereof. Eleventh. That it does not appear that any of the acts directed to be done and performed by the final decree of this court have not been done in conformity therewith and with law. Twelfth. That the petition does not state facts sufficient to entitle the petitioner to the relief demanded therein."

The decree of 1859, which is claimed by petitioner to be the final decree, reads as follows:

"It satisfactorily appearing to the court that in the decree of this court heretofore entered in this cause, and affirmed on appeal by the supreme court of the United States, a clerical error has intervened, and that the said decree is repugnant and inconsistent with itself; and it further appearing to this court that the northern boundary of the tract of land confirmed to said claimants is erroneously described as running by the southern base of the Cerrito, therein mentioned, whereas the said northern boundary, as declared and adopted by the supreme court of the United States in the opinion of said court in this case, is 'the rivulet which issues from the mountain range, and runs along the foot of said Cerrito of San Antonio, and at the entrance of a little gulch there is a rock elevating itself in the form of a monument, and looking towards the north'; and it appearing to this court that the rivulet so adopted as the said northern boundary runs along the northern base of the said Cerritos of San Antonio, and not along the southern base thereof; and it further appearing that the ridge of mountains constituting the eastern boundary of said rancho is erroneously denominated its western boundary, as is manifest from the face and terms of the decree itself,—it is, on motion of the counsel for the parties interested in said claim, and the district attorney being present and not objecting thereto, ordered that the said decree be, and the same hereby is, construed and amended by substituting the word 'northern' for 'southern' where the word 'southern' the first time occurs in said decree, and the word 'eastern' for 'western' where the latter word first occurs in said decree.

"Ogden Hoffman, U. S. Dist. Judge.

"[Indorsed] Filed December 1, 1859."

The record in the original case of United States of America against Vicente Peralta et al. (No. 100) shows that on June 5, 1871, the following decree was entered in said cause:

"This cause came on this day again to be heard upon objections to the modified survey filed in this cause, and was argued by counsel, and thereupon, and in consideration thereof, it is ordered, adjudged, and decreed that the said modified survey be, and the same is hereby, set aside, as not being in conformity with the direction of this court heretofore entered and given in this cause; and it is further ordered, adjudged, and decreed that the said survey hereby set aside be modified between course 98 and course 113, as the same are laid down on the plat heretofore filed in this cause of the survey of said lands made by James T. Stratton, United States deputy surveyor, and approved by J. W. Mandeville, United States surveyor general for the state of California, on the 3d day of March, 1860, so as to include all of the lands between said course down to the ordinary high-water line, and exclude only so much land between said courses as is covered by the tide which happen between the full and change of the moon, twice in 24 hours. And it is further ordered, adjudged, and decreed that the surveyor general of the United States for the state of California cause said survey hereby set aside to be modified, without delay, in accordance with this decree, and return a plat of the same into this court for its approval; and, in determining the line of ordinary high water between the courses aforesaid, it is further ordered, adjudged, and decreed that the said surveyor general adopt the line fixed as such by the officers of the United States coast survey, as the same is delineated, on the plat marked 'Exhibit Rogers No. 1,' and described in the field notes of said survey, copies of which are on file in this cause.

Ogden Hoffman, District Judge."

And on August 4, 1871, a decree approving the survey made in conformity with the decree of June 5, 1871, was entered, as follows:

"This cause came on this day again to be heard, and it appearing to the court that no exception has been filed to the modified survey heretofore made under order of this court, and a plat of which was filed in the clerk's office of this court on the 26th day of July, 1871: Now, therefore, on motion of Williams & Thornton, due notice thereof having been given, it is ordered, adjudged, and decreed that this court doth hereby order, adjudge, and decree that said modified survey be, and is hereby, approved, as a true and correct location of the lands confirmed in the above-entitled cause. The survey, of which confirmation is hereby made, contains eighteen thousand eight hundred and forty-eight  $\frac{98}{100}$  (18,848  $\frac{98}{100}$ ) acres, and is the same executed under the order and direction of this court, by decree entered in this cause on the 5th day of June, 1871, a duly-certified plat whereof was filed in the clerk's office of this court as aforesaid on the 26th day of July, 1871, and is marked: 'Approved August 4th, 1871. Ogden Hoffman, Dist. Judge,'—and attached hereto as a part of this decree.

Ogden Hoffman, U. S. Dist. Judge."

Boyd & Fifield, for petitioner.

Frank L. Coombs, U. S. Atty., and Marshal Woodworth, Asst. U. S. Atty.

HAWLEY, District Judge (after stating the facts). The petition and demurrer, which have been copied verbatim in the foregoing statement, are deemed sufficient to explain the nature and character of this proceeding, and to render it unnecessary to refer in detail to the steps that were taken in the original case prior to the rendition of the decree of November 30, 1859, filed December 1, 1859. For the purpose of disposing of the questions raised by the pleadings herein, it will be admitted, without discussion, that the court has jurisdiction, and is possessed of the inherent power and authority to do whatever is necessary to be done in order to enforce its

lawful decrees. It must not, however, be understood by this admission to include the proposition that in proceedings like the present the court has any jurisdiction, power, or authority to order or direct the issuance of a patent by the United States, as prayed for by the petitioner. That branch of the question will be hereafter referred to.

The pleadings upon this motion are peculiar, in this: That the petition of the intervener does not state all the proceedings in the suit of United States against Peralta; and the United States, instead of answering the petition and setting up all the facts, demurs thereto, thereby admitting, in the eye of the law,—in so far as the demurrer can be treated as a general demurrer,—that the allegations of the petition are true. It is apparent that the petition does not state all of the steps that were taken by the court after the decree of 1859. It entirely ignores any reference to the proceedings of this court in rendering the decree of 1871, and of the steps taken thereunder which resulted in the issuance of a patent to the claimants in the original suit. Counsel, in illustrating their arguments in favor of or against the demurrer, have detailed many facts in regard to the proceedings had in the original case, and the decrees rendered therein, and the various steps taken thereunder. The contention of petitioner's counsel is that the court should not consider any facts whatever, except those mentioned in the petition and admitted by the demurrer. The argument on the part of the United States is to the effect that the court is bound to take judicial notice of its own orders and decrees made in the original suit, regardless of the question whether they are set forth or referred to in the petition under consideration or not. In relation to these contentions, it will be observed that the demurrer, with the exception of a few points made therein, must be considered as a special demurrer, in the nature of a special plea, setting forth facts why the relief asked for should not be granted. It does not admit, but, on the contrary, expressly denies, that the decree of this court made November 30, 1859, and filed December 1, 1859, "is the final decree of this court in relation to the matters and issues involved in this cause," and, in this connection, avers that the decree of 1859, with reference to the lines of the grant established thereby and with reference to the surveys directed thereunder, was subsequently changed and modified with reference to said lines and surveys by the decree made October 4, 1871, and other decrees, and that this was and is the final decree of this court with reference to said lines and surveys. The pleading interposed by the United States is not a speaking demurrer, in the sense that it endeavors to bring in a state of facts independent of the records in the original cause, and to bind the petitioner by such statement. This cannot be done. The pleading, by whatever name it may be called, only seeks to complete the record of the decrees made in the original case, without a consideration of which the court could not properly decide the questions sought to be raised by an imperfect or incomplete statement of the record. As the petition does not contain all the essential facts of the original case with reference to the decree of 1859, and of the steps taken by the court thereunder, I fail to see any good or substantial reason

why such facts could not be as well supplied by a special demurrer or plea as by an answer. The principles in relation to the effect of the special demurrer presented herein bear a close analogy to, if not entirely consistent with, the well-settled rule that a demurrer reaches back to the first error in the pleadings, and judgment may properly be given thereon against the party who committed it. As was said by Marshall, C. J., in *Cooke v. Graham's Adm'r*, 3 Cranch, 229, 235, 2 L. Ed. 420, "When the whole pleadings are thus spread upon the record by a demurrer, it is the duty of the court to examine the whole, and go to the first error." 6 Enc. Pl. & Prac. 326, and authorities there cited. This general principle is often applied where, as here, the defect pointed out is one of substance, and not of mere form. The end sought to be reached by the demurrer, and the intention of the pleader in regard thereto, are, in substance, identical with the object to be accomplished by a special plea. The object of a plea in equity is to save the parties the expense of a trial upon all the matters alleged in the bill. The purpose of the plea is to reduce the cause, or some part of it, to a single point, which, if sustained, constitutes a complete defense to the suit, or at least to those portions of the bill to which the plea applies.

In *Farley v. Kittson*, 120 U. S. 303, 314, 7 Sup. Ct. 534, 30 L. Ed. 684, the court said:

"The office of a plea is not, like an answer, to meet all the allegations of the bill, nor, like a demurrer admitting those allegations, to deny the equity of the bill; but it is to present some distinct fact, which of itself creates a bar to the suit, or to the part to which the plea applies, and thus to avoid the necessity of making the discovery asked for, and the expense of going into the evidence at large. *Mitt. Pl. (4th Ed.)* 14, 219, 295; *Story, Eq. Pl.* §§ 649, 652."

In *Adams, Eq. (8th Ed.)* 336, it is said:

"The principle of a defense by plea is that the defendant avers some one matter of avoidance, or denies some one allegation of the bill, and contends that, assuming the truth of all the allegations in the bill, or of all except that which is the subject of denial, there is sufficient to defeat the plaintiff's claim. It is applicable, like a demurrer, to any class of objections, but the most usual grounds of plea are: (1) Want of jurisdiction; (2) personal disability in the plaintiff; (3) a decision already made by the court of chancery, or by some other court of competent jurisdiction."

See, also, *U. S. v. California & O. Land Co.*, 148 U. S. 31, 39, 113 Sup. Ct. 458, 37 L. Ed. 354; 16 Enc. Pl. & Prac. 598.

It is true that the steps to be pursued under a special plea are in some respects differently provided for; but inasmuch as the practice here pursued was not objected to, on that ground, and the hearing on the special demurrer does not otherwise affect the substantial rights of the parties, the irregularities in the practice, if any exist, may be deemed wholly immaterial. *U. S. v. Gurney*, 4 Cranch, 333, 2 L. Ed. 638; *Zimmerman v. So Relle*, 25 C. C. A. 518, 80 Fed. 417, 420.

The affirmative facts set forth in the demurrer are shown to exist by an inspection of the records in the original case. I am of opinion that it is the duty of this court to assume, without any proof on either side, the facts which are not controverted by the special de-



murrer or plea to be as set out in the petition; and, with reference to the facts which are controverted by the special demurrer, the court must assume the facts therein set forth to be as therein stated. With reference to the questions thus presented, I am of opinion that this court, after the rendition of the decree of 1859, under the provisions of the statutes of 1851, 1860, and 1866, retained jurisdiction of the cause, and had the power and authority to reject or approve any survey thereafter made, or to otherwise change or modify the decree, upon proceedings properly brought before it for that purpose. If the decree of 1859 was final in the sense that it determined the validity of the grant, it was not a final decree in the full sense of that term, because it did not determine the correctness of the survey, and could not do so until it was made by the surveyor general and presented to the court. This was accomplished by the orders and decrees of the court made in 1871, and the decree approving the survey must therefore be treated as the final decree of this court. It is not denied that a survey thereunder was made by the surveyor general of the United States and approved by the court, and that subsequent thereto a patent was issued in conformity therewith. This court was thereby deprived of any further jurisdiction in the premises. From the arguments of counsel, it appears that, in the earlier stages of the proceedings in the original case touching the location and boundaries of the grant, the question arose whether the state of California had the superior right by virtue of its sovereignty over the tide and submerged lands in San Francisco Bay, or whether such lands should be included in the grants from the Mexican or Spanish governments. The court was called upon to determine whether or not the boundary line of the lands granted to Peralta should or should not be confined to the high-water mark along the bay and estuary. On this point counsel for the petitioner, in his brief, says:

"Our contention here \* \* \* is that when the decree of this court declared the western boundary line of the rancho of San Antonio, as defined in the grant from Mexico, as being a line along the Bay of San Francisco, it did not mean a line running through the creeks and sloughs with which this shore of the bay from Contra Costa to Santa Clara is intersected. It did not mean running up those creeks and sloughs, and taking the banks of the creeks and sloughs, instead of the shore of the bay, as being the boundary."

This matter is here referred to simply for the purpose of giving a better understanding with reference to the controversy between the parties as to the respective surveys.

The facts set forth in the petition and demurrer present a case which was brought in 1852, under the provisions of the act of congress of 1851, to establish a claim to the lands of the rancho of San Antonio by virtue of a right or title derived from the Spanish and Mexican governments. The various steps taken in said case resulted in the decrees of this court entered in 1859 and 1871, and culminated in the issuance of patents to the claimants in 1877. The quantity of land claimed embraced about 46,685 acres, and the amount embraced in the patents was only 44,333 acres; being 2,352 acres, or thereabouts, less than was included in the survey made in

1895. It will thus be seen at a glance that the present proceeding was instituted more than 40 years after the decree of 1859, upon which petitioner relies, was rendered, and about 28 years after the rendition of the decree of 1871, upon which the United States rely, and over 20 years after the close of the proceeding in the original case by the issuance of patents in conformity with the decree of this court of 1871. The patentees, under whom petitioner claims, acquiesced in the correctness of the decree of 1871, and accepted the patents issued thereunder without objection. The proceedings were, so far as the record shows, conducted in good faith, and have remained unchallenged for over 20 years, during which time vast interests have been acquired by other parties in the lands not embraced in the patents. Under such a state of facts, it becomes apparent that petitioner must necessarily present a clear case,—one entirely free from doubt as to her legal and equitable rights in the premises,—in order to obtain any relief. The patents, as issued, in effect decide that the lands described therein include all the lands to which the claimants were entitled under the decree and survey. If the decree of 1871, and the survey therein referred to, did not embrace all the lands to which the grantors of the petitioner were entitled, they should have taken the necessary steps to have the same set aside or modified. By the issuance of a patent, presumably at their request, the entire proceedings were at an end. The final decree of this court was enforced, and patents were issued in accordance therewith. The petitioner could not thereafter invoke the power of this court to annul its action, and to proceed under the decree of 1859, which had been changed by the decree of 1871.

The magnitude and importance of the questions herein involved will readily be seen by a careful perusal of the opinions of Mr. Justice Field, of Hoffman, district judge, and Sawyer, circuit judge, in the three cases of *U. S. v. Flint* (decided in 1876) 4 Sawy. 42, 87, Fed. Cas. No. 15,121. These were suits in equity brought in the United States circuit court of California to vacate certain patents issued by the United States upon confirmed Mexican grants, upon the ground that said patents were obtained by fraud. They were commenced 19 years after the final decree in the United States district court, and 8 years after the issuance of the patent by the government. The act of 1851 is discussed at great length, and a reference thereto is made, for the purpose of giving the views entertained as to its proper construction and effect by the learned judges who participated in the decisions. This court is not, however, called upon, under the pleadings before it, to discuss the merits of the case. The question as to the sufficiency of the petition to require an answer is alone involved. To determine this question it is only necessary, as before stated, to inquire and decide whether, from the averments in the petition and the so-called demurrer, the decree of 1859 is the final decree of this court, and whether this court has any jurisdiction to order a patent to be issued as prayed for by petitioner. The contention of petitioner is that the decree of 1859 is the final decree, and that the court was not possessed of any jurisdiction to thereafter change or alter the same, and that, under the provisions of section 8 of the act of

1866, it became the duty of the surveyor general of the United States for California to survey the land as described in said decree, and that the court had no power or authority to reject or disapprove of such survey, and upon such survey it became the duty of the United States to issue its patent in accordance therewith. An examination of the provisions of the statute, and of the authorities upon which petitioner relies, fails to convince me of the soundness of this contention.

Section 13 of the act of 1851 provides, among other things, that all lands, the claims to which shall be finally decided by the district or supreme court, shall be deemed, held, and considered as part of the public domain of the United States, and that:

"For all claims finally confirmed by the said commissioners, or by the said district or supreme court, a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same." 9 Stat. 631.

The amendatory act of 1860 requires the surveyor general, after making a survey in pursuance with the provisions of section 13 of the act of 1851, to give notice of such survey by publication. Section 2 of this act (1860) provides:

"That the district courts of the United States for the Northern and Southern districts of California are hereby authorized, upon the application of any party interested, to make an order requiring any survey of a private land claim within their respective districts to be returned into the district court for examination and adjudication, and on the receipt of said order, duly certified by the clerk of either of said courts, it shall be the duty of the surveyor general to transmit said survey and plat forthwith to the said court."

Section 6 provides:

"That all surveys and locations heretofore made and approved by the surveyor general of California, which have been returned into the said district courts, or either of them, or in which proceedings are now pending for the purpose of contesting or reforming the same, are hereby made subject to the provisions of this act." 12 Stat. 33.

Section 8 of the act of July 23, 1866, entitled "An act to quiet land titles in California," upon which petitioner chiefly relies, reads as follows:

"That in all cases where a claim to land by virtue of a right or title derived from the Spanish or Mexican authorities has been finally confirmed, and a survey and plat thereof shall not have been requested within ten months from the passage of this act, as provided by sections six and seven of the act of July first, eighteen hundred and sixty-four, 'To expedite the settlement of titles to lands in the state of California,' and in all cases where a like claim shall hereafter be finally confirmed, and a survey and plat thereof shall not be requested, as provided by said sections within ten months after the passage of this act, or any final confirmation hereafter made, it shall be the duty of the surveyor general of the United States for California, as soon as practicable after the expiration of ten months from the passage of this act, or such final confirmation hereafter made, to cause the lines of the public surveys to be extended over such land, and he shall set off in full satisfaction of such grant, and according to the lines of the public surveys, the quantity of land confirmed in such final decree, and as nearly as can be done in accordance with such decree." 14 Stat. 218.

What is the jurisdiction, extent, and power of the district court and of the surveyor general under the provisions of these acts? At the time of the rendition of the decree of 1859, grave doubts existed as to whether or not the district court had the power under that act to reject or approve the survey required to be made by the surveyor general for California. With reference to the act of 1851 numerous authorities have been cited by the respective counsel, a few of which will be noticed:

In *U. S. v. Fossatt*, 21 How. 445, 450, 16 L. Ed. 185, where this court, presided over by the learned district judge who rendered the decrees under consideration in the present case, had, in conformity with the directions of the decree, declared the external lines on three sides of the tract claimed, leaving the other line to be completed by a survey to be made, and from this decree the appeal was taken, the supreme court said:

"It is asserted on the part of the appellants that the district court has no means to ascertain the specific boundaries of a confirmed claim, and no power to enforce the execution of its decree, and consequently cannot proceed further in the cause than it has done. The thirteenth section of the act of 3d March, 1851, makes it the duty of the surveyor general to cause all private claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same. It was the practice under the acts of 1824 and 1828 (4 Stat. 52, 284) for the court to direct their mandates specifically to the surveyor designated in those acts. And in the case *Ex parte Sibbald v. U. S.*, 12 Pet. 438, 9 L. Ed. 1167, the duty of the surveyor to fulfill the decree of the court, and the power of the court to enforce the discharge of that duty, are declared and maintained. The duties of the surveyor begin under the same conditions, and are declared in similar language, in the acts of 1824, 1825, and of 1851. The opinion of the court is that the power of the district court over the cause, under the acts of congress, does not terminate until the issue of a patent conformably to the decree."

In June, 1859, Judge Hoffman, in *U. S. v. Folsom*, 7 Sawy. 602, 612-617, Fed. Cas. No. 15,127, was again called upon to pass upon the question. In his opinion he states:

"A decree having been entered at a former term confirming the claim in this case according to the boundaries mentioned in the grant, the appeal therefrom was, by consent of the district attorney, acting under the instructions of the attorney general, dismissed. A motion is now made that the survey be brought into court, to be examined and passed upon, and that a final decree be entered confirming to the claimants the lands so surveyed. This motion is made that the court may exercise the jurisdiction which, by the recent decision of the supreme court in the case of *U. S. v. Fossatt*, 21 How. 445, 16 L. Ed. 185, it is supposed to possess."

He then reviewed at great length the opinion of the supreme court in that case. His views in regard thereto are interesting and instructive. Among other things, he said:

"That the supreme court have, in their opinion, laid down principles generally applicable to all cases, I think, is evident. In the first place, they discuss and decide the point whether this court has, by the act of 1851, any authority to decide questions of extent, location, and boundary. Such questions, they declare, may be 'essential in determining the validity of a claim,' and the power to decide upon 'validity' involves the power to decide upon all questions of boundary. \* \* \* I therefore think that in all cases where a decree of confirmation has been entered, and a survey under it has been made, on which a patent is about to issue, which survey is objected to as erroneous, it is the

duty of the court to direct the survey to be returned to it, that it may hear and determine the questions of location and boundary which may be raised."

So much for the act of 1851. We now direct our attention to the views expressed by the courts with respect to the amendatory act of 1860:

In *U. S. v. Halleck*, 1 Wall. 439, 454, 17 L. Ed. 664, Mr. Justice Field, in delivering the opinion of the court, after referring to the case of *U. S. v. Fossatt*, and to the fact that the district court had ordered the new survey to be returned into court, and that proceedings in regard thereto were pending at the time of the passage of the act of June 14, 1860, speaking with reference to said act, said:

"Whatever question might be raised as to the jurisdiction of the district court to supervise the survey previous to that act, there can be none since its passage. That act applies not merely to surveys subsequently made, but also to such surveys as had been previously made and approved by the surveyor general, and returned into the district court upon objections to their correctness."

In the *Fossatt or Quicksilver Mine Case*, 2 Wall. 649, 712, 17 L. Ed. 739, objections were made to the survey and location on the ground, among others, that the proceedings under the act of 1860 were not judicial, but purely executive and ministerial. It was therefore contended that the appeal from the order or the decree of the district court regulating the survey and location ought not be entertained, because the court could only determine the validity of the grant, leaving its survey and location to the executive department of the government. Mr. Justice Nelson, in delivering the opinion of the court, in reply to these propositions said:

"We need only refer to the opinion of this court in the present case the second time it was before us, as presenting a conclusive refutation of these several positions. The fundamental error in the argument is in assuming that the survey and location of the land confirmed are not proceedings under the control of the court rendering the decree, and hence not a part of the judicial action of the court. These proceedings are simply in execution of the decree, which execution is as much the duty of the court, and as much within its competency, as the hearing of the cause and the rendition of its judgment,—as much so as the execution of any other judgment or decree rendered by the court. This power has been exercised by the court ever since the Spanish and French land claims were placed under its jurisdiction. \* \* \* The powers of the surveyor general under these acts were as extensive and as well defined as under the act of 1851. The act of 1860 did not enlarge or in any way affect his powers. They remained the same as before."

With the view I take of the averments in the pleadings herein, I deem it unnecessary to discuss at any length the provisions of section 8 of the act of 1866, because, if the decree of 1859 is not the final decree, that act has no application to the proceedings herein. If the court retained jurisdiction under the acts of 1851, 1860, and 1864, up to the time of the decree of 1871, and thereafter until the patent was issued, that fact disposes of the motion made by the petitioner. The act of 1866 is not, and could not be, applicable to this case, except upon the theory of the petitioner, that the decree of 1859 is the final decree, and that no survey was made thereunder until 1895, whereas the record shows, as averred in the pleading of the United States, that the decree of 1859 was supplemented and modified upon application of parties interested in some

of the lands embraced therein by the decree of 1871. The act of congress of 1866 may be more general in its character, scope, and effect than the previous acts. It will be observed, however, that the act does not repeal the provisions of the act of 1851, or of the amendatory act of 1860, or of the act of 1864.

But if it should be conceded that petitioner's contention is true, viz. that this court had no jurisdiction, power, or authority over the survey under the act of 1866, and that the land department was thereby vested with the exclusive jurisdiction to judicially determine whether or not the survey of 1895 conformed to the decree of 1859, the question would then arise whether this court has any jurisdiction in the present proceedings to compel the commissioner of the general land office, the secretary of the interior, or the executive department of the government, to cause a patent to be issued in conformity therewith. Certainly not. If this court had no power to decide questions of locality and survey, and the land department was vested with exclusive jurisdiction in regard thereto, how could this court in the present proceeding set aside the rulings in the land department refusing to grant a patent in conformity with the survey made in 1895? There are no provisions in the act of 1866 to compel the commissioner of the general land office or the secretary of the interior to approve the survey if it is deemed to be erroneous, or to give it any effect whatever if it is disapproved of for good reasons. For aught that appears in the petition, the survey of 1895 might have been rejected because it did not, in the opinion of the land department, conform to the decree; or the patent then applied for may have been refused because the decree of the district court of 1859 was not the final decree, and that the decree of 1871 had been enforced by the issuance of patents in conformity therewith, and that the questions of title and boundaries of the grant were thereby finally disposed of. No case has been cited by petitioner's counsel that would authorize this court to order the government or the officers of the land department to issue a patent in accordance with that survey. None having been found, it will be presumed that none exists. If the patents issued, in pursuance of and in conformity with the decree of this court in 1871, approving the survey made by the surveyor general, are (as hereinbefore declared to be) valid, then it necessarily follows that the relief asked for cannot be granted.

In *De Guyer v. Banning*, 167 U. S. 723, 736, 17 Sup. Ct. 937, 42 L. Ed. 340, et seq., which was an independent action in ejectment, the plaintiffs offered in evidence in support of their title a patent which did not grant lands that were excluded from the surveyed claim, and contended that they had the right to go behind both the survey and patent, and recover the possession of the lands so excluded, the same as they would have had the right to do if the lands had been included in both the survey and the patent. The court, with reference to this contention, said:

"In our opinion, if those who obtained the decree of confirmation objected to the survey as not being in conformity with that decree, their objection should have been made known to the district court before the survey was transmitted

to the general land office, or at least before it was acted upon and made the basis of a patent. The patent was not issued until nearly a year after the survey was made and certified. Under the act of 1851, it was within the power of the district court to have required a survey in exact conformity with its decree. Its jurisdiction over the subject did not end with the decree. The surveyor general was required by the statute (section 13) to cause an accurate survey to be made of all private claims finally confirmed under the act of 1851, and to furnish plats of the same. If he misinterpreted the decree; if he made an inaccurate survey, and excluded from it lands that were confirmed to the original claimants,—the court had authority to compel the proper execution of its decree."

After referring to many decisions of the supreme court upon this subject, the court said:

"We are of opinion that while it may be true, in some cases, that an action to recover possession of lands confirmed to a claimant under the act of 1851 can be maintained before a patent is issued, yet a patent issued avowedly in execution of such decree was conclusive between the United States and the claimants, and, until canceled, it alone determines, in an action to recover possession, the location of the lands that passed under the decree,"

—And thereafter discussed at great length the effect of a patent, to which opinion reference is here made, and to the authorities there cited.

See, also, *De Guyer v. Banning*, 91 Cal. 400, 402, 27 Pac. 761, and authorities there cited.

In *Chipley v. Farris*, 45 Cal. 527, 538, which involved the title to lands alleged to have been covered by a Mexican grant, and in respect to which there were proceedings under the act of congress of March 3, 1851, it was contended on one side that the patent was conclusive upon all points of the case, and put an end to all questions of lines and boundaries. On the other side it was insisted that the confirmation of the claim gave the claimant a perfect title, and that he could not be divested of title to any lands embraced in the decree of confirmation by a patent that excluded a portion of them. In answering these contentions the court said:

"A patent issued under the act of 1851 is, as has often been held by this court, the final act in proceedings instituted for the confirmation of the claim of the patentee to land which had been granted by the former government, and for the segregation of such land from the public lands of the United States; and it is a record which binds both the government and the claimant, and cannot be attacked by either party, except by direct proceedings instituted for that purpose. *Leese v. Clark*, 18 Cal. 535. While it stands, the claimant, or those deriving title through him, will not be permitted to aver that the claim comprised other or different lands from those mentioned in the patent. Such being the nature and effect of the patent, the evidence offered by the plaintiffs to prove that the patent was void was properly excluded. It is unnecessary, in order to give effect to a patent, to show an acceptance of it by the patentee. The general rule is that a patent takes effect upon its being issued, and it is unnecessary to show a delivery to or an acceptance by the patentee. \* \* \* It is contended by the plaintiffs that the survey, which is incorporated into the patent, does not accord with the decree of confirmation, and that they are entitled to rely upon the decree—which is also incorporated into the patent—for title to lands within the decree, but not within the survey. This position cannot be maintained consistently with the views already expressed as to the nature and effect of the patent. The patent purports to convey the lands described in the survey, and its scope cannot be extended, nor, on the other hand, can it be limited, by showing that the decree comprised a greater or less area than the survey. Nor can the claimant, after admitting, as he must, the conclusive effect of the patent, make out title to lands not

conveyed by the patent, by the production of the proceedings which culminated in the patent. The patent, while it remains in force, conclusively determines what lands the claimant was entitled to under his claim and the decree of confirmation. The claimant can neither reform the patent, nor show that it is in any respect incorrect, in an action of ejectment."

The merits of this case have been settled by the final decree of this court, and the patents issued in conformity therewith. If the present motion could be sustained, and a new order made in disregard of the final decree of this court, it would open up a new field of inquiry, and create future litigation that would be endless. As was said by Mr. Justice Field in *U. S. v. Flint*, supra:

"Of course, under such a system of procedure, the settlement of land titles in the state would be postponed indefinitely, and the industries and improvements which require for their growth the assured possession of land would be greatly paralyzed."

The obligations resting upon the government concerning the Mexican and Spanish grants are purely political in their character, and are settled and discharged in such manner and upon such terms as they deem expedient. To quote the opinion of Mr. Justice Field in *Beard v. Federy*, 3 Wall. 478, 492, 18 L. Ed. 88:

"By the act of March 3, 1851, they have declared the manner and the terms on which they will discharge this obligation. They have there established a special tribunal, before which all claims to land are to be investigated; required evidence to be presented respecting the claims; appointed law officers to appear and contest them on behalf of the government; authorized appeals from the decisions of the tribunal, first to the district, and then to the supreme court; and designated officers to survey and measure off the land when the validity of the claims is finally determined. When informed, by the action of its tribunals and officers, that a claim asserted is valid and entitled to recognition, the government acts, and issues its patent to the claimant. This instrument is therefore record evidence of the action of the government upon the title of the claimant. By it the government declares that the claim asserted was valid under the laws of Mexico; that it was entitled to recognition and protection by the stipulations of the treaty, and might have been located under the former government, and is correctly located now, so as to embrace the premises as they are surveyed and described. As against the government, this record, so long as it remains unvacated, is conclusive. And it is equally conclusive against parties claiming under the government by title subsequent. It is in this effect of the patent as a record of the government that its security and protection chiefly lie."

The presumption of the law always is that the officers of the executive department of the government, who are specially charged with the supervision of matters in relation to the issuance of patents, did their duty; and if, under any circumstances, their action can be sustained, it must be presumed that such circumstances existed. I am of opinion that it is the duty of this court, under the facts herein presented, to decline to review the action of the executive department in refusing to issue a patent under the survey of 1895, and to decline to grant the motion of petitioner to compel them so to do. The affirmative facts set forth in the demurrer constitute a complete defense and bar to the relief prayed for by petitioner. The entire matter is *res judicata*. From the views herein expressed, and conclusions reached, it necessarily follows that the demurrer should be sustained, and the petition dismissed. It is so ordered.



## MALCOMSON v. WAPPOO MILLS et al.

Ex parte PEOPLE'S NAT. BANK.

(Circuit Court, D. South Carolina. February 1, 1900.)

**1. CORPORATIONS—RIGHTS OF THIRD PARTIES DEALING WITH OFFICERS—DIVERSION OF FUNDS.**

A bank which held the individual note of the president of a business corporation received a payment thereon by his direction from a debtor of the corporation. The president was sole manager of the corporation, and the owner of the greater part, if not all, of its stock, and treated its business and property as his own, without objection from any one. *Held*, that the bank was entitled to retain such payment without prejudice to its right to receive a dividend equally with other creditors, upon a claim it held against the corporation, from a receiver appointed to wind up its affairs in insolvency.

**2. SAME—INSOLVENCY—INTEREST ON CLAIMS.**

The receiver of an insolvent corporation, who has properly withheld payment of a dividend to a creditor until he could obtain the instructions of the court, is not personally liable for interest thereon; but, if he still has in his hands funds of the corporation, interest may properly be allowed and paid therefrom to place the creditor on an equality with others.

In Equity. On application of receiver for instructions.

James Simons, for receiver.

W. C. Miller, for petitioner.

SIMONTON, Circuit Judge. This case comes up on a report of the receiver asking instructions of the court. Among the claims presented against the receiver is that of the People's National Bank, as holder of the bonds of the Wappoo Mills, collateral security for a note of C. C. Pinckney, Jr., of \$8,500. Under the order of distribution in this case a dividend of \$2,572.98 is payable on these bonds so held by the People's National Bank. The receiver asks the instruction of the court under the circumstances hereafter stated. C. C. Pinckney, Jr., was indebted to the People's National Bank in two notes. One note was for \$8,500, secured by bonds of the Wappoo Mills as collateral. The other note was for \$1,500, secured by collaterals also, but of a different character. Mr. Pinckney was the manager and sole owner of the Wappoo Mills, a corporation. In July, 1897, the Wappoo Mills, through C. C. Pinckney, Jr., contracted to sell to the Etiwan Company, another corporation, 1,500 tons ground rock at a certain price. Mr. Sloan, the president of the Etiwan Company, says that when this contract was made the condition precedent was that 50 cents of the price of each ton of ground rock should be paid by the Etiwan Company towards the payment of the debt due by C. C. Pinckney, Jr., to the People's National Bank. Mr. Pinckney denies that this was a condition precedent to the contract of sale, but he says that he had promised to do this, and had assented to the payment. Some time afterwards, in a conference with the president of the People's National Bank as to the renewal of his \$1,500 note, he referred to and confirmed the action of the Etiwan Company, in paying to the bank at the rate of 50 cents per ton on all ground rock delivered to the Etiwan

Company under this contract. The sum so paid was \$545. This sum was applied by the bank to the \$1,500 note. When the dividend was declared, application was made to the receiver for the dividend payable on the bonds of the Wappoo Mills held by the People's National Bank. The receiver had in his hands a claim against the Etiwan Company for ground rock delivered under the contract, —1,094 tons of the 1,500 tons. Having been informed that \$545 of the purchase money had been paid to the People's National Bank, he did not feel himself authorized to pay the dividend to the bank until this \$545 was paid to him, or in some way accounted for. This was his proper course. When the matter was explained to him, and he ascertained that money due to the Wappoo Mills was paid on a debt due by C. C. Pinckney, Jr., individually, the receiver did not feel that he had authority to pass upon the validity of this action, nor to decide upon the right of Mr. Pinckney to direct this diversion of a debt due to the Wappoo Mills. In this, too, he acted with propriety. On this he asks the instruction of the court. When he reported the matter, the special master was instructed to take and report testimony regarding it. The result of the testimony is stated above. Counsel have been heard, and their argument, with the testimony, has been considered.

There can be no doubt that either before the contract of sale was consummated, or during its progress, or, it may be, after it was made, Mr. Pinckney agreed that 50 cents on the price of each ton of ground rock delivered should be paid in reduction of his debt to the People's National Bank; that this payment was made by the Etiwan Company to the bank; and that Mr. Pinckney ratified, confirmed, and recognized it. The sole question is as to his right to do this. Mr. Pinckney was the sole manager of the Wappoo Mills; if not the only stockholder, the owner of the largest part of its stock. He managed its affairs as if they were his own, and it is impossible to extricate them from his personal affairs. He exercised, without objection from any one, the right to use the property and funds of the Wappoo Mills as his own. Under these circumstances the Etiwan Company and the bank had the right to deal with him on this footing. His direction as to the payment of the price of the rock bound the Wappoo Mills, and it is a good credit on the account due by the Etiwan Company to the Wappoo Mills. But the receiver would not have been safe in so treating it, except under the instructions of the court in this case. The bank appropriated the money received from the Etiwan Company to the \$1,500 note, instead of the \$8,500 note. In the absence of any direction upon this matter by its debtor, it had the right to make the appropriation, both notes having collaterals as security. The receiver will, therefore, pay to the People's National Bank the dividend to which it is entitled on the bonds of the Wappoo Mills held and presented by it, without deduction.

The counsel for the bank ask for interest on this dividend from the time when it was payable. Interest in cases of this kind is allowed by way of damages, or is the compensation paid for the use of the money detained, when such use has been or could have been

made. In the present case the receiver was right in seeking instructions of the court, and the delay which has occurred is incidental to all litigation. *Thomas v. Car Co.*, 149 U. S. 116, 117, 13 Sup. Ct. 824, 37 L. Ed. 663. The receiver did not and could not have used the money; so he is not liable personally for any interest. But, if he has in his hands any funds still liable for the debts of the Wappoo Mills, the bank is entitled to interest on its claim from the time of its demand. In no other way could it be put upon a footing with other creditors who received their dividends. *Armstrong v. Bank*, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747; *People v. E. Remington & Sons*, 126 N. Y. 679, 28 N. E. 249.

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BRUNSWICK TERMINAL CO. et al. v. NATIONAL BANK OF BALTIMORE.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1900.)

No. 298.

1. STATUTE OF LIMITATIONS—WHAT LAW GOVERNS.

Code Ga. 1882, § 2916 (Code 1896, § 3766), providing that all suits for the enforcement of rights accruing to individuals under statutes, "acts of incorporation," or by operation of law, shall be brought within 20 years after the right of action accrues, and not the statute of limitations in Maryland, applies to an action in Maryland against a stockholder in a Georgia corporation to enforce his liability as stockholder as created by the charter of the corporation, within the rule that, where a statutory liability is sought to be enforced, and the statute prescribes the period of limitation, the law of the forum, where contrary thereto, does not govern.

2. FEDERAL COURTS—FOLLOWING DECISION OF STATE COURTS.

A federal court will follow the construction given by the supreme court of a state to a statute of limitations of that state.

Brawley, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Maryland.

Henry W. Williams (Goodyear & Kay and Williams & Williams, on the brief), for appellants.

D. K. Este Fisher and Allan McLane (William A. Fisher and James L. McLane, on the brief), for appellee.

Before GOFF, Circuit Judge, and BRAWLEY and WADDILL, District Judges.

WADDILL, District Judge. This is an appeal from the decree of the circuit court of the United States for the district of Maryland dismissing the bill in equity filed in that court by the appellants against the appellee. 88 Fed. 607. The bill was filed by the appellants, creditors of the Brunswick State Bank of Georgia, on their own behalf and on behalf of such other creditors as might intervene against the appellee, the National Bank of Baltimore, alleged to be liable as a stockholder in the Brunswick State Bank. The Brunswick State Bank was incorporated by an act of the Georgia legislature of October 24, 1881, and discontinued business, being insolvent,

on the 25th of May, 1893. By its charter (section 9, p. 522, Laws 1889) it is provided:

"That said corporation shall be responsible to its creditors to the extent of its property and assets, and the stockholders, in addition thereto, shall be individually liable, equally and ratably, and not one for the other, as sureties to the creditors of such corporation, for all contracts and debts of the said corporation, to the extent of the amount of their stock therein, at the par value thereof, respectively, at the time the debt was created, in addition to the amount invested in such shares."

Code Ga. 1882, § 1496, further provides:

"When a stockholder in any bank or other corporation is individually liable under its charter, and shall transfer his stock, he shall be exempt from such a liability, unless he receives a written notice from a creditor, within six months after such transfer, of his intention to hold him liable: provided, he shall give notice for once a month, for six months, of such transfer, immediately thereafter, in two newspapers in and nearest the places where said institution shall keep its principal office."

The appellee was at one time a stockholder of the Brunswick State Bank of Georgia, and, upon transfer of its stock, failed to comply with the statutory provisions last set forth, and appellants claim that it has incurred the stockholders' liability provided for in the charter hereinbefore recited, and is liable to them in this suit.

In the lower court the appellee appeared, and filed its answer, setting up, among other defenses, that of the statute of limitations, and insisted that the case was governed by the Maryland statute of limitations, applicable to actions of assumpsit or actions of debt on simple contracts (Code Md. [Pub. Gen. Laws] art. 57, § 1), which requires the suit in such cases to be commenced within three years from the time the right of action accrues. The appellants, complainants in the lower court, demurred to the plea of the statute of limitations thus set up, and elected to stand upon the demurrer, and the case turned upon that question solely, the court overruling the demurrer to said plea, and dismissing the bill.

The single question to be determined in this case is whether the statute of limitations of the state of Maryland or of the state of Georgia applies to the claim sued on. The merits of the case were not touched upon by the decision of the lower court, and it is not the purpose of this court to express any opinion thereon. It is a general rule, too well settled to admit of serious controversy at this late day, that the remedies, as distinguished from the rights of the parties, are determined by the law of the forum, and that the statutes of limitations are part of the remedy, and not of the laws affecting rights. *McElmoyle v. Cohen*, 13 Pet. 312, 327, 10 L. Ed. 177; *Bank v. Eldred*, 130 U. S. 693, 696, 9 Sup. Ct. 690, 32 L. Ed. 1080; *Telegraph Co. v. Purdy*, 162 U. S. 329, 339, 16 Sup. Ct. 810, 40 L. Ed. 986; *Willard v. Wood*, 164 U. S. 502, 520, 17 Sup. Ct. 176, 41 L. Ed. 531; *Townsend v. Jemison*, 9 How. 407, 13 L. Ed. 194; *Railway Co. v. Wyler*, 158 U. S. 285, 289, 15 Sup. Ct. 877, 39 L. Ed. 983. There are, however, exceptions to this rule; one being where a statutory liability is sought to be enforced, and the statute prescribes the period of limitation. In this case the general

rule, adopting the statutes of limitations of the forum, is departed from, and the limitation prescribed by the act fixing the liability is applicable. Indeed, this principle was recognized by the learned judge in the court below in his opinion, but he proceeded upon the theory that there was no statute of the state of Georgia fixing the limitation in actions to enforce stockholders' liability. This, it seems, was a mistake, and that there existed such a statute. Code Ga. 1882, § 2916 (Code 1895, § 3766), is as follows:

"All suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of the law, shall be brought within twenty years after the right of action accrues."

This statute, in our opinion, governs in this case, and not the Maryland statute. It is exceedingly broad in its terms, and is expressly made applicable to suits for the enforcement of rights accruing to individuals under statutes and acts of incorporation. This statute has been construed by the supreme court of the state of Georgia, and by it held applicable to causes of action arising under acts of incorporation in that state. *Insurance Co. v. Davis*, 63 Ga. 471. This case turned upon the question of whether the liability arising under the act of the Georgia legislature incorporating the Georgia Masonic Mutual Life Insurance Company was subject to the period of limitation prescribed by the law of that state applicable to simple contracts, or by the act now under consideration, and the court decided that the liability was a statutory one, lasting for 20 years, and that this act applied. A further presentation of the general doctrine of a stockholder's statutory liability by the supreme court of the state of Georgia will be found in *Banks v. Darden*, 18 Ga. 318, 341. This court will follow the construction given by the supreme court of the state of Georgia to a statute of limitations of that state. No rule is, perhaps, more thoroughly established, and we know of no reason for disregarding it in the present case. *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316; *Balkam v. Iron Co.*, 154 U. S. 177, 188, 14 Sup. Ct. 1010, 38 L. Ed. 953. In *Balkam v. Iron Co.*, supra, Mr. Justice White, speaking for the court, said:

"No laws of the several states have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in courts of the United States, than statutes of limitations of action, real and personal, as enacted by the legislature of a state, and as construed by its highest court."

And in support of this position the unbroken decisions of the supreme court, commencing as early as 4 Cranch, and running down to the time of its delivery, were cited by the learned justice. In *Flash v. Conn*, 109 U. S. 371, 381, 3 Sup. Ct. 263, 27 L. Ed. 966, on an appeal from the circuit court of the United States for the district of Florida, it was held that the decision of the New York court of appeals, holding a certain statutory stockholder's liability not to be a penalty, but in the nature of a contract, and therefore not barred by the three-years limitation, as in the case of a penalty, but by the six-years limitation prescribed as to contracts, was binding in all jurisdictions. The court (Mr. Justice Woods) says:

"We think this is a case where the construction of the state court is entitled to great, if not conclusive, weight with us. It is the settled construction of the law of the state, upon which the rights and liabilities of a large number of its citizens must depend. If the liability of a stockholder under section 10 arises upon contract, the six-years limitation applies to it; if the liability is in the nature of a penalty, the three-years limitation applies. It is clear that confusion and uncertainty would result should the state and federal courts place different constructions on the section. Such result ought, if possible, to be avoided. \* \* \* If this were a case arising in the state of New York, we should, therefore, follow the construction put upon the statute by the courts of that state. The circumstance that the case comes here from the state of Florida should not leave the statute open to a different construction. It would be an anomaly for this court to put one interpretation on the statute in a case arising in New York, and a different interpretation in a case arising in Florida. Our conclusion, therefore, is that this action was not brought to enforce a liability in the nature of a penalty."

The rule recognizing the statute of limitations of the state passing the act under which the liability sought to be enforced arises, in cases of statutory liability, where there is a period of limitation prescribed, has been frequently followed by the federal and state courts. *Flash v. Conn*, supra; *The Harrisburg*, 119 U. S. 199, 214, 7 Sup. Ct. 140, 30 L. Ed. 966; *Bank v. Francklyn*, 120 U. S. 756, 7 Sup. Ct. 757, 30 L. Ed. 825; *Boyd v. Clarke* (C. C.) 8 Fed. 849; *Andrews v. Bacon* (C. C.) 38 Fed. 777; *Munos v. Southern Pacific Co.*, 2 C. C. A. 163, 2 U. S. App. 22, 51 Fed. 188; *Theroux's Adm'r v. Railroad Co.*, 27 U. S. App. 508, 12 C. C. A. 52, 64 Fed. 84; *Eastwood v. Kennedy*, 44 Md. 563; *Railway Co. v. Hine*, 25 Ohio St. 629; *O'Shields v. Railway Co.*, 83 Ga. 621, 10 S. E. 268, 6 L. R. A. 152. The reason upon which this line of decisions is based is that in the enforcement of a liability not existing at common law, and arising by virtue of a statute, the right, as well as the mere remedy, is involved, and that to the statute in question alone, as construed by the courts of the state of its passage, can resort be had, either in the matter of the ascertainment of rights arising thereunder, or remedies provided thereby. The statute itself prescribes just what right it gives, and it can likewise provide the remedy for its enforcement, and the time within which it shall be operative. *The Harrisburg*, supra, was an admiralty proceeding in the United States district court for the state of Pennsylvania, in which the liability sought to be enforced was one arising under the statutes of the state of Massachusetts, occasioned by the wrongful death of the libellant; and the supreme court, speaking through Mr. Chief Justice Waite, said:

"The statutes create a new legal liability, with a right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania or the indictment in Massachusetts could be maintained if brought or found after the expiration of the year; and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made part of its existence. It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The

liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

The *Harrisburg* was a case seeking to enforce a liability arising under the statute for wrongful death, and most of the cases last above cited are of the same character, though not all of them; notably *Flash v. Conn*, *Bank v. Francklyn*, and *Andrews v. Bacon*,—the latter case being almost a counterpart of the present one. But we perceive no good reason why the same general doctrine applicable to cases of liability arising under a statute should not apply to cases like the one now under consideration, where it is sought to impose upon stockholders in a corporation a personal liability. Such a liability is unknown to the common law, and exists only by virtue of the statute, and the limitation of the right imposed by the statute controls in the matter of its enforcement. In *Pollard v. Bailey*, 20 Wall. 526, 527, 22 L. Ed. 378, Mr. Chief Justice Waite, in discussing the doctrine of the individual liability of the stockholders in a corporation for the payment of its debts, thus states it:

"The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation, and provide for the manner of its enforcement. The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action. But, where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone, must be employed."

And in the more recent case of *Bank v. Francklyn*, *supra*, Mr. Justice Gray, in referring to the principles as above settled, said:

"Pursuant to these principles, this court has repeatedly held, not only that suits, either at law or in equity, in the circuit court, by creditors of a corporation, to enforce the liability of stockholders under a state statute, are governed by the statute of limitations of the state (*Terry v. Tubman*, 92 U. S. 156, 23 L. Ed. 537; *Carrol v. Green*, 92 U. S. 509, 23 L. Ed. 738; *Terry v. Anderson*, 95 U. S. 628, 24 L. Ed. 365), but also that the question whether the remedy in the federal courts should be by action at law or by suit in equity depends upon the nature of the remedy given by the statutes of the state (*Mills v. Scott*, 99 U. S. 25, 25 L. Ed. 294; *Terry v. Little*, 101 U. S. 216, 25 L. Ed. 864; *Patterson v. Lynde*, 106 U. S. 519, 1 Sup. Ct. 432, 27 L. Ed. 265; *Flash v. Conn*, 109 U. S. 371, 3 Sup. Ct. 263, 27 L. Ed. 966). See, also, *Blair v. Gray*, 104 U. S. 769, 29 L. Ed. 922; *Chase v. Curtis*, 113 U. S. 452, 460, 5 Sup. Ct. 554, 28 L. Ed. 1038."

Counsel for appellee insists that the Georgia act of limitation, above quoted, does not apply, and should not control, in this case, because it is not a part of the act of incorporation of the Brunswick Bank of Georgia, under which the liability sought to be enforced arises, and that, inasmuch as this act contains no specific clause of limitation, the general acts of limitation of the state of Maryland, and not those of Georgia, apply. We cannot accede to this proposition in this case. While there is force in the contention, and in some cases it would be doubtless correct, it is not, in our opinion, true here. The statute of limitations of the state of Georgia sought to be applied was not, in its broader sense, the general statute of limitation of the state, as distinguished from a statute contained in the particular enactment; but it was the special statute of limi-

tations of that state, applicable to statutory liabilities, or liabilities arising under acts of incorporation, or by operation of law, in existence at the time and for years previous to the passage of the act of incorporation of the Brunswick Bank, and therefore must be considered as forming a part of, as read into, the act incorporating the bank, as much so as if it had been formally incorporated therein, and the stockholders and all persons dealing with this bank are presumed to know of its existence, and are bound by its terms. For these reasons the decree of the circuit court dismissing the bill of the complainant is reversed, and the cause remanded, with instructions to said court to reinstate the same, and proceed therein to a final decree.

**BRAWLEY, District Judge, dissents.**

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**HIGGINS et al. v. BALTIMORE & O. R. CO. et al.**

(Circuit Court, W. D. Pennsylvania. January 4, 1900.)

**REMOVAL OF CAUSES—DIVERSITY OF CITIZENSHIP—FORMAL PARTIES.**

Where a bill filed in a state court against a stockholder in a corporation shows that the only question involved is the ownership of the stock held by such defendant, the corporation is not a necessary party, and its joinder as a defendant will not prevent the removal of the cause by the defendant stockholder, where the requisite diversity of citizenship exists between him and the complainant.<sup>1</sup>

**On Motion to Remand to State Court.**

Henry Crawford and Knox & Reed, for complainants.

Johns McCleave, for Baltimore & O. R. Co.

Thomas Herriott, for Pittsburgh & W. Ry. Co.

**BUFFINGTON, District Judge.** This bill was filed in the state court by citizens of New York against the Baltimore & Ohio Railroad Company, a corporation of Maryland, and the Pittsburgh & Western Railway Company, a corporation of Pennsylvania. Both complainants and the Baltimore Company are stockholders of the Pittsburgh Company, the Baltimore Company owning the majority of such stock. After presenting to the state court a bond and petition for removal, the Baltimore Company filed a copy of the record in this court. Complainants now move to remand. This motion is resisted by the Baltimore Company on the ground the bill involves "a controversy which is wholly between citizens of different states, and which can be fully determined as between them." If such be the fact, it follows this court has jurisdiction, the case was, under the provisions of section 2, Act Aug. 13, 1888, rightfully removed, and the present motion should be denied. It is contended by the Baltimore Company that the question in this bill, to wit, the ownership of certain stock in the

<sup>1</sup> As to diverse citizenship as a ground of federal jurisdiction, see note to *Shipp v. Williams*, 10 C. C. A. 249, and, supplementary thereto, note to *Mason v. Dullangham*, 27 C. C. A. 298.



Pittsburgh Company, is one wholly and solely between it and the complainants, and that plenary relief, to the full extent prayed in the bill, can be afforded complainants by a decree against the Baltimore Company alone, without reference to the Pittsburgh Company; that the latter company, while made a party respondent, is a mere formal one, and is not indispensable to the relief sought by a decree against the Baltimore Company. It is, of course, well settled that the jurisdiction of the federal courts cannot be defeated by the joinder of mere nominal parties. *Wormley v. Wormley*, 8 Wheat. 421, 5 L. Ed. 651; *Bacon v. Rives*, 106 U. S. 99, 1 Sup. Ct. 3, 27 L. Ed. 69; and cases cited in *Wilson v. Oswego Tp.*, 151 U. S. 64, 14 Sup. Ct. 259, 38 L. Ed. 70. The bill discloses that a receiver for the Pittsburgh Company has been appointed by this court. The fact that our receiver was not made a party suggests the drawers of this bill had not in view any relief or decree which would affect the property or corporate rights of that company. Indeed, the bill shows the complaint is wholly against the Baltimore Company, and the only question involved is the ownership of the stock held by that corporation. It is therein alleged such ownership by the Maryland corporation is *ultra vires*, and contrary to the constitution of Pennsylvania. Relief is sought against the Baltimore Company in three specific prayers: First, that it be decreed the purchase, ownership, and voting of said stock by the Baltimore Company is against public policy, and in violation of the provisions of the constitution of Pennsylvania; second, that such stock be sold, and pending sale the Baltimore Company be restrained from transferring it; and, third, that the Baltimore Company be enjoined from voting the stock. It will thus be seen, if these prayers are granted, the full measure of relief sought by the bill will be obtained by a decree, as prayed for, against the Baltimore Company alone. It is not sought to include or join the Pittsburgh Company in such decree, and its corporate rights or property are not affected thereby. It would therefore seem clear that, both by the subject-matter of the bill and the specific relief sought thereunder, a separable controversy is presented between citizens of New York on the one side, and a corporation of Maryland on the other. It is true the fourth prayer seeks a decree against the Pittsburgh Company, but the bill shows no complaint or cause of action against that corporation. It is evident its relation to the case is merely formal. A decree against it would be a formal sequence to the third provision of the decree sought against the Baltimore Company, for, clearly, if the Baltimore Company were, under the third prayer, enjoined from voting the stock, the further enjoining the Pittsburgh Company from receiving a vote already enjoined would be matter of form, not substance, and would neither add to, nor detract from, the all-sufficient decree against the Baltimore Company. Being of opinion, then, that the bill discloses, in the words of the act of congress, "a controversy which is wholly between citizens of different states, and which can be fully determined as between them," the motion to remand should be denied; and it is so ordered.

**WILLSON et al. v. WINCHESTER & P. R. CO. et al.**

(Circuit Court of Appeals, Fourth Circuit. February 6, 1900.)

No. 306.

**1. COURTS—REMOVAL OF CAUSE—DIVERSE CITIZENSHIP.**

An action between a citizen of West Virginia and a railroad company, a citizen of Maryland, brought in West Virginia, is removable to the United States courts, although the liability of the railroad company is as lessee of another company, which was a citizen of West Virginia.

**2. SPECIFIC PERFORMANCE—CONTRACT TO MAINTAIN RAILROAD STATION.**

Where a railroad company, in consideration of a conveyance by plaintiff of a right of way through his land, agreed to establish and maintain a station on his land, plaintiff to operate the station and receive fees therefor, and did maintain such station for a period of years, after which it refused to do so longer, plaintiff's remedy is by an action at law, and a bill for specific performance will not lie.

**3. SAME—ACCOUNT.**

When a railroad agreed to maintain a station at a certain point, of which plaintiff was to be the agent, and it afterwards discontinued such station, and established another at a different point, plaintiff is not entitled to an accounting as to fees received at the latter, since the amount received at one station would not prove how much would have been received at another.

**Appeal from the Circuit Court of the United States for the District of West Virginia.**

This is an appeal from a decree of the circuit court of the United States for the district of West Virginia, entered on the 17th of October, 1898 (82 Fed. 15), overruling the motion of the complainants to remand the cause to the circuit court of Jefferson county, in said state, from which it had been removed into the federal court, and sustaining a demurrer to complainants' bill, and dismissing the same. The object of the suit is to have specific performance of a deed filed as Exhibit A with the bill, entered into on the 13th of February, 1850, between the Winchester & Potomac Railroad Company of the one part, and John A. Thomson of the other, to the following effect:

"This indenture, made and dated the 13th day of February, in the year eighteen hundred and fifty, between the Winchester & Potomac Railroad Company of the one part, and Jno. A. Thomson of the other, witnesses, an agreement between said parties, as follows, to wit: Whereas, the road or track of said company is so located as to pass through the lands of the said Thomson, in the county of Jefferson; and whereas, in consideration that said Thomson relinquished to said company the right of way through his said lands, and waived all claim to damages, the said company, on its part, agreed to fix and establish, at a suitable place on said land, a depot or stopping place for putting down and taking up passengers, freight, etc.; it being further agreed that the necessary buildings, platform, and other fixtures and arrangements for that purpose should be erected and kept up by said Thomson at his own expense, subject to proper stipulations and conditions as to the charges for receiving and forwarding storage, etc., and that said company should construct the side track and switches necessary for said depot; and whereas, said agreement has accordingly been in operation for many years, but has never heretofore been reduced to form or put in writing: Now, the design of this instrument is to certify and preserve the proof of such agreement, the terms of which are more plainly stated as follows, to wit: The said John A. Thomson hereby releases all claim to damages for the passage of said road through his said lands, and guarantees and secures to said company the said right of way (as long as said company or said road shall exist). (2) In consideration thereof the said company will continue to observe and use the depot and stopping place now established at Summit Point, and commonly called 'Thomson's Depot,' as one of the company depots or stopping places. (3) That the company will not (un-

less compelled by law) establish any other depot or stopping place nearer to said Thomson than Cameron's on the north, and Wade's on the south. (4) That said company shall maintain or keep up at its own expense a proper side track and suitable switches as now established at said depot, or as the same may be modified by consent of said Thomson. But (5) said Thomson, on his part, at all times maintain and keep in good condition, at his own charge, all necessary and convenient buildings, platforms, fixtures, etc., for the reception, proper storage, accommodation, and delivery of passengers, produce, freight, etc., at said depot, and that he shall keep a trustworthy and competent agent at the same; it being further agreed and understood that said Thomson, or his agent or assigns, shall be entitled to the commissions and depot charges made at said establishment, but that the said charges, commissions, etc., at said depot shall not at any time be increased beyond the rates now allowed and charged at said depot, except with the permission of said company. It is further agreed that the fence near said depot, which separates the railroad track from the county road, shall be maintained by said Thomson, but the said company shall pay the reasonable charges for keeping it up. In testimony of which the said John A. Thomson has heretofore set his hand and seal, and William L. Clark, president of said company, by direction of the directors of the same, both hereto affixed his hand and the seal of said company.

"John A. Thomson. [L. S.]

"Wm. L. Clark, President. [L. S.]"

The appellants claim under the said Thomson by successive alienations of his right in the property involved and his interest under said contract, alleging, among other things, that the said railroad, extending from Harper's Ferry to Winchester, was built under a charter granted by the state of Virginia about the years 1831-32; that the same passed through the lands of the said Thomson for about a mile; that, pursuant to a verbal agreement entered into at the time of the construction of the road, the provisions of said deed of 1850 were carried out between said Thomson and said railroad; that the said Winchester & Potomac Railroad Company continued to operate said road until the year 1867, and carried out said contract and deed; that in said year it leased its said road and franchises to the Baltimore & Ohio Railroad Company for a period of 20 years from July 1, 1867; that the lessee continued to operate said road, and carry out the contract and deed with the said Thomson and those claiming under him, until the month of March, 1875, when they arbitrarily refused longer to carry out the same and use the depot mentioned in the contract, built by the said Thomson at Summit Point, and instead thereof, and in violation of the said agreement, established a depot or stopping place a quarter of a mile east or north of said Thomson's depot at Summit Point, where for several years it received and discharged passengers and freight carried by its trains, and that a few years after thus violating its undertaking established another stopping place or depot a few hundred yards west of said Thompson's depot, which is now the regular depot at Summit Point, and the only depot there used by said road for its business; that both of the depots thus established were within the limits of "Wade's upon the south and Cameron's on the north," specifically mentioned in the contract aforesaid. Appellants allege that by this breach of contract they are greatly damaged; that the charges and commissions authorized and provided for by the terms of their agreement with the said company amounted in gross, at the time of the breach thereof, to between \$1,500 and \$1,800 per annum, and that they had been damaged to the extent of \$10,000; that said appellees, notwithstanding their abandonment of the contract aforesaid in reference to their depot at Summit, continued to use the right of way over the lands belonging to said appellants. They further allege that after the abandonment of the contract aforesaid, some time prior to the year 1881 (the exact date not appearing), the appellants instituted their suit at law against the Baltimore & Ohio Railroad Company in the circuit court of Jefferson county to recover damages, laid at \$10,000, by reason of the breach of the contract aforesaid; that application was made by the appellee to remove the case to the circuit court of the United States for the district of West Virginia, which motion the state court overruled; that the same was subsequently docketed in the United States circuit court for the district of West Virginia; that demurrers were filed to the declaration in each court,

and before the same were disposed of the papers in the state court were lost, and that said suit is still pending in both the state and federal courts. The said bill thereupon charges that complete and adequate remedy cannot be afforded in a court of law, and that in the common-law action aforesaid only a recovery can be had as of the time of its institution, which necessitates other suits, and concludes with a prayer for the specific performance of the covenants of the deed aforesaid, or a decree for such equitable compensation for the breach thereof as will secure to them the losses sustained, and for general relief, and makes the said Winchester & Potomac Railroad Company and the Baltimore & Ohio Railroad Company parties defendant.

A. W. McDonald (Benjamin Trapnell, on the brief), for appellants.  
John Bassel, for appellees.

Before GOFF, Circuit Judge, and PURNELL and WADDILL, District Judges.

WADDILL, District Judge, after stating the facts as above, delivered the opinion of the court.

The assignments of error are that the court erred in refusing to remand the cause to the state court, because the application for removal was not made in time; and also because the Winchester & Potomac Railroad Company, against which relief was asked, was a corporation of West Virginia, in which state appellants resided, and removal ought not, therefore, to have been made; and, third, because the court sustained the demurrer to the bill and dismissed the same.

The removal from the state to the federal court seems to have been seasonably and properly made, and it is unnecessary, with the view we take of the case, to determine whether the Winchester & Potomac Railroad Company, a corporation chartered by the legislature of Virginia, has been made a West Virginia corporation by the laws of the latter state, or merely licensed to do business therein. The Baltimore & Ohio Railroad Company, as lessee of the Winchester & Potomac Railroad Company, is the defendant against whom relief is substantially asked, and that corporation has frequently been held to be a citizen of the state of Maryland, and not of the state of West Virginia. Hence the case was one properly removable into the federal court. *Railroad Co. v. Harris*, 12 Wall. 65, 20 L. Ed. 354; *Martin v. Railroad Co.*, 151 U. S. 684, 14 Sup. Ct. 533, 38 L. Ed. 311, and cases there cited.

Upon the merits of the case, it will be observed that the decree of the lower court dismisses the appellants' bill without prejudice to them to enforce any demand they might have against the appellees by action at law.

The questions involved in considering the demurrer to the appellants' bill in this cause, and in determining the rights of the appellants under the contract or deed aforesaid, set out in their bill, have recently been under review both by the supreme court of the United States and by the circuit court of appeals for the Fifth circuit. *Railway Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385; *Same v. Scott*, 41 U. S. App. 624, 23 C. C. A. 424, 77 Fed. 726, subsequently reported, on second appeal, in 36 C. C. A. 282, 94 Fed. 341. The principles enunciated in these two cases are

in effect that, under a contract like the one under consideration, the obligation to build and maintain the depot is discharged by its being once built and used and operated for the purposes for which it was intended, and that there is no continuing liability to keep and maintain the same, or any right of recovery for failure to do so. We do not feel called upon, however, to decide in this case whether the appellants will be denied all remedy under their contract or not, as it seems quite clear that the relief asked cannot be afforded in a court of equity, and that their remedy, if any they have, is in a court of law. This specific question was determined in the case of *Railway Co. v. Marshall*, *supra*. In that case, under a contract more favorable to appellants' view than the one sued on here, for there the word "permanent" was used in connection with the establishment of the terminus and shops of the railroad company at the city of Marshall, Tex., Mr. Justice Miller, in speaking for the court, held that it could not be supposed that the parties intended to covenant to build and rebuild, and never to change, any of its offices or the place of manufacturing cars or other machinery for the use of the company, nor that it would forever keep up for the town of Marshall this establishment when once organized; and, in discussing the question of the right to proceed in equity, the learned justice said: "But we are further of opinion that, if the contract is to be construed as appellant insists it should be construed, it is not one to be enforced in equity." Page 405, 136 U. S., page 849, 10 Sup. Ct., and page 390, 34 L. Ed. And, after a review of the authorities at page 407, further stated: "Without more minute examination of the authorities on this subject, we are of opinion that the plaintiff is not entitled to any relief in a court of equity." The circuit court of appeals for the Fifth circuit, in *Railway Co. v. Scott*, *supra*, following *Same v. Marshall*, *supra*, reached the same conclusion, and held that the defendant company was not liable in damages for removal of its depot to some other place. The facts in this latter case are substantially the same as in this case.

The fact that under the contract sued on the appellants claim the right to receive certain commissions and depot charges, and that in their bill they ask for an account, showing the revenues from the depot, does not materially affect this case, as it is admitted that no depot has been maintained under their contract at the place therein provided for, during the period covered by this suit, and it does not follow that an accounting of the revenues at another depot, at some other place maintained by the company, would throw any material light upon the damages claimed for breach of this contract, and which damages can be more readily determined in a court of law by a jury than in this forum.

It may be further remarked that no sufficient reason is given for the great lapse of time that took place between the breach of this contract and the institution of this suit. From March, 1875, until the institution of this suit, on the 27th of October, 1893, covers a period of nearly 19 years; and if it be contended that the time covered by the common-law suit, which is still pending, should not

be computed in this estimate, then some 13 years have elapsed during which time this suit could have been instituted. Under the familiar principle of equity, this suit for the specific performance of the contract sued on cannot be maintained, and the decree of the lower court dismissing the appellants' bill, without prejudice to maintain any appropriate action at law of which they may be advised, is hereby affirmed.

PURNELL, District Judge (concurring). I concur in the reasoning and conclusions of Judge WADDILL. The judge below in refusing to remand seems to have had in mind the decision of the supreme court, filed subsequent to his decision, in *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.*, 174 U. S. 552 et seq., 19 Sup. Ct. 817 et seq., 43 L. Ed. 1081 et seq., and the cases there cited with approval. For the purposes of jurisdiction a corporation is a citizen of one state only, and state legislatures cannot pass acts to affect the jurisdiction of the federal courts, whether so intended or not. The conclusion, therefore, would be sound, even if the Winchester & Potomac Railroad Company were not a mere nominal party defendant.

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#### JOHNSON v. SOUTHERN BUILDING & LOAN ASS'N.

(Circuit Court, W. D. Virginia. October 9, 1899.)

**1. COURT COMMISSIONERS—POWERS.**

It is not within the authority of a master commissioner to determine that a party or other person is in contempt of the court, whose decree the master is executing, and on that ground to deny such person the right to be represented by counsel before him; such power being vested in the court alone.

**2. RECEIVERS—EXTRATERRITORIAL RIGHTS—SUITS IN OTHER JURISDICTIONS.**

When a federal court has appointed a receiver for the property of an insolvent corporation within its jurisdiction, it will not permit his conduct of litigation before a master respecting claims against the estate prosecuted under the court's authority to be interfered with by a receiver subsequently appointed for the same corporation in another jurisdiction; and the foreign receiver has no right, through comity or otherwise, to be represented by counsel in such litigation.

**3. INSOLVENT CORPORATIONS—RECEIVERSHIP—RIGHTS OF CORPORATION.**

The corporation is not extinguished, however, by reason of its insolvency, or the appointment of receivers for its property; and, being a party to the suit, it has a right to appear by counsel employed without cost to the estate in the hands of the receiver.

Upon the joint petition of the Southern Building & Loan Association and D. A. Carpenter, receiver, appointed by the chancery court of Knox county, Tenn., in the chancery cause of J. T. Barrow and others against the Southern Building & Loan Association, pending in that court.

Fulkerson, Page & Hurt, for petitioners.

Moore & Addison and J. H. Larue, for J. R. Miller, receiver.

PAUL, District Judge. In this cause, on the 27th of January, 1897, the plaintiff, Linda H. Johnson, filed in this court a creditors'

bill on behalf of herself and all other creditors of the defendant, the Southern Building & Loan Association, alleging the insolvency of the defendant corporation, and the possession by it of assets in this district, and praying for the appointment of a receiver within the jurisdiction of this court, and for the injunction usually granted on the appointment of a receiver. A temporary receiver was appointed, an injunction awarded, and a rule issued to show cause why the appointment of a receiver should not be made permanent. On the hearing in the month of July, 1897, of the rule to show cause, the order appointing a temporary receiver was made permanent, and the injunction against all creditors and stockholders of the corporation, restraining them from interfering with the property of the corporation, and forbidding its officers and agents from interfering with or disposing of its property within the jurisdiction of this court, was continued in force. The cause was referred to a master commissioner to take an account of the assets of the defendant corporation within the jurisdiction of this court, and of the claims of creditors. On the 16th day of April, 1897, J. T. Barrow and wife filed their bill of complaint in the chancery court of Knox county, Tenn., against the said the Southern Building & Loan Association; and on a hearing that court adjudged the said corporation to be insolvent, and appointed D. A. Carpenter and John W. Conner receivers. The order of reference is still pending, uncompleted, before the master commissioner of this court. The petition states that there is pending before the commissioner, among other matters referred to him, an inquiry as to the "liability of the firm of Miller & Warden for a loan made by said association, and as to whether, by reason of alleged negligence of the Southern Building & Loan Association in placing and taking out insurance upon the property conveyed in trust to secure said loan, the said Miller & Warden are entitled to have the collateral bond and deed of trust executed by said Miller & Warden canceled and delivered up, and the said building and loan association, and all persons claiming under or through it, perpetually enjoined from collecting the said bond, and from enforcing the said deed of trust." The petition further states that on the 22d of August, 1899, the said D. A. Carpenter, receiver, employed certain attorneys to appear before the commissioner to represent the interests of said Carpenter, receiver, in the matter of the claim against Miller & Warden; that on the 25th of August, 1899, the defendant the Southern Building & Loan Association employed the same attorneys to represent said association in the matter in controversy. Objection was made to the appearance of said Carpenter, receiver, and of said defendant association by counsel for said Miller & Warden, and by counsel for the receiver of this court. The chief grounds of objection were that the only issue involved was one between the receiver of this court and the said Warden & Miller, and that neither said association nor said Carpenter, receiver, had the right to appear, by counsel or otherwise, in the controversy; that the said Carpenter, receiver, and said building and loan association were in contempt of this court, in refusing to obey its orders requiring them to produce before the commissioner

certain deeds, notes, and other documents necessary to the proper taking of the account ordered. The commissioner sustained the objections taken to Carpenter, receiver, and said building and loan association appearing in the cause by counsel. The reasons given by the commissioner are, briefly, that no one except J. R. Miller, the receiver of this court, has any right to prosecute the claim against Miller & Warden; that the attorneys for the Southern Building & Loan Association and Carpenter, receiver, have not been employed by J. R. Miller, the receiver in this cause; that said Carpenter, receiver, is in contempt of this court, by reason of his failure to deliver to J. R. Miller, the receiver of this court, the papers he was directed to deliver by decree of July 22, 1897, and by reason of his failure to pay dividends to any stockholders in this district who have proven their claims in this cause; that to permit said counsel for the Southern Building & Loan Association and for said Carpenter, receiver, to appear in the cause, would lead to confusion, etc.

The action of the commissioner in refusing to allow counsel to appear at the instance of Carpenter, receiver, or of the Southern Building & Loan Association, on the ground that they are in contempt of this court, in not obeying its former orders, cannot be maintained. There has never been any report to this court, either by the receiver in this cause or by the commissioner, showing that its orders have been disobeyed by either of the petitioners. Certainly no process of attachment for contempt has been issued, executed, returned, heard, and judgment for a contempt entered thereon by the court. Until these steps are taken, no person, whether a party to the cause or not, can be held in contempt of the court for disobedience of its orders. It is not within the authority of a master commissioner to determine that a party to a cause or other person is in contempt of the orders of the court whose decree the master is executing. This power is conferred on the court alone. Section 725, Rev. St.; Desty, Fed. Proc. (9th Ed.) 838; 1 Fost. Fed. Prac. § 341. The prominent question presented by the facts in this matter is the right of the petitioners, or either of them, to interfere in the management of the cause pending in this court. The receiver of this court was appointed nearly two months before said D. A. Carpenter was appointed a receiver by the chancery court of Knox county, Tenn. The receiver of this court was directed, by the decree appointing him, to take charge of all the property and assets of every kind within this district belonging to the insolvent corporation, the Southern Building & Loan Association. He did so, and now has such property in his custody and under his control. The jurisdiction of the federal court being first invoked, it will retain its jurisdiction, and any interference on the part of the state court with property at the time within the jurisdiction of the federal court is unauthorized. Gluck & B. Rec. 71. The doctrine as to the right of a receiver to sue in a foreign jurisdiction is thus stated by the supreme court in Booth v. Clark, 17 How. 322, 15 L. Ed. 164:

"We think that a receiver has never been recognized by a foreign tribunal as an actor in a suit. He is not within that comity which nations have permitted, after the manner of such nations as practice it in respect to the judg-



ments and decrees of foreign tribunals, for all of them do not permit it in the same manner and to the same extent, to make such comity international or a part of the law of nations. \* \* \* He [the receiver] has no extraterritorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor might have done, where his debtor may be amenable to the tribunal which the creditor may seek."

The court states the reasons on which its decision rests as follows:

"We think that a receiver could not be admitted to the comity extended to judgment creditors, without an entire departure from chancery proceedings as to the manner of his appointment, the securities which are taken from him for the performance of his duties, and the direction which the court has over him in the collection of the assets of the debtor, and the application and distribution of them. If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give security to the court, the aid of which he seeks, for his faithful conduct and official accountability."

The doctrine as stated by the supreme court has been followed by frequent decisions both in the federal and state courts. It is cited with approval by the supreme court of appeals of Virginia in *Davis' Adm'r v. Snead*, 33 Grat. 705. Beach, Rec. §§ 680, 681. While the general rule as to the incapacity of receivers to bring suits in a foreign jurisdiction is as stated above, the courts have, as a matter of comity, relaxed its rigor, and allow a receiver to sue in other states to enforce his rights. *Id.* § 682. But the doctrine of comity has never been carried to the extent of allowing a receiver in a foreign jurisdiction to interfere, by attorney or otherwise, in the conduct of litigation in a cause where the home court has appointed its own receiver. The receiver of the court in which the litigation is pending is responsible for its proper conduct. He has, as an officer of the court, given bond conditioned for a faithful discharge of his duties. The receiver of a foreign tribunal will not be allowed to intrude himself, against the protest of the home receiver, into a cause in which he has no interest to protect and no rights to enforce. Nor has an insolvent corporation the authority to interfere with the receiver appointed to take charge of its assets, in his efforts to reduce the same to possession. The corporation is not, as contended by counsel for the receiver, by reason of its insolvency and the appointment of a receiver, extinguished. *Second Nat. Bank of Paterson v. New York Silk Mfg. Co.* (C. C.) 11 Fed. 532. One of the incidents of a corporation is perpetual succession.

In *Wait, Insol. Corp.* §§ 34, 36, it is said:

"We know of no positive rule of law that prevents an insolvent corporation from continuing business. \* \* \* And the appointment of a receiver of a railroad corporation does not necessarily prevent the directors from discharging their functions in matters not affecting the receivership, and an injunction restraining any action whatever on their part will not be considered necessary to accomplish the objects of the receivership."

The corporation in this case, being a party to the suit, has a right to be represented by counsel before the master during the taking of the account ordered, in order that it may look after the general inter-

ests of the company. But such counsel must be employed at its own expense, and will not be permitted to interfere with the receiver in the conduct of the business intrusted to him. The receiver in this cause is under instructions from the court not to employ attorneys without first submitting to the court the necessity of such employment, the character of the services to be rendered, and the compensation to be paid. On the approval of the court, he can contract with counsel. The court will not compel the receiver to accept the services of attorneys contrary to his wishes, and, against his protest, burden the fund in his hands with the fees of what he regards as unnecessary counsel. An order will be entered in accordance with the views of the court.

**RUFE v. COMMERCIAL BANK OF LYNCHBURG, VA.**  
(Circuit Court of Appeals, Fourth Circuit. February 6, 1900.)

No. 314.

**1. JUDGMENTS—ASSIGNMENT.**

Promises by a debtor to pay the debt out of the proceeds of a judgment in a pending action, and to assign such judgment in payment of the debt, do not amount to an equitable assignment, as against other creditors, where there was no assignment in fact, and the debtor afterwards refused to execute such an assignment.

**2. SAME.**

An instrument executed by a judgment creditor, giving an irrevocable power of attorney to his counsel to collect the judgment, and making it his duty, after paying his own fees, to pay a sum due from the judgment creditor to a third person, and providing that "this assignment shall in no wise control" such counsel in the management of the cause or his right to effect a compromise, operates as an assignment of the judgment.

**3. SAME.**

Pending an appeal from a judgment, the judgment creditor assigned it to his attorney, to pay, first, his own fees, and then a debt due to a third person, and reserving a right to the attorney to compromise the action. Afterwards the judgment was set aside, and a compromise judgment entered for a much less sum. *Held*, that the assignment operated as an assignment of the latter judgment.

**Appeal from the Circuit Court of the United States for the Western District of Virginia.**

This is an appeal from the circuit court of the United States for the Western district of Virginia. 92 Fed. 789. The matter in issue is the right to the proceeds of a judgment obtained, on the law side of that court, in the name of F. M. Threadgill against Thomas C. Platt, president of the United States Express Company. The parties to this issue are the Commercial Bank of Lynchburg, Va., on the one side, and P. Rufe on the other.

F. M. Threadgill was a dealer in cigars and tobacco in Lynchburg. He held a large claim against the United States Express Company, a joint-stock company, of which Thomas C. Platt was the president and representative. He was indebted largely to P. Rufe, and also to the Commercial Bank. His claim against the express company arose from the transportation by it of many boxes of cigars intrusted to it by him, and which were either lost or not delivered by it. Rufe was a manufacturer of cigars, and Threadgill owed him a large sum of money for the purchase of cigars,—the same cigars which he had intrusted to the express company, for which he was suing it. He also was a large debtor to the Commercial Bank for moneys lent in his business, and also to aid him in his contract with the express company. Threadgill

made efforts to settle with the express company before suit, and, failing this, he brought his action on the law side of the circuit court at Lynchburg. On 27th April, 1894, he obtained a verdict for \$54,371, and entered judgment accordingly. During the negotiations before suit, and pending the suit and after judgment, Mr. Threadgill wrote many letters to Rufe, in which he declared a fixed intention to pay him out of the results of his suit against the express company and the judgment thereon. It is claimed, upon the part of Rufe, that these letters amount to an equitable assignment of his claim against the express company to Rufe. A careful examination of the letters betrays an intention to pay Mr. Rufe, perhaps a desire to assign the claim on terms, but they do not show that this intention was ever carried into effect. This is demonstrated by two facts in the record. In a letter of Capt. Charles M. Blackford to the attorney of Mr. Rufe, dated as late as 21st September, 1897, this gentleman says: "He [Mr. Threadgill] still seems unwilling, however, to give any assignment which will give Mr. Rufe any priority, should the claim be collected, or any part thereof." This letter was written after the transaction with the Commercial Bank, hereafter to be related. The other fact is that Mr. Rufe, after the verdict for \$54,371, instituted attachment proceedings in the state of New York against the United States Express Company, seeking to recover this money, as money due to Threadgill, to pay Threadgill's debt to him. Mr. Threadgill, while he was encouraging Mr. Rufe, also encouraged the bank. He repeatedly expressed his intention to pay the bank out of the proceeds of this claim, using pretty strong language. The cashier of the bank was so much impressed by this that he was of the opinion that a distinct understanding existed between Threadgill and the bank that the latter should have an interest in any money recovered from the express company, after counsel fees were paid; that "we [the bank] should have the first money after the counsel fee was paid," and even stronger than that. In this case, also, however marked the expression of intention, there was no positive act, irrevocable in its character, dignified enough to be called an assignment. In his answer, Mr. Threadgill does not admit that he made any assignment to Rufe in these letters, or in any way, prior to the second trial of his case, which will be alluded to hereafter.

Verdict and judgment having been rendered for F. M. Threadgill against the express company, a writ of error was granted to the supreme court of the United States, and the cause appeared on the docket of that court. Before the case was reached, upon discovery of certain facts not necessary to be mentioned here, a bill was filed on the equity side of the circuit court for the Western district of Virginia, setting out these facts, and praying an injunction against the enforcement of that judgment. This bill was answered, and the cause was at issue. Pending the cause, on 22d January, 1897, F. M. Threadgill executed the following paper: "Know all men by these presents that the undersigned, F. M. Threadgill, hereby constitutes and appoints Charles M. Blackford his attorney in fact, as well as in law, to collect from the United States Express Company the amount of a judgment in his favor obtained at the April term, 1895, of the circuit court of the United States for the Western district of Virginia, in a suit wherein he was plaintiff, and Thomas C. Platt, etc., was defendant, and the amount of which judgment is \$54,371.00, with interest from the 27th day of April, 1894. This power of attorney shall be irrevocable. It shall be the duty of the said Charles M. Blackford, upon collecting the said judgment, or so much thereof as may be collectible, after paying the late firm of Kirkpatrick & Blackford their fee, as per written contract with said Threadgill under date January 8, 1896, to pay to the Commercial Bank of Lynchburg the sum of \$8,259.00, with interest thereon from the 9th day of February, 1897, and also to pay to the said bank any sum which the said bank may, at the time of such payment, have paid out by way of premium on sundry policies of insurance upon the life of the said Threadgill, held by the said bank under an assignment made by him and wife to the said bank on the 18th day of May, 1896, with any interest which may have accrued thereon. But it is distinctly understood that this assignment shall in no wise control or affect the judgment of the said Kirkpatrick & Blackford in the management of the said cause, and they shall have the same power to compromise the same which they had before this assignment was made."

The result of the proceeding in equity was an injunction against the enforcement of the judgment upon the verdict of April term, 1895, upon the condition of a new trial of the law case. This latter case was heard in December, 1897, and during the trial a compromise was reached, resulting in a verdict for Threadgill of \$6,000. The counsel for Mr. Rufe, who were present at this trial, taking no part therein, but watching the interests of their client, were consulted by counsel for Threadgill before the latter would consent to the compromise. After the compromise was concluded and communicated to the court, the presiding judge instructed the jury to find a verdict for plaintiff for \$6,000. Before the verdict was rendered by the jury, counsel for plaintiff, Threadgill, asked the presiding judge "to direct that the verdict, whatever it might be, when rendered by the jury, was for the use of P. Rufe, a creditor of Threadgill, subject to a lien for counsel fees." Counsel representing the Commercial Bank objected to this, and, after discussion, the presiding judge ordered that a memorandum of the statement of Threadgill's counsel be made upon the record.

Threadgill had entered into a contract with his attorneys before the trial, fixing their compensation, at all events, at \$10,000. Of their own accord they reduced their fees to \$2,000. This amount, with the consent of all parties, without prejudice, has been paid. There remains the sum of \$4,000. This last-named sum is the subject-matter of the case before us.

The Commercial Bank of Lynchburg filed its bill, claiming that under assignment from Threadgill they are entitled to the remainder of this judgment, and it prayed that it may be so decreed. To this bill Thomas C. Platt, Charles M. Blackford, survivor of Kirkpatrick & Blackford, who were Threadgill's attorneys, F. M. Threadgill, and P. Rufe are parties defendant. Mr. Platt answers, admitting that he has in hand to pay on this judgment the sum of \$4,000, and asks leave to pay this sum into court, and thereupon he disclaims all interest in the suit. Mr. Blackford also disclaims. Mr. Threadgill answers, recognizing Rufe as entitled to the fund by reason of the occurrence at the trial. Rufe claims the fund as under assignment from Threadgill, who, as he claims, began and conducted the suit for his use. The cause, being at issue, was heard by the court below on the pleadings and testimony, and after argument. The decree is wholly in favor of complainant, who is held entitled to the fund. All the defendants but Mr. Rufe are dismissed from this suit. He has been allowed an appeal. The case comes here on exceptions.

Beverley T. Crump and F. S. Kirkpatrick, for appellant.  
Randolph Harrison, for appellee.

Before SIMONTON, Circuit Judge, and BRAWLEY and WAD-DILL, District Judges.

SIMONTON, Circuit Judge (after stating the facts as above). Both parties in this appeal claim under F. M. Threadgill. It is evident that Threadgill, up to the trial in December, 1897, had made no assignment of his claim against the express company to Rufe. He had professed and promised, and was liberal in expressions of future intentions. But no act was done carrying the professions, promises, and intention into effect. This is manifest from the letter of Mr. Blackford of 21st September, 1897, and by Mr. Rufe's own action of attachment in New York. "An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment. A covenant in the most solemn form has no greater effect. The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund, any authority to collect, or any power of revocation. If he

do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund holder can safely pay, and is compellable to do so, though forbidden by the assignor." *Christmas v. Russell*, 14 Wall. 69, 20 L. Ed. 762; *Removal Cases*, 100 U. S., at page 477, 25 L. Ed. 600; *Story*, Eq. Jur. § 1035a, note 1.

The course taken by Threadgill's counsel at the trial, in December, 1897, just before verdict rendered, would have vested the verdict in Rufe, if it were then under the control of Threadgill, or if he had not assigned it to some one else. This depends upon the right of the bank. Their case is this: After repeated declarations and promises from Threadgill, with regard to the protection of the debt to the bank out of the express company's claim, he executed the instrument set out above. That instrument, dated January 22, 1897, consists of three parts. It appoints Mr. Charles M. Blackford his attorney in fact, as well as at law, to collect from the United States Express Company the amount of the judgment of April term, 1895, of \$54,371. And this power of attorney is declared irrevocable. It thus transfers from Threadgill the dominion and power over the judgment, and vests these absolutely in Mr. Blackford. It then declares the interest coupled with the power which made the latter irrevocable. It makes it the duty of the said Charles M. Blackford, upon collecting the judgment, or so much thereof as may be collectible, first to pay the late firm of Kirkpatrick & Blackford their fee as per contract, next to pay the Commercial Bank of Lynchburg the fixed sum of \$8,259 and interest thereon, and next any sums the bank may have paid on life policies of said Threadgill. It thus constituted Mr. Blackford a trustee for these purposes. And, finally, it declares that this assignment shall in no wise control the judgment of that legal firm in the management of the case, or in their power to compromise it, which they had before this assignment was made. Thus, the attorney was invested with an interest in the judgment itself, with the power to control it. This being the case, the instrument operated as an assignment. As is said in *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. 206, 5 L. Ed. 597:

"If the interest passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. The estate, being in him, passes from him by a conveyance in his own name. He is no longer a substitute acting in the place and name of another, but is a principal acting in his own name, in pursuance of the powers which limit his estate."

See, also, *Taylor v. Benham*, 5 How. 269, 12 L. Ed. 147. \*

It is contended that the irrevocable power of attorney did not give Mr. Blackford any interest in the judgment, but only in the proceeds of the judgment. The judgment is nothing but the adjudication of the court in respect to the cause of action. *McNulty v. Hurd*, 72 N. Y. 521. It furnishes the means of enforcing the collection of the debt. "It is impossible to separate them. The judgment would be barren, nor can we conceive of its existence without the debt." *Pattison v. Hull*, 9 Cow. 747. The debt is the principal thing. By whatever terms the assignment was made, if the debt passed all rights and remedies for its collection also passed with it. The right to the debt, as evidenced by the judgment

against the defendants, cannot exist in the hands of different persons. One cannot hold the judgment, and another the debt. They are inseparable. *Bolen v. Crosby*, 49 N. Y. 183. So, when the instrument passed the whole sum evidenced in the judgment, and devoted it, in the hands of Mr. Blackford, to certain specified uses, with that passed also "all the rights and remedies for its recovery and collection"; that is to say, the judgment and its incidents. See, also, *Institute v. Kauffman*, 18 Wall. 154, 21 L. Ed. 776. In *Hunt v. Rousmanier's Adm'rs*, the borrower agreed to secure the lender. To this end a power of attorney was executed by the borrower, authorizing the lender to sell two vessels, property of the borrower, and to apply the proceeds of sale to his debt. The question was, was it such a security as was agreed upon? The court held that it did operate as a security, and that it was as complete as a mortgage would have been, only not as safe; this because, not being irrevocable, the death of the borrower would revoke it. So the power of attorney operated as an assignment. The circumstances of the case at bar strengthens this view. Threadgill, being indebted to the bank, had made repeated promises, and had as repeatedly declared his intention, to secure it by this judgment. So strong were his assurances that the bank officers speak of it as a complete understanding to this effect. Finally, he is induced to act, and, carrying out his promises, he executes this instrument. Its language denotes its purpose. Twice in the paper itself it is spoken of as "this assignment." When the instrument was executed, Mr. Kirkpatrick, one of his attorneys, was present, strongly objecting to it, and doing everything he could to prevent Threadgill from executing it. He realized its effect on Rufe's claim, and he believed that Threadgill was bound to protect Rufe. Threadgill, however, declared that he had pledged his word as a Christian gentleman to carry out his verbal contract with the bank when called on to do so, and that whether it ruined Mr. Rufe or himself or the express company or anybody else he was going to carry out his pledge to the bank, and thus he signed the paper.

This instrument, therefore, being an assignment, what is its effect? Was it defeated because the judgment of April term, 1895, was set aside, and another judgment obtained on the same cause of action,—the judgment under which \$6,000 was recovered? At the time this power was executed, the judgment recovered in April, 1894, was in great jeopardy. It was threatened by two formidable modes of attack,—the writ of error in the supreme court, and the bill in equity in the circuit court. Threadgill's counsel, in a letter written in 1896, speaking of it, says that Threadgill incurs a strong chance of losing the greater part, and possibly every dollar, of his claim. For this reason, manifestly, the last clause was inserted in the power of attorney reserving to these gentlemen their full power of managing the cause and of compromising the same. The assignment of the judgment carried with it the claim which was the cause of action. *George v. Tate*, 102 U. S. 564, 26 L. Ed. 232; *Pattison v. Hull*, 9 Cow. 747. "The assignment of a judgment which was void, because in excess of the jurisdiction of the court, has been

held to transfer the debt for which the judgment was entered. And it seems that the assignment of a judgment necessarily carries with it the cause of action on which it is based, together with all the beneficial interest of the assignor in the judgment and all its incidents." *Freem. Judgm. (Ed. 1886) § 431; Brown v. Scott, 25 Cal. 189.* This being so, no act of Threadgill taken after the execution could affect the rights of the bank, nor can the declaration of his attorneys, made in open court, have any effect, that the proceeds of the verdict then about to be taken were the property of Rufe. They could only have done this under instructions from Threadgill.

It has been suggested that the last clause in the power of attorney saving to Messrs. Kirkpatrick & Blackford the right to exercise their judgment in the management of the said cause, and the same power to compromise the same which they had before this assignment was made, in effect nullified the preceding parts of the instrument, and gave them full power to compromise by paying Rufe, and disappointing the bank. Even if the construction of this clause was doubtful, such a construction would violate the rule, "*Ut res magis valeat, quam pereat.*" It would defeat the purpose of the instrument altogether, and operate a fraud on the bank. But the clause is not of doubtful construction. The judgment was seriously threatened by two formidable modes of attack. Messrs. Kirkpatrick & Blackford were uncertain—perhaps, we may say, were apprehensive—of the result. Experienced and able management of the cause—of the whole cause, and not of this incident only—was necessary. Who could better be intrusted with this management than these able counsel? In its result Threadgill, these gentlemen, and the bank were vitally concerned. Therefore there was to be no change of counsel in meeting the dangers of the future. They retained a power to compromise, because, from the circumstances surrounding the cause, a compromise was inevitable, perhaps was necessary, in order to escape total defeat. But what sort of a compromise? Clearly, it must be one affecting the interests of those interested in the cause and its judgment,—a sacrifice of a part of their interest to secure the rest of it, not an abandonment or destruction of it, or a transfer of it to some one else. Mr. Blackford was, to all intents and purposes, a trustee for the bank. He could never have entertained the idea of taking their interest and of giving it to another.

It has been finally suggested that inasmuch as the verdict was only for \$6,000, and as Kirkpatrick & Blackford had the first lien on it for a fee of \$10,000, they had the right, if they chose, to give a part of their verdict to Rufe. But the record shows that these gentlemen, with great generosity, voluntarily reduced their claim to \$2,000, leaving the remainder to be disposed of as right should appear. This ends the contention on that point. The decree of the circuit court is affirmed, each party paying his own costs in this court.

**GREENE v. STAR CASH & PACKAGE CAR CO.**

(Circuit Court, D. Connecticut. January 30, 1900.)

**ANCILLARY RECEIVERS—APPOINTMENT.**

An order making an ex parte appointment of G. as ancillary receiver of a corporation will be vacated, there not only being no suit pending in the jurisdiction making the appointment, but the appointment being on application of G., alleging his appointment as receiver in the federal court for another district, in a suit by L., and relief being sought in such suit, not by G., but by L. only, and G. having been appointed receiver therein after counsel claiming to represent the corporation, and desiring to be heard on its behalf, had been informed by the clerk of such court that no such suit had been instituted.

Henry C. White, for complainant.  
Brown & Perkins, for defendant.

**TOWNSEND**, District Judge. On motion to vacate an order, granted ex parte, appointing Gardiner Greene, of Connecticut, ancillary receiver on his own application, wherein he alleged his appointment as receiver in the circuit court of the United States for the district of West Virginia, in a suit brought by Wilbur F. Lakin for the dissolution of the defendant corporation. The case relied on by counsel for Greene, opposing the motion, is *Platt v. Railroad Co.* (C. C.) 54 Fed. 569, where the court said as follows:

"In *Mercantile Trust Co. v. Kanawha & O. Ry. Co.* (C. C.) 39 Fed. 337, Justice Harlan and Judge Jackson held, in a formal opinion, that the circuit courts of the United States cannot take jurisdiction of a bill whose only purpose is an ancillary receivership; but in other districts such bills have been frequently entertained and acted upon, generally, if not always, on ex parte proceedings, and without argument. The same has been done ex parte on several occasions in this court. We will at present follow this practice; stating, however, that this is without prejudice to a full consideration of the question if hereafter a motion is made to dissolve or annul the order."

On the other hand, the opinions of Mr. Justice Harlan in *Mercantile Trust Co. v. Kanawha & O. Ry. Co.*, supra, and of Judge Wellborn in *Re Brant* (C. C.) 96 Fed. 257, are to the effect that a court has no jurisdiction to appoint a receiver, except in a pending suit. In the latter case the authorities are cited, collected, and discussed. It is not necessary, in the disposition of this motion, to pass on the question raised in the above-cited cases. Here not only is no suit pending in this jurisdiction, but the application for appointment of the ancillary receiver is not made by Lakin, the only party seeking relief in the circuit court in West Virginia. This bill is filed by the receiver appointed in that suit, who is merely an officer of the West Virginia court, who is not aggrieved, and who is not seeking any relief. It appears that the questions relating to the organization of this corporation, the status of its officers, and the ownership of its property, have long been the subject of litigation in the courts of this state, and that, shortly after the state court had found that said Lakin was acting collusively in certain suits affecting the property of the corporation in Connecticut, he instituted said suit in the circuit court of West Virginia, and this petitioner was appointed receiver therein, after counsel claiming to represent the said corpora-



tion, and desiring to be heard on its behalf, had been informed by the clerk of said court that no such suit had been instituted or was pending. In these circumstances, the rights of the parties claiming to represent this corporation should not be prejudiced by the appointment of a receiver *ex parte*. The motion to vacate is allowed.

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ILLINOIS CENT. R. CO. v. BENTZ.

(Circuit Court of Appeals, Sixth Circuit. February 12, 1900.)

No. 734.

**MASTER AND SERVANT—FELLOW SERVANTS—RAILROAD ENGINEER AND TELEGRAPH OPERATOR.**

A telegraph operator at a railroad station, charged with duties in connection with the operation of trains on the road, and the engineers of such trains, are fellow servants at common law, and the railroad company is not liable for the death of an engineer in a collision, due to the negligence of an operator in failing to report the passing of a train at his station.<sup>1</sup>

In Error to the Circuit Court of the United States for the Western District of Tennessee.

This is a writ of error to review a judgment of the circuit court for the Western district of Tennessee in favor of Isabella Bentz against the Illinois Central Railroad Company. Isabella Bentz is the widow of Ed. Bentz, who was an engineer on a locomotive engine of one of the freight trains of the defendant company, and was killed by a collision between two trains of that company at a point two miles north of the town of Russell, in the state of Tennessee. This action was brought under the statute of Tennessee providing for damages for injury by wrongful death. The evidence disclosed the facts to be as follows: Bentz's train was freight train No. 84. The train with which it collided was freight train No. 81. Bentz's train was running north from Jackson, Tenn., towards Martin, Tenn., a distance of 53 miles. The only telegraph station open at night between Jackson and Martin was at Milan, 23 miles from Jackson. The train dispatcher was at Jackson. Bentz's train left Jackson at 2:40 a. m. on the morning of June 10, 1897, and proceeded north. It approached Milan about 20 minutes after 4. The engineer blew for the semaphore signal, which was set at red, and failed to receive the white signal in reply. He blew again when about 200 feet from it, and the trainmen testify that then the red signal turned to white. The telegraph operator denies that the signal was whistled for, or that the white light was signaled. However this may be, the train then proceeded north from Milan towards Martin, which was the next telegraph station open at night, and at a point two miles north of Russell, in going round a curve, collided with train No. 81, coming south. Bentz jumped to save his life, and was killed by the fall. The collision took place about 5:20 in the morning. At 4:30 that morning freight train 81 was reported to the train dispatcher as being at Martin, and orders for its proceeding were asked for. Thereupon the train dispatcher asked Loving, the telegraph operator at Milan, over the wire, whether train 84 had come in sight. Loving replied that it had not passed, and was not in sight. Thereupon the train dispatcher sent identical orders, one to Martin, to 81, and one to Milan, to 84, directing that the two trains meet at Idlewild, a point 10 or 12 miles north of Milan and 7 miles south of Russell. This order was acknowledged (or "O. K'd," as the phrase

<sup>1</sup> As to who are fellow servants, see notes to Railroad Co. v. Smith, 8 C. C. A. 668; Railway Co. v. Johnston, 9 C. C. A. 596; Flippin v. Kimball, 31 C. C. A. 286.

is) by the telegraph operators at Milan and at Martin. The theory of the defendant company is that Bentz and the conductor in charge of his train ran through Milan in spite of the red signal and without waiting for the white light. At the conclusion of all the evidence, counsel for the defendant requested the court to charge the jury that from the evidence introduced it was apparent that the accident was caused either by the negligence of the telegraph operator at Milan, who was a fellow servant of Bentz, or by Bentz's own negligence, and that they must therefore return their verdict for the defendant. This the court refused. The jury, under the charge of the court, returned a verdict for plaintiff, on which judgment was entered.

C. G. Bond, for plaintiff in error.

S. D. Hays, for defendant in error.

Before TAFT, LURTON, and DAY, Circuit Judges.

TAFT, Circuit Judge (after stating the facts as above). If Bentz disregarded the red signal, and passed Milan without waiting until the white signal was shown him, it is not disputed that the resulting collision would have been due to his negligence, and that he could not recover from the company. The only other possible theory of the accident is that the telegraph operator gave the white signal to Bentz, the engineer, as the men on Bentz's train testify he did, and that, when he was asked a few minutes later by the train dispatcher at Jackson whether the train had passed, he negligently forgot the fact. If he had then remembered that Bentz's train had passed his station 15 minutes before, and had so informed the operator, it would have been entirely within the power of the train dispatcher either to hold 81 at Martin, or to permit it to run on to Greenfield, a distance of nine miles, and there wait the coming of Bentz's train. The failure of the telegraph operator to keep the train dispatcher advised as to the whereabouts of Bentz's train was the cause of the collision, and the only cause, unless Bentz contributed to it by his own negligence, as already explained. We have already decided in this court, in the case of *Railroad Co. v. Camp*, 31 U. S. App. 213, 13 C. C. A. 233, 65 Fed. 952, that at the common law (and there is no statute in Tennessee) a telegraph operator is the fellow servant of an engineer. See, also, *Railroad Co. v. Clark*, 16 U. S. App. 17, 6 C. C. A. 281, 57 Fed. 125; *Slater v. Jewett*, 85 N. Y. 61; *Sutherland v. Railroad Co.*, 125 N. Y. 737, 26 N. E. 609; *Reiser v. Pennsylvania Co.*, 152 Pa. St. 38, 25 Atl. 175; *McKaig v. Railroad Co. (C. C.)* 42 Fed. 288. The fact that the supreme court of Tennessee, in the case of *Railroad Co. v. De Armond*, 86 Tenn. 73, 5 S. W. 600, had taken another view of this question, under the department theory of fellow servants, which prevails in the state courts of that state, was noted in the *Camp Case*, and the view of the Tennessee court was dissented from. If the *De Armond Case* is the authority which was followed by the learned judge at the circuit, the *Camp Case* could not have been called to his attention. The jury, on the facts of the case, because the injury occurred through the negligence of a fellow servant of the plaintiff's husband, should have been directed to bring in a verdict for the defendant. The judgment of the court below is reversed, with directions to order a new trial.

## PICKENS TP. v. POST.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1900.)

No. 328.

## 1. STATUTE—TITLE OF ACT.

A statute is not invalid, under a constitutional provision requiring every act to relate to one subject, which shall be expressed in its title, where it has but one general object, which is expressed in its title, and the body of the act is germane to such object.

## 2. MUNICIPAL BONDS—ESTOPPEL BY RECITALS.

A recital in negotiable municipal bonds, by the authorities authorized to issue such bonds upon certain conditions, that all such conditions have been complied with, is conclusive as to the regularity of all proceedings precedent to their issuance in favor of a bona fide holder.

## 3. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

The decision of the supreme court of a state, declaring unconstitutional a statute authorizing the issuance of municipal bonds, is not conclusive on a court of the United States in a case involving the rights of a bona fide purchaser of such bonds, whose rights accrued prior to such decision, and, where the supreme court of the United States has determined the same act to be constitutional and valid, its decision governs in such case.<sup>1</sup>

## 4. MUNICIPAL BONDS—BONA FIDE HOLDERS—BURDEN OF PROOF.

The holder of a negotiable instrument is presumed to have taken it before maturity, for value and without notice of defenses.

## 5. SAME—RIGHTS OF INDORSER.

A purchaser of negotiable municipal bonds from a prior holder acquires all the rights of such prior holder, and such rights cannot be affected by his own knowledge, at the time of his purchase, of defenses to such bonds.

## 6. SAME—UNAUTHORIZED DELIVERY—NOTICE TO PURCHASERS.

The fact that negotiable municipal bonds were issued by one with whom they had been deposited in escrow by the municipality, without authority, cannot affect their validity in the hands of a purchaser, who had no knowledge of the conditions upon which they were held.

## 7. SAME—NOTICE TO PURCHASER OF DEFENSES—LIS PENDENS.

A bona fide purchaser of municipal bonds before maturity is not affected with constructive notice of a suit respecting the validity of the statute under which such bonds were issued.

### In Error to the Circuit Court of the United States for the District of South Carolina.

This case comes up on writ of error to the circuit court of the United States for the district of South Carolina. The plaintiff below, defendant in error here, holds certain bonds and coupons of the township of Pickens, in Edgefield county, S. C. His suit is on these bonds and coupons. The bonds, with the coupons, were made, executed, and issued under the following circumstances: The general assembly of South Carolina, on 21st December, 1833, passed an act to authorize counties, townships, cities, and towns interested in the construction of the Carolina, Cumberland Gap & Chicago Railroad Company to subscribe to the capital stock of the said company. 18 St. at Large S. C. 409. Section 1 of this act authorizes the subscription in such sums, in bonds or money, as a majority of the qualified voters of the county, township, city, or town may authorize the county commissioners of such county or the municipal authorities of such city or town to subscribe. Section 5 makes it the duty of the county commissioners of each county or township interested to submit the question of subscription to the voters of the county or township, giving them

<sup>1</sup> As to state laws as rules of decision in federal courts, see notes to *Griffin v. Wheel Co.*, 9 C. C. A. 548; *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.

power to order the election, specifying the time, place, and purpose of such election. Section 7 makes it the duty of the county commissioners to declare the election, and to make the subscription, if so authorized by the result of the election. Section 9 provides "that for the purpose of this act all the counties, and the townships in said counties, along the line of railroad, or which are interested in its construction as herein provided for, shall be, and they are hereby, declared to be bodies politic and corporate and vested with the necessary powers to carry out the provisions of this act, and shall have all the rights and be subject to all the liabilities in respect to any rights or causes of action growing out of the provisions of this act. The county commissioners of the respective counties are declared to be the corporate agents of the counties and townships so incorporated and situate within the limits of the said counties." At the time of the passage of this act townships in South Carolina were not bodies corporate, and were simply territorial designations. Pickens township being interested in the construction of this road, the county commissioners of Edgefield county ordered the election, and, the result authorizing the subscription, they subscribed in bonds the sum of \$15,000. The subscription was made. The bonds were prepared and executed. Each bond, on its face, contains a certificate by the county commissioners to the effect that all of the conditions precedent to the issuing of such a bond have been fully performed. These bonds were deposited by the county commissioners with the Carolina Savings Bank at Charleston, with authority to issue them upon certain conditions. The plaintiff, claiming to be holder of these bonds, sued upon 25 of them, each for \$100, and numbered from 1 to 25, inclusive; upon 15 of the bonds, each for \$500, numbered from 25 to 40, inclusive; and upon 5 of them, each for \$1,000, and numbered 41 to 45, inclusive; together with coupons on each of them, respectively. The Pickens township bonds were issued to one George Potts, under an order of the president of the railroad, dated 11th December, 1888. They got into the hands of McCracken & Co., who were contractors, building the road. McCracken & Co. transferred them to the firm of Post, Martin & Co., and, Martin having withdrawn, the firm became Post & Pomeroy, of which firm the present plaintiff is the survivor. The railroad was never built as originally contemplated. It has been completed to Edgefield Courthouse. It has not been so completed as to pass out of Pickens township, although it runs into that township. The bonds are coupon bonds, payable to bearer. They bear date 1st January, 1888. Coupons are payable annually.

The answer contains five defenses: (1) It denies each and every allegation of the complaint, save such as may be hereafter admitted. (2) Puts in issue the existence of the firm of Post & Pomeroy, and the survivorship of Post, and denies the bona fides of the holding of plaintiff. (3) Denies that Pickens township is a corporation; denies the validity of the act authorizing the subscription; denies the validity of the election; denies the validity of their issue, and denies the authority of the county commissioners to issue them; denies that plaintiff got the bonds in due course of business, and avers that he got them on speculation, and without consideration, with full knowledge of their invalidity; avers that the road had not been completed through the township, and that the bonds were acquired after the supreme court of South Carolina had declared similar bonds unconstitutional and void. (4) Alleges that the bonds had been deposited with the Carolina Savings Bank upon certain conditions, which have not been performed, and that the delivery of them by said bank to Potts was fraudulent and void. (5) Denies that Pickens township is a body politic and corporate. (6) Pleads the statute of limitations as to such of the coupons as did not mature within six years, and as to such annual installments payable on said bonds as did not fall due and payable within six years.

The cause, being at issue, was tried before the circuit court and a jury. The court, upon all the evidence, instructed the jury to find for the plaintiff. Judgment was entered on the verdict, a writ of error was sued out on exceptions taken at the trial, and on these exceptions the cause is here. The exceptions cover the legal grounds taken in the answer, and allege error in that the judge took from the jury the questions of fact whether the bonds were not acquired after the decision of the supreme court of South Carolina determining that the township bonds issued under precisely the same authority as these

were invalid, and the further fact as to the bona fide acquisition of these bonds by the plaintiffs for valuable consideration, without notice.

G. W. Croft (Croft & Tillman, on the brief), for plaintiff in error.

H. A. M. Smith (N. G. Evans and Mitchell & Smith, on the brief), for defendant in error.

Before SIMONTON, Circuit Judge, and PAUL and WADDILL, District Judges.

SIMONTON, Circuit Judge (after stating the facts as above). It is contended that the act authorizing the issue of these bonds infringes section 20, art. 2, of the constitution of South Carolina, requiring every act to relate to one subject, expressed in its title. This objection is met by *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. Ed. 816; *Jonesboro City v. Cairo & St. L. R. Co.*, 110 U. S. 192, 4 Sup. Ct. 67, 28 L. Ed. 116; *Town of Mahomet v. Quackenbush*, 117 U. S. 508, 6 Sup. Ct. 858, 29 L. Ed. 982; *Morton v. Comptroller General*, 4 S. C. 430.

The crucial question in this case is, does it appear from all the evidence that the plaintiff is a bona fide holder of these bonds before maturity for value and without notice of infirmity? If he be such a holder, all controversy as to the regularity of the proceedings antecedent to the preparation, execution, and issuance of these bonds is settled by the certificate of the county commissioners which appears on each bond. *Town of Coloma v. Eaves*, 92 U. S. 484, 23 L. Ed. 579; *Evansville v. Dennett*, 161 U. S. 434, 16 Sup. Ct. 613, 40 L. Ed. 760.

This is certainly the case as to every fact except the constitutional power in the legislature to pass the act authorizing the subscription. *Gunnison Co. v. E. H. Rollins & Sons*, 173 U. S. 255, 19 Sup. Ct. 390, 43 L. Ed. 689.

This power in the legislature is denied. It is charged that so much of this act as creates the townships into corporations, and authorizes them to subscribe to this railroad, is in conflict with section 20, art. 2, and with section 8, art. 9, of the constitution of the state of South Carolina, of force at the date of the act. *Floyd v. Perrin*, 30 S. C. 1, 8 S. E. 14, 2 L. R. A. 242. Whether the plaintiff is affected by this decision in *Floyd v. Perrin* depends also upon the fact whether he be a bona fide purchaser for value before maturity, without notice. The supreme court of the United States in *Folsom v. Township Ninety-Six*, 159 U. S. 627, 16 Sup. Ct. 174, 40 L. Ed. 278, had before it the validity of township bonds issued in South Carolina, and the effect upon the validity of these bonds of the decision in *Floyd v. Perrin*. The same bonds sued upon in *Folsom's Case* were passed upon by the supreme court of South Carolina in *Floyd v. Perrin*. In *Folsom's Case* the supreme court held the bonds valid, notwithstanding the decision in *Floyd v. Perrin*. No question was made as to the purchase of the bonds by *Folsom*. As to him the court says: "There not being shown a single decision of the state court against the constitutionality of the act of 1885, before the plaintiff purchased his bonds, nor any settled course of decision upon the subject even since his purchase, the question of the validity of these

bonds must be determined by this court according to its own view of the law of South Carolina." It then decided that the act, in that it created townships into corporations and clothed them with power to subscribe to railroads, was not in conflict with the constitution of South Carolina. This decision was made November 18, 1895.

But for these reasons it cannot be doubted that the supreme court would have followed the uniform current of decisions, and would have adopted the construction placed by the highest court of the state on its own constitution and statutes. *Claiborne Co. v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489, 28 L. Ed. 470; *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. 554, 33 L. Ed. 909; *Stutsman Co. v. Wallace*, 142 U. S. 293, 12 Sup. Ct. 227, 35 L. Ed. 1018; *Sioux City Terminal Railroad & Warehouse Co. v. Trust Co. of North America*, 173 U. S., at page 107, 19 Sup. Ct. 341, 43 L. Ed. 628.

The evidence of the plaintiff tends to show that *McCracken & Co.*, the contractors, got these bonds some time in 1888; that of the defendants, by the order to the Carolina Savings Bank, the bailee, shows that they were delivered to one George Potts, under an order dated 11th December, 1888. Who Potts was does not appear. As they were dated January 1, 1888, interest, and an installment on the principal, were due January 1, 1899. So they were issued before maturity. Now, the holder of a negotiable instrument is presumed to have taken it before maturity, for valuable consideration, and without notice of any objection to which it was liable, and this presumption stands until overcome by sufficient proof. *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Chambers Co. v. Clews*, 21 Wall. 317, 22 L. Ed. 517; *San Antonio v. Mehaffy*, *supra*; *Montclair Tp. v. Ramsdell*, 107 U. S. 147, 2 Sup. Ct. 391, 27 L. Ed. 431. To impeach the title of a holder for value of negotiable paper, by proof of any facts and circumstances outside of the instrument itself, it must first be shown that he had knowledge of such facts and circumstances at the time the transfer was made. *Goodman v. Simonds*, 20 How. 343, 15 L. Ed. 934. Such a holder is not affected by anything which has occurred between other parties, unless he had knowledge thereof at the time of purchase. *Brown v. Spofford*, 95 U. S. 474, 24 L. Ed. 508. A bona fide holder of negotiable paper is entitled to transfer to a third person all the rights with which he is vested, and the title so acquired cannot be affected by proof that the indorsee was acquainted with the defenses existing against the paper. *Gunnison Co. v. E. H. Rollins & Sons*, 173 U. S. 275, 19 Sup. Ct. 390, 43 L. Ed. 689. Such are the safeguards which the law throws around negotiable paper, and which protect one holding it. Thus, the burden of proof is on the defendant to show the defects in plaintiff's title.

The defendant charges that these bonds were in escrow with the Carolina Savings Bank, and that the issuance of them by that bank was fraudulent and void. But notice of the conditions on which the Carolina Savings Bank held these bonds has not been brought home to the holder of them. If the maker or indorser, before delivery to the payee, leave the note in the hands of a third person as an escrow, to be delivered on certain conditions only, and the per-

son to whom it is thus intrusted violate the confidence reposed in him, and put the note in circulation, this, though not a valid delivery as to the original parties, must, as between a bona fide holder for value and the maker or indorser, be treated as a delivery rendering the note or indorsement valid in the hands of such bona fide holder. *Burson v. Huntington*, 21 Mich. 415, cited and approved *Provident Life & Trust Co. v. Mercer Co.*, 170 U. S. 605, 18 Sup. Ct. 788, 42 L. Ed. 1156.

It is also charged that the bonds, when transferred, showed that there were coupons unpaid as well as installments of principal. But the evidence does not disclose precisely the time when *McCracken & Co.* got the bonds. Some time in 1888. If this be correct, neither principal nor coupons were past due. But, if they were, "failure to pay interest alone is not sufficient in law to throw discredit upon negotiable paper, upon which it is due, to subject the holder to the full extent of his security to antecedent equities." *Morgan v. U. S.*, 113 U. S. 476, 5 Sup. Ct. 588, 28 L. Ed. 1044.

It is also alleged that the case of *Floyd v. Perrin* was decided on November 30, 1888, before, or, at the least, just about the time of, the delivery of these bonds; that this was notice to the holder of their invalidity. It may well be doubted if this court can recognize *Floyd v. Perrin* as authority to this extent. We are controlled by the decisions of the supreme court of the United States, and that court evidently was of the opinion that *Floyd v. Perrin* was an erroneous interpretation of the constitution of South Carolina. *Folsom v. Township Ninety-Six*, supra. Be this as it may, "the question of lis pendens, as applicable to negotiable securities, was fully considered by us in the case of *Warren Co. v. Marcy*, 97 U. S. 107, 24 L. Ed. 977, and we then held that a bona fide purchaser before maturity is not affected with constructive notice of a suit respecting such paper." *Cass Co. v. Gillett*, 100 U. S. 593, 25 L. Ed. 585; *Thompson v. Perrine*, 103 U. S. 806, 26 L. Ed. 612.

In conclusion, we see nothing in the testimony which rebuts the presumption in favor of a holder of commercial paper not yet matured. The court below was not in error in instructing the jury to find for the plaintiff. The judgment of the circuit court is affirmed.

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TRAVELERS' INS. CO. v. MAYOR, ETC., OF JOHNSON CITY.

(Circuit Court of Appeals, Sixth Circuit. February 12, 1900.)

No. 732.

MUNICIPAL CORPORATIONS—VOID BONDS—RECOVERY BY PURCHASER ON QUANTUM VALEBAT.

A purchaser, in the market, of negotiable bonds payable to bearer, and unindorsed, issued by a city to a railroad company of another state, to whom it had no power to issue the bonds, in payment of a subscription to the company's stock, which it had no power to make, although it had power to subscribe for the stock of a domestic corporation, and to issue its bonds in payment therefor, cannot recover from the city the amount paid for such bonds as money had and received to the city's use and

benefit on the ground that the stock had been delivered and retained, and the railroad and a depot constructed, which were the conditions upon which the subscription was made. In such case the stock was void in the hands of the city for want of power on its part to become a stockholder; and the railroad and depot, built on lands owned by the company, did not become property of the city, or confer upon it any such direct benefits as could raise an implied promise to pay therefor independently of its void contract.

**In Error to the Circuit Court of the United States for the Eastern District of Tennessee.**

This was a suit at law by the Travelers' Insurance Company to recover from the mayor and aldermen of Johnson City \$50,000 and interest from January 5, 1892, as money had and received to the use of the defendants. The case made in the declaration was: That under the act of the general assembly of the state of Tennessee, providing: "That any county, incorporated city or town, may become a stockholder in any railroad company incorporated under the general laws of this state, to an amount not exceeding, in the aggregate, one-tenth of its taxable property, by complying with the requirements of this act" (Laws 1887, c. 3, § 1), and which provided in its twelfth section: "That when such subscription shall become due and payable, as provided in section eleven of this act, the county, or city, or town making the subscription shall make and execute its coupon bonds for the amount of such subscription, payable not more than twenty years after date, and bearing interest at such rate as may be agreed upon, not exceeding six per cent. per annum, payable semi-annually, and deliver the same to the railroad company, provided, that such county, city or town may pay such subscription in cash at maturity, if it shall so elect,"—the Charleston, Cincinnati & Chicago Railroad Company, on December 30, 1890, applied to the defendant in error to subscribe \$75,000 to the capital stock of said railroad company, the subscription to be paid in the coupon bonds of the defendant. That an election was held on January 30, 1890, pursuant to law, and under orders of the mayor and board of aldermen. That the sheriff made his return, showing that more than three-fourths of the electors voting voted for the subscription, and that thereupon the defendant made the subscription accordingly, and resolved that it be paid in coupon bonds of the town. That the bonds issued were in the form following:

"State of Tennessee, County of Washington, Corporation of Johnson City:

"Know all men by these presents, that the corporation of Johnson City, in the county of Washington, state of Tennessee, acknowledges itself indebted and firmly bound to the Charleston, Cincinnati & Chicago Railroad Company, or bearer, in the sum of one thousand dollars, lawful money of the United States of America, and for value received hereby promises to pay to said company, or bearer, the sum of one thousand dollars at the National Bank of Deposit in the city of New York, state of New York, in twenty years after date, with interest thereon from date hereof at the rate of six per cent. per annum, payable semiannually, on the first days of May and November in each and every year, on presentation and delivery of coupons hereto annexed, and duly signed by the recorder of Johnson City; for the performance of all which the taxable property of said Johnson City is irrevocably pledged, pursuant to an act of the general assembly of the state of Tennessee, entitled 'An act to enable the counties and incorporated cities and towns to subscribe to the capital stock of any railroad company incorporated under the general laws of this state, in the mode prescribed therein, and to provide for the payment of such subscriptions,' approved February 17, 1887, and also an act passed February 28, 1887, approved March 2, 1887, authorizing Johnson City to issue bonds to an amount not exceeding seventy-five thousand dollars. This bond is one of a series of seventy-five bonds of like tenor, date, and amount herewith, issued by virtue of said above-named statutes, and in issuing same all of the provisions and requirements of each of said statutes have been strictly fulfilled and complied with. In witness whereof the mayor and the recorder of the corporation of Johnson City, Tennessee, have hereunto signed their



names, and the same has been countersigned by the board of trustees of the sinking fund of said town, at said Johnson City, on the first day of May, A. D. 1890.

\_\_\_\_\_  
"Mayor.

\_\_\_\_\_  
"Recorder;

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

"Board of Trustees of the Sinking Fund."

That by the contract of subscription the bonds were to be deposited in the First National Bank in escrow, to be delivered to the railroad company, or its order, upon presentation of a certificate signed by the mayor of the city and the chief engineer of the railroad company. That the three conditions of the subscription, which were the delivery of the stock, the construction of the railroad, and the erection of a railway station, had been complied with. That the railroad and station were completed, and the stock issued in accordance with the contract, and the bonds were delivered to the railroad company upon proper certificate. That the stock issued to the amount of \$75,000 has ever since been held by the defendants. That, soon after the delivery of the bonds by the city to the railroad company, the same were put by the railroad company upon the market for sale, and the plaintiff, relying upon the representations made on the face of the bonds that all the requirements of law had been strictly complied with in their issue, purchased \$50,000 of the bonds, and paid \$50,000 in lawful money for the same without notice of any infirmity in the bonds.

The declaration further shows that, after paying the interest coupons on these bonds for several years, the defendants filed a bill in the chancery court of Washington county, Tenn., against the railroad company and the plaintiffs and others, in which it sought to have the bonds declared void on the various grounds therein set up; that upon a final hearing of the cause the chancellor entered a decree, on March 13, 1895, adjudging the bonds to be void in the hands of bona fide purchasers, upon the ground that the Charleston, Cincinnati & Chicago Railroad Company was not a corporation under the laws of the state of Tennessee, but was a South Carolina corporation; and that \$75,000 exceeded one-tenth of the taxable property of Johnson City, in violation of the terms of said statutes authorizing the subscription. On appeal this was affirmed by the court of chancery appeals. Plaintiff then appealed to the supreme court of Tennessee, which also affirmed the decree of the chancellor (44 S. W. 670), adjudging that said bonds were invalid and void upon the grounds stated, and enjoining their collection. The declaration avers further that the corporation to which this subscription was made was a Tennessee corporation, and not a corporation of South Carolina; that in fact there were two corporations, and that the application made by the railroad company for the subscription was made in the name of the Tennessee corporation. The bill further avers that the defendants were estopped by their recitals to deny that this was a Tennessee corporation, or that the statutory limit of indebtedness had been exceeded. The prayer of the bill is for the amount paid by plaintiff for the bonds, on the ground that the defendants have received this amount in value to their benefit. The declaration was demurred to on the ground that it did not state a cause of action, and the demurrer was sustained. The plaintiff not wishing to plead further, judgment was entered for the defendants, and that judgment is now here for review.

T. S. Webb, for plaintiff in error.

Isaac Harr (Burrow Bros., on the brief), for defendants in error.

Before TAFT, LURTON, and DAY, Circuit Judges.

TAFT, Circuit Judge (after stating the facts as above). The averments of the declaration that the railroad company whose stock

was subscribed for by the defendants was a Tennessee corporation, and that the plaintiff was a bona fide purchaser for value, without notice of any infirmity in the bonds, and that the defendants were estopped by the recitals in their bonds from denying that the railroad company was a Tennessee corporation, lend no legal force to it, in the face of its other averments, which show that those very questions of fact and law were decided adversely to the plaintiff in an action to which the plaintiff and defendants were adversary parties, and in which the question of the validity of these bonds was the sole matter at issue. The question for our consideration here is, therefore, whether one who, for full value, purchases in the market negotiable bonds payable to bearer, and unindorsed, issued by a municipal corporation to a railroad company of another state, to whom it has no power to issue the bonds, in payment of a subscription to the company's stock to which it has no power to make a subscription, after the railroad has been built, and the depot has been constructed on the company's ground, and the certificates for the stock subscribed for have been delivered to the municipal corporation, all in accordance with the condition of the subscription agreement, may recover from the municipal corporation the money paid by it in open market for the bonds, on the ground that that amount has been expended in conferring upon the city the benefit of the railroad and the depot and the stock, when it further appears that the corporation has power to make subscriptions for the stock of a domestic corporation, and to pay for the same in its bonds. We think the question must be answered in the negative. The cause of action is for money had and received to the use of the city. Such an action is based, not on an express or implied contract, but upon an obligation which the law supplies from the circumstances, because, *ex æquo et bono*, the defendant should pay for the benefit which he has derived at the expense of the plaintiff. It is an obligation which the law supplies, because, otherwise, it would result in the unjust enrichment of the defendant at the cost of the plaintiff. It is an obligation which arises only when the defendant has received money or property from the plaintiff and appropriated the same to his own use, either when he might have elected not to take it, or, having the power to do so, might return the benefit thus conferred to the plaintiff, and fails to do so. In this case the three benefits conferred on the plaintiff are: (1) The issuing of the stock; (2) the construction of the railroad; and (3) the building of the depot. As to the first, it has been conclusively adjudged by the supreme court of Tennessee in the case of *Johnson City v. Charleston, C. & C. R. Co.*, 100 Tenn. 138, 44 S. W. 670, in which the plaintiff and the defendants were adversary parties, that the city had no power to subscribe to the stock of the railroad company. This being so, the city did not become a stockholder in the railroad company, and did not receive the benefit of the stock purporting to be issued. The contract of subscription was utterly void, and the certificate was but waste paper. It imposed no obligation upon the railroad company or its stockholders; it conferred no benefit upon the city. The case of *Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198, leaves no

doubt on this point. There a national bank, without power to do so under the national banking laws, purchased stock in a savings bank of the state of California. It was held that, in the absence of power to own the stock, the national bank did not become a stockholder, and was not liable to pay the assessment upon the stock for the benefit of creditors, although in that case it had received, and had not returned, dividends issued to it as a stockholder. The other benefits said to have been conferred upon the city were the construction of the railroad and the building of the depot. As the railroad and the depot were constructed on the land of the railroad company, they did not go into the possession of the city as its property. Had the railroad company, without any subscription by the city, built its railroad through the city, and erected its station there, it certainly could not be claimed that this would have given the railroad company a right of action against the city for the value of the benefits conferred on the city by such construction, however great those benefits might have been in adding to the prosperity of the city and its inhabitants. In the absence of an express agreement to pay for such a benefit, no tacit agreement to do so can be inferred. Where the conferring of the benefits was induced by an express agreement which is void, the law will not supply an obligation to pay on the ground of unjust enrichment as a quasi contract, unless, in the absence of the express agreement, a real, but tacit, contract could have been inferred from the circumstances. The benefit indirectly conferred on one man's property by the improvement of the land of another is not an unjust enrichment of the other. Hence, *ex æquo et bono*, no obligation in law to pay for it arises. The case in hand is not distinguishable in principle from that of *Railroad Co. v. Bensley*, 6 U. S. App. 115, 2 C. C. A. 480, 51 Fed. 738, 19 L. R. A. 796, decided by this court, in which Mr. Justice Brown delivered the opinion. In that case the owners of lots in Chicago in close proximity to the lot on which it was proposed to construct the Chicago Board of Trade Building entered into a written contract with the owner of the lot by which they agreed that, if he would sell the lot to the board of trade at a low price, so as to induce the board of trade to buy it, and if the board of trade should construct its building thereon within a certain time, they would pay the owner of the lot, each of them, a certain sum of money. The owner of the lot accordingly sold it to the board of trade at the price named in the agreement, but the building was not constructed within the time fixed by the agreement. Suit was brought by the owner to recover from the contractors the amounts stipulated to be paid in the contract after the building had been constructed. The court held that time was of the essence of the contract, and was made a condition precedent to the obligation to pay, and that, therefore, no recovery could be had under the contract. The plaintiff then sought to recover on a *quantum valebat*, and it was held that the benefit conferred was not one which created an obligation on the part of the lot owners to pay, even though it appeared that, owing to the erection of the Board of Trade Building, they had been enabled to sell their land at a largely increased price. The court said:

"Had the defendant received a benefit from the performance of this contract to which he would not have been entitled had the contract not been made, the result might have been different; but, as a matter of fact, it received no benefit from the erection of this building which did not accrue to other owners of neighboring property who did not sign the contract or subscribe in aid of the purchase of the lot, and as to such persons it would not be claimed that a liability arises. Its acquiescence in the completion of the building is immaterial, since it had no right to interfere. It is, then, only upon the basis of the special contract to pay that an action will lie, and this contract not having been performed by the plaintiff, there can be no recovery."

Mr. Justice Brown mentioned, as a most satisfactory case upon this point, *Railway Co. v. Thompson*, 24 Kan. 170, and said:

"This was an action upon certain bonds issued by the city of Parsons in aid of the construction of the plaintiff's road, and subject to a condition that the plaintiff should 'have its road constructed and in operation on or before the first day of July, 1878.' It was held that time was of the essence of this contract, and that the failure of the plaintiff to complete the road by the day named was fatal to a recovery, notwithstanding the road was completed shortly after that, and the city received the benefit of it. In delivering the opinion of the court, Mr. Justice Brewer, now of the supreme court of the United States, observed: 'Nor is this a case of part performance by one party and the acceptance by the other of the proceeds of such performance. The work done by the company was upon its own grounds. It owns the road absolutely and entirely. It has parted with nothing which the city has received. The city has accepted and appropriated none of its labor and none of its materials. It has received the benefit of the work in no other sense than every individual in the community, and in no other way than of one person receiving benefit from his neighbor's improvement of his own property.'"

While these were cases in which the plaintiff failed to recover on the express contract, not because it was ultra vires and void, but because the plaintiff failed to comply with a condition precedent in such contract, the principle upon which they were placed is entirely applicable to the case at bar. This is made apparent by the language of Mr. Justice Jackson in delivering the opinion in *Hedges v. Dixon Co.*, 150 U. S. 182-186; 14 Sup. Ct. 71, 37 L. Ed. 1044. There a county had issued bonds in aid of a railroad in excess of its authority, and the holders of the bonds filed a bill in which they asked from the court the relief of cutting down the obligation of the bonds proportionately so as to bring it within the lawful amount. The supreme court held that the relief could not be granted, and, referring to the cases of *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153, and *Read v. City of Plattsburgh*, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. Ed. 414, in which it had been permitted to bondholders of bonds issued without authority to recover from the municipal corporation issuing the bonds the amount of money received by it and expended by it for lawful purposes as money had and received to its use, the court said:

"The circumstances and conditions which gave the holders of the bonds an equitable right in those cases to recover from the municipality the money which the bonds represented do not exist in the case under consideration, where the county received no part of the proceeds of the bonds, and no direct money benefit, but merely derived an incidental advantage arising from the construction of the railroad, upon which advantage it would be impossible for the court to place a pecuniary estimate, or to say that it would be equal to such portion of the bonds in question as the county could lawfully have issued."

For these reasons we think that there is no ground upon which to base a recovery for money had and received to the use of Johnson City.

The cases relied upon by the plaintiff are *Read v. City of Platts-mouth*, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. Ed. 414; *Chapman v. Douglass Co.*, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378; *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Louisiana v. Wood*, 102 U. S. 294, 26 L. Ed. 153; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659. It is contended that they sustain the view that money paid for the benefit of the city on the faith of the issue of invalid bonds may be recovered in an action for money had and received. It will be found that, in every case cited but one, the city or county or municipal corporation which issued the bonds received the money or labor or material furnished, and that it was expended in improving the property of the city or other corporation in a manner in which the city had power to improve its own property. In *Hitchcock v. Galveston*, *supra*, the benefit conferred upon the city was the building of sidewalks, which the city had the right to build and pay for, but which, it was found, it had no right to pay by issuing bonds. In *Louisiana v. Wood* the money received for the bonds was used partly by the city in payment and redemption of matured bonds and coupons and warrants of the city, lawfully issued, and part of it was deposited in the city treasury. In *Parkersburg v. Brown*, which is the exception, the money which was received for the bonds was used to purchase land and to erect a manufacturing establishment, the operation of which it was supposed would benefit the city. The bonds were declared void for want of power in the city to aid private manufacturing establishments. The relief granted by the court was not to hold the city as for money had and received, but to follow the property into which the money had been put, and to sell the property, and distribute the net proceeds thereof to those with whose money the property had been purchased and improved. In *Chapman v. Douglass Co.*, *supra*, a county in Nebraska bought land upon which to erect a poor house and farm, and in payment therefor issued notes for four equal annual installments of the purchase price, and gave a mortgage to secure the payment of the notes. It was decided by the supreme court of the state that the county could not bind itself to pay the purchase money by notes, or to secure it by mortgage upon the property, but its power was limited to a payment in cash, and the levy of an annual tax to create a fund wherewith to pay the residue. It was held that, the contract being unauthorized only so far as it related to the time and mode of paying the purchase money, and the title to the land having passed by the conveyance, the county held the title as trustee for the benefit of the vendor, and that, unless the sum due on the purchase money was paid within a reasonable time, the county might be required to execute a deed releasing to the vendor all the title acquired under his deed. In *Read v. City of Platts-mouth*, the money paid for the bonds was used by the city of Platts-mouth in the construction of a high school building. The power of the city to issue bonds to build a high school was questioned, and by a subsequent

act the bonds issued were validated by the legislature. At the time the bonds were issued it could not lawfully issue them in the amount in which they were issued. It was held that the city, having taken the money and put it into a school house, which it owned, was bound by the force of the transaction to repay to the purchaser of its void bonds the consideration received and used by it, or its lawful equivalent, and that, therefore, the enabling act validating the bonds only recognized an existing moral and legal obligation, and was valid. It thus appears that in each of the cases, except *Parkersburg v. Brown*, the benefit received by the municipal corporation was money paid to it or property delivered into its actual possession under such circumstances that, had no express contract been attempted, a tacit contract might have been inferred. In *Parkersburg v. Brown* the money paid was followed, as in rem, into the thing bought with it.

It follows that the judgment of the court was correct, and it must be affirmed, with costs.

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**JAMES P. WITHEROW CO. v. DE BARDELEBEN COAL & IRON CO.**

(Circuit Court of Appeals, Fifth Circuit. February 6, 1900.)

No. 824.

**1. CONTRACTS—CONSTRUCTION.**

Plaintiff contracted to build two blast furnaces for defendant, and to furnish five boilers of a designated pattern, which he guaranteed sufficient for the entire plant. The five boilers furnished being insufficient, plaintiff furnished three more; and, it then appearing that still more would be required, a supplemental contract was entered into, by which he agreed to furnish two additional batteries, of two boilers each, at his own cost, if both were required, but the contract providing that if one of such batteries should prove sufficient, with those previously erected, defendant should pay \$3,000 for the last battery, or it might elect not to retain it, in lieu of such payment. *Held*, that plaintiff could in no event recover more than \$3,000 upon such supplemental agreement, even if able to show that neither of the additional batteries furnished thereunder were required to fulfill his former contract; the necessity for one, at least, of such batteries being conceded in the making of the second contract.

**2. APPEAL—REVIEW—RULINGS ON MOTION FOR NEW TRIAL.**

Rev. St. § 914, requiring circuit and district courts of the United States to conform, as near as may be, in civil actions at law, to the practice, pleadings, and form of procedure existing in the state courts, has no application to procedure on appeal or writs of error; and the settled rule of the federal courts that a ruling on a motion for a new trial is discretionary, and not reviewable on a writ of error, is not affected by a state statute providing for appeals from such rulings.

In Error to the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

John F. Martin, for plaintiff in error.

Walker Percy and W. I. Grubb, for defendant in error.

Before PARDEE, McCORMICK, AND SHELBY, Circuit Judges.

SHELBY, Circuit Judge. On March 31, 1886, James P. Witherow made an agreement with the De Bardeleben Coal & Iron Company to

erect for it two blast furnaces. The details of the contract and specifications are not material. It is, however, important to note that Witherow agreed to furnish "five water-tube boilers, Heine patent, guarantied sufficient for entire plant." After one of the furnaces was in operation, some doubt was expressed by the De Bardeleben Coal & Iron Company as to whether the five water-tube boilers would be sufficient to run the entire plant when finished, and thereupon Witherow furnished one extra boiler of the Heine patent; and later, at the request of the De Bardeleben Coal & Iron Company, Witherow delivered to it two other extra-large boilers, Heine patent, in addition to the six boilers already furnished. After Witherow had furnished the eight boilers as stated, and while he was erecting the last two of them, it still appearing that the boiler power was not sufficient, the following contract was executed by Witherow:

"Bessemer, Ala., Nov. 2d, 1888.

"Whereas, the boiler power furnished by James P. Witherow to the De Bardeleben Coal and Iron Company has not been found sufficient for the entire plant described in his contract with them, dated 31st March, A. D. 1888, as guarantied therein; and whereas, James P. Witherow is now erecting an additional battery at said furnace plant, of the same pattern, but of size L, and of somewhat different construction: Now, I, the said James P. Witherow, agree to furnish two other additional batteries, similar in size and construction to the additional battery above referred to as now being erected at such furnace plant. It being understood that if both of such two additional batteries, with the rest of the boiler power furnished, are found necessary to supply sufficient steam for the entire plant described in such contract, with one battery left always idle for necessary cleaning and repairs, then I am to pay the entire cost of such additional batteries. If, however, one of the additional batteries herein stipulated for be found sufficient for the purposes above described, then the De Bardeleben Coal and Iron Company is to pay me \$8,000 for the second additional batteries. The two additional batteries herein provided to be completed and in position within sixty days from this date, provided the foundations for the same are ready to receive them. In case of disagreement between myself and the said De Bardeleben Coal and Iron Company as to whether the said additional battery is necessary or not, then the matter to be referred to some third party, to be mutually selected, and his decision to be final. If the second of the additional batteries above referred to prove satisfactory to the De Bardeleben Coal and Iron Company, they have the right to cancel this agreement, as to the third additional battery, without cost to them, if they so elect.

"[Signed]

James P. Witherow."

Each battery named in the contract consisted of two boilers. Witherow delivered the four additional boilers in conformity with this contract, making, in all, twelve boilers that he furnished. This suit is brought to collect pay for the last four boilers. The plaintiff company, which has become the successor of James P. Witherow, and the owner of the claim, contends that it is not necessary to use the four boilers last delivered in order to successfully operate the plant. The plaintiff therefore sues for \$16,000, the value of the four boilers. The defendant in error contends that all the boilers furnished were necessary to operate the plant. These contentions make the issue of fact in the case, on which much evidence was offered by each party. Whether or not these four boilers last furnished were necessary to supply sufficient steam to operate the entire plant to its reasonable capacity, leaving two idle for use while cleaning and repairing, was the one question of fact for the jury. The plaintiff in-

sisted that the contract should be so construed that, if the jury answered this question in the negative, it was entitled to receive \$16,000; but the trial judge construed the contract to mean that the plaintiff in no event could recover on the contract more than \$8,000. The circuit court (Judge Toulmin presiding) instructed the jury on this point as follows:

"Witherow entered into an agreement with the defendant to deliver to it (the defendant) four other and additional boilers, which agreement was in writing, and dated November 2, 1888, and which is in evidence before you. In that agreement Witherow states, in substance, that the boiler power furnished by him had not been found sufficient for the entire plant described in his former contract, as he had guaranteed therein; and he agrees to furnish two other additional batteries, which, it has been shown, meant four additional boilers, and stipulates that if both such two additional batteries (in other words, four additional boilers), with the rest of the boiler power furnished, are found necessary to supply sufficient steam for the entire plant described in the original contract, with one battery (that is, two boilers) left always idle for necessary cleaning and repairs, then Witherow would pay the entire cost of such additional boilers, but if one of the additional batteries (that is, two boilers) stipulated for be found sufficient for the purpose described (that is, sufficient to supply steam for the entire plant), then the defendant should pay him \$8,000 for two boilers. In the recital of this agreement, Witherow speaks of an additional battery (two boilers) that he was then erecting at the furnace plant, and then goes on and agrees to furnish two other additional batteries, or four additional boilers, and, in the winding up of the agreement, says that if the second of the additional batteries above referred to proved satisfactory to the defendant, the defendant had the right to cancel the agreement as to the third additional battery, without cost, if he so elected. My construction of that clause is that Witherow was referring to all three of the additional batteries mentioned in that agreement, and when he says, 'If the second of the additional batteries above referred to proved satisfactory,' etc., he had reference to the first of the two additional batteries which he then and there agreed to furnish, and, if they proved satisfactory to the defendant, the defendant could, at its election, cancel the agreement to pay the \$8,000 for the other and last additional battery referred to, and which Witherow had stipulated to furnish, —in other words, that the defendant had the right to relieve itself of paying \$8,000 for the two boilers which it might have no need for. Now, you will observe that Witherow agreed to furnish four additional boilers, and stipulated that if all of them, with the rest of the boiler power already furnished, were necessary to supply sufficient steam for the plant, with two of the boilers left always idle, then he was to pay the entire cost, and the defendant was to pay nothing. If, however, two of the additional boilers were found sufficient for the purpose, then the defendant was to pay him \$8,000, unless the defendant elected to cancel the agreement as to that. Now, the plaintiff avers in its complaint that it was not necessary to use four of the boilers delivered to the defendant, in order successfully to operate the defendant's furnace plant, and it claims pay for four boilers in the sum of \$16,000. But I charge you, gentlemen, that, if you find the plaintiff is entitled to recover at all, it can only recover \$8,000 for two boilers, with interest on that amount from the time it was due or ought to have been paid, if you find from the evidence when that was. If you cannot find when that time was, then interest would run from the beginning of the suit."

This charge, we think, properly construes the contract. It leaves but little to add on the subject. By the original contract to erect the furnace, Witherow was to furnish five water-tube boilers, "guaranteed sufficient for the entire plant." It is conceded that the five boilers were insufficient. He furnished another, which was still not enough, and while erecting two more (the seventh and eighth) the contract sued on was made. The De Bardeleben Coal & Iron Company had Witherow's guaranty to furnish sufficient boilers at his own expense,



and it is not probable that it would agree to pay for boilers that were needed to run the plant. Witherow, on the other hand, would not probably agree to furnish, without additional pay, more boilers than were sufficient. The parties being so placed by the original contract, the one sued on was made. Witherow evidently conceded that two more boilers (the ninth and tenth) would be needed. The De Bardeleben Coal & Iron Company thought four more (the ninth, tenth, eleventh, and twelfth) would be needed. The contract provides that two batteries, of two boilers each, shall be furnished; but it provides, in terms, for the payment of \$8,000 for one of the batteries if it was retained by the De Bardeleben Coal & Iron Company, and was unnecessary to run the plant. If one additional battery (the ninth and tenth boilers), with those already furnished, was all that was needed, Witherow was to be paid \$8,000 for the other battery (the eleventh and twelfth boilers). In no event, by the contract, was he to be paid \$16,000 for the two batteries. The last sentence of the agreement confers the right on the De Bardeleben Coal & Iron Company, if, in its opinion, the eleventh and twelfth boilers were not needed, to decline to retain them, and so avoid paying the \$8,000 for them. But the defendant accepted and retained both of the batteries, claiming that both were needed to fulfill the guaranty of Witherow. On this construction of the contract, if the last battery was required to run the plant, leaving one battery always idle for necessary cleaning and repairs, the plaintiff was entitled to nothing; if the last battery was not required, the plaintiff was entitled to recover \$8,000 and interest. This question was fairly submitted to the jury, and they found, by a verdict for the defendant, that all the boilers furnished (twelve in number) were required to run the plant, leaving two idle ones for cleaning and repairs.

It is assigned as error that the court below refused to grant a new trial in the case. In the United States courts it has been uniformly held that the granting or refusal of a motion for a new trial is within the discretion of the court, and cannot be reviewed by an appellate court. It is contended by counsel for the plaintiff in error that the act of the legislature of Alabama of February 16, 1891 (Acts 1890-91, p. 779, No. 363; Code Ala. 1896, § 434), which provides for appeals from decisions on motions for new trials, should be followed in practice in the federal courts. It is true that the Revised Statutes of the United States (section 914) provide that the practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding. This statute, we think, does not have any application to the review of decisions refusing or granting new trials. In *Newcomb v. Wood*, 97 U. S. 581, 583, 24 L. Ed. 1085, the court said: .

"It has long been the established law in the courts of the United States that to grant or refuse a new trial rests in the sound discretion of the court to which the motion is addressed, and that the result cannot be made the

subject of review upon a writ of error. We cannot think that congress intended by the act of June 1, 1872 (17 Stat. 197, § 5), to abrogate this salutary rule."

The object of section 914 of the Revised Statutes was to assimilate the form and manner in which the parties should present their claims and defenses in preparation for the trial of suits in the federal courts, to those prevailing in the courts of the states. This does not include proceedings in the appellate courts. It has no application to proceedings by writs of error or by appeal. In *re Chateaugay Iron Co.*, 128 U. S. 544, 553, 9 Sup. Ct. 150, 32 L. Ed. 508. The case of *Cowley v. Railroad Co.*, 159 U. S. 569, 16 Sup. Ct. 127, 40 L. Ed. 263, cited in the brief for plaintiff in error, has, we think, no application to this question. It merely states the familiar rule that the federal courts may enforce in equity new rights or privileges conferred by state statutes, as they may enforce on their common-law side new rights of action given by statutes. The Alabama statute cited does not confer on parties litigating in the federal courts the right to review by writ of error the decision of the circuit court refusing to grant a new trial. *Fishburn v. Railway Co.*, 137 U. S. 60, 11 Sup. Ct. 8, 34 L. Ed. 585.

There are many assignments of error (67 in all) which relate to the admission and exclusion of evidence. We have examined all of them, and are of opinion that the record shows no error to the injury of the plaintiff in error. It would serve no useful purpose to discuss them. The judgment of the circuit court is affirmed.

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**FLORIDA CENT. & P. R. CO. v. AMERICAN SURETY CO. OF NEW YORK.**

(Circuit Court of Appeals, Second Circuit. January 24, 1900.)

No. 3.

**1. INDEMNITY INSURANCE—FIDELITY OF EMPLOYEES—CONSTRUCTION OF CONTRACT.**

A surety company issued to a railroad company a bond by which it agreed to indemnify the latter against loss by reason of the dishonesty or culpable negligence of its employes, who were named, and the amount of indemnity as to each stated, in a schedule. The liability was limited to losses which should occur and be discovered during the continuance of the contract, and the bond contained the following provision: "And it is agreed further that the company, upon the execution of a stipulated amount of risk or insurance under the terms of this bond in behalf of any employe, shall not thereafter be responsible to the employer under any previous insurance of said employe, it being mutually understood that it is the intention of this provision that but one (the last) insurance of the employe shall be in force at one time, unless otherwise provided." At the end of each year after the issuance of such bond a new schedule of employes was furnished by the employer, accepted by the company, and a new premium paid, based thereon. The bond stated no time of its duration, but the notice of acceptance of each subsequent schedule stated the term of insurance to be for one year. *Held*, that the bond was not a continuing contract from year to year, but that a new contract was made annually; and on each renewal under the above provision the liability of the insurer for any past and undiscovered defalcation of an employe terminated.

**2. SAME.**

A contract by a surety company to indemnify an employer against loss by reason of the dishonesty or culpable negligence of its employes limited

the liability of the company to such losses as should occur during the continuance of the contract, and should be discovered "during said continuance, and within six months after the death, dismissal, or retirement of the employé causing such loss. Held that, at the expiration of the year for which indemnity was given, the liability of the company ceased as to an undiscovered loss caused by an employé who still remained in the position in which his fidelity had been guaranteed, although he subsequently died, and the loss was discovered within six months thereafter.

In Error to the Circuit Court of the United States for the Southern District of New York.

George Zabriskie and J. Archibald Murray, for plaintiff in error.

Henry L. Stimson and Henry C. Willcox, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The American Surety Company of New York issued on March 14, 1891, for a valuable consideration, to the Florida Central & Peninsular Railroad Company, a bond of indemnity against loss through the defalcation of its employés, who were to be named, among whom was W. Naylor Thompson, its treasurer. The railroad company was insured against loss by his dishonesty or culpable negligence in the sum of \$25,000. In an action at law in the circuit court for the Southern district of New York upon this bond by the railroad company against the surety company to recover the amount of the defalcations which will hereafter be specified, a verdict for the defendant was directed by the court, and to review the judgment which was entered upon the verdict this writ of error was brought.

Before March 14, 1891, the surety company had annually, while it was insuring the plaintiff, issued to it a new bond of indemnity, but after the date of the bond in suit no new and separate bond was issued. The bond provided as follows:

"Whereas, the employer has in its service certain employés, whose names, occupations, and locations appear in the schedule register marked 'Florida, Central and Peninsular Railroad Company Bond Record with the American Surety Company of New York,' and which is hereby made a part of this bond; and whereas, the employer requires security for the performance of the duties devolving on said employés in the respective capacities to which they now are or may hereafter be assigned by said employer; and whereas, the employer may hereafter require like security for other employés who now are or may hereafter be engaged in its service, and whose names may, in the manner hereinafter indicated, be inserted in said schedule register:

"Now, therefore, in consideration of the payment of forty cents, annual premium for each one hundred dollars of security required of the company by the employer, it is hereby agreed that, subject to the conditions herein contained, the company does hereby insure the employer to the extent of the insurance on each employé against any and all pecuniary loss sustained by the employer of money, securities, or other personal property in the possession of said employés, or for the possession of which any of them is responsible, by dishonesty or culpable negligence on the part of any of said employés in the positions hereinbefore referred to, or the duties in the employer's service which he may hereafter be called upon to perform during the continuance of his insurance under this bond, and which loss shall be discovered during said continuance and within six months after the death, dismissal, or retirement of the employé causing such loss; but in no event shall the company be liable for a greater sum than that for which the insurance on the defaulting employé is granted, and which insurance, and the period thereof, are stated

in the schedule register hereinbefore mentioned, opposite each employé's name; and the company shall pay to the employer within sixty days from the receipt of a satisfactory proof of a loss under this bond the amount of said loss, but not exceeding the extent of the insurance on the employé or employes whose dishonesty or culpable negligence occasioned such loss: provided, that the company shall not be liable under this bond for the amount of any balance that may be found due the employer from the employé, and which may have accrued prior to the date of said insurance, and which may be discovered within the period of said insurance, it being the true intent and meaning of this bond that the company shall be responsible as aforesaid, for money, securities, or other personal property diverted from the employer within the period specified in said insurance.

"And it is agreed further that the company, upon the execution of a stipulated amount of risk or insurance under the terms of this bond in behalf of any employé, shall not thereafter be responsible to the employer under any previous insurance of said employé, it being mutually understood that it is the intention of this provision that but one (the last) insurance of the employé shall be in force at one time, unless otherwise provided. [This paragraph is known in the case as "Lines 62 to 66."]

"The right to make any claim under this bond shall cease at the expiration of six months from the date at which the defaulting employé shall cease to be in the service of the employer, or the date on which the company may elect to terminate the insurance on such employé as hereinafter provided."

The surety company furnished to the railroad company a book called the "Schedule Register," and had in its office a copy or abstract of this book, in which were entered the names, occupations, and locations of the employes for whose conduct security was required, and the amount of the indemnity which was agreed to be furnished. At the expiration of each year from and after March 14, 1891, until March, 1895, the railroad company made out a new and similar schedule of the employes against whose misconduct they were to be indemnified, and the amount of insurance for each, paid the annual premium, and forwarded the schedule, or a copy of it, to the surety company, which accepted the same, and gave a notice of acceptance. The last notice, dated March 8, 1895, which was substantially like the preceding notices, was as follows:

"You are informed that, subject to the conditions of the guaranty contract executed March 14, 1891, by the American Surety Company of New York to the Florida Central & Peninsular Railroad Co., the said American Surety Company hereby guarantees the employes of the said railroad company as follows, and from the dates herein specified, to March 15, 1896."

Thompson continued to be insured until March 15, 1896. The railroad company applied as usual in March, 1896, for new insurance, but, as the surety company required an increase of rate, no renewal was had. On June 10, 1896, Thompson was taken ill. The railroad company notified the surety company in July of the discovery of defalcations by him. He ceased to be treasurer on August 1st, and died in September, or early in October, 1896. Suit was brought within the time limited in the policy upon a claim consisting of four alleged misappropriations amounting to \$6,157.86. The claim consists of four items, amounting altogether to \$6,157.86. The first item is for \$3,310.22, which is the amount of a collection voucher dated September 1, 1894, representing moneys misappropriated on or before that date. The second item is for \$1,000, paid to Thompson on a check drawn in favor of himself, by himself as treasurer, on

March 8, 1895. The third item is for \$800, alleged to have been paid to and misappropriated by Thompson on December 15, 1893. The fourth item is for \$1,047.64, representing the amount which Thompson was alleged to be indebted to his petty cash account on August 1, 1896, for various advances which he made to himself out of the railroad company's money during his incumbency as treasurer. The first three of these items were for moneys taken by Thompson, if at all, prior to March 15, 1895, the date of the beginning of the last year of the insurance; and none of the four items were discovered by the plaintiff, or any of its officers, until three or four months after March 15, 1896. The defendant contends that none of these alleged losses fall within the terms of the contract of insurance, because the first three items did not occur within the last period from March 15, 1895, to March 15, 1896, and because none of the items were discovered until after March 15, 1896. The plaintiff insists that the guaranty of Thompson's fidelity was effected by the bond of March 14, 1896, that the contract was a continuing one through the payment of an annual premium so long as his name remained in the schedule register, and was a continuing indemnity for Thompson's losses which occurred at any time after March 14, 1891. It is evident that it must have been known by the railroad company that the intention of the contract was to make the indemnity of a limited character, and it is also plain that the contract was blindly and clumsily drawn, but, so far as it relates to the circumstances of this case, we think it is capable of being understood. The bond states no time of its duration, and gives the name of no person for whose conduct there is to be an indemnity. To make the contract intelligible, it must be read in connection with the schedule register and the notices of acceptance, and from them it appears that annually a new list of employes was entered on the schedule, which was sent to the surety company, and was accepted by it as the list of employes whose fidelity was to be guaranteed from the date of the termination of the pre-existing contract to March 15th of the succeeding year. Some of the names of a preceding list had probably disappeared. New names had taken the places of those who had been dropped, and a new annual premium had been paid for those whose names were on the new schedule. The course of business between the parties, as well as the bond itself, shows that there is to be an annual designation of employes upon the schedule, and an annual selection and acceptance of the names by the surety company, and that the new schedule will, in all probability, contain the names of employes whose fidelity had been guaranteed by a previous contract. Such being the case, the meaning of the part of the contract which declares that upon the execution of a stipulated amount of risk or insurance in behalf of an employe the company shall not be responsible under any previous insurance of said employe becomes clear, and is that, when a new schedule of the amount of insurance in behalf of any employe formerly on the schedule has been executed or completed, and actually or constructively accepted, the old or previous insurance against losses previously committed by him is at an end, and that for these losses the company is no longer liable.

The contract further declares that only the last insurance of the employé shall be in force at one time. These provisions are inconsistent with the theory that it was the intention or the idea of the parties that a continuing liability for old and undiscovered losses in continuous previous years was being piled up in each renewed contract. The bond also provides that it is its intent that the surety company shall be responsible "for property diverted from the employer within the period specified in said insurance." The word "insurance" has different meanings in the contract. Sometimes it means the amounts of indemnity, and sometimes it means the contract of insurance. The latter meaning is the one intended in the clause just referred to. For the period specified in the contract of insurance, reference must be had to the two other papers which, with the bond, form the contract, and which indicate very plainly that the liability is confined to losses in the current year. This construction is furthermore shown in the rider attached to the bond in suit, which is as follows:

"Whereas, the schedule bond issued March 15th, 1890, by the American Surety Company of New York, in favor of the Florida Central and Peninsular Railroad Company on certain employés therein mentioned, and others subsequently bonded and guarantied subject to its provisions, expires March 15th, 1891; and, whereas, said bond allows six months from said date of expiration in which to make claims for losses thereunder, the provision contained in lines 62 to 66 of the bond hereto attached, is hereby modified so as to recognize the right of the employer to make claim within six months from the expiration of the bond first mentioned for any loss occurring thereunder, but with the understanding that the aggregate liability of the American Surety Company of New York for the acts of any employé under both the bonds herein mentioned shall not during said period exceed the amount of the last guaranty or bond upon the employé for whose acts a claim may be made."

This rider shows that, unless it had been inserted, the liability, if any, which existed under the bond of 1890, would have disappeared by virtue of the provision contained in lines 62 to 66.

The remaining question of the proper construction of the contract relates to the fourth item, which was discovered three or four months after March 15, 1896, and before Thompson left the service of the railroad company. The contract indemnifies the employer against loss by the dishonesty or culpable negligence of the named employé, which loss shall be discovered during the continuance of his insurance, and within six months after the death, dismissal, or retirement of the employé causing such loss. The loss must be discovered during the year for which indemnity was given, if the employé is still in the position in which his fidelity had been guarantied; but, if the employé died, was dismissed, or retired during the year, it must be discovered within six months after such retirement. Cases may easily be imagined of hardship under the stringent terms of this policy, and what would be the result in case the loss happened during the last days of the life of the contract when discovery was impossible during its life is a question which does not arise here. The loss which is the subject of the fourth item commenced before January, 1, 1896, when there was a balance against Thompson of \$1,177.56, and continued until August 1, 1896, when it had been reduced to \$1,047.64. He had apparently drawn the railroad's checks for the

payment of his private bills from time to time during the period of his treasurership, but the company's system of audit was very lax, and the state of the cash account was unknown, and not examined,—a condition of affairs which was intended to be guarded against by the narrow terms of the contract of indemnity. Inasmuch as the annual renewal of the contract of indemnity ceased on March 15, 1896, when Thompson was acting as treasurer, the liability ceased as to all losses which had not been discovered. If Thompson had ceased to be treasurer before March 15, 1896, the facts of the case would have corresponded with those in *Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co.*, 26 C. C. A. 146, 80 Fed. 766, in which, fifteen days before the employe's yearly insurance ended, he was retired by promotion from the position which he held, and the loss was discovered about three months after his retracy, in which case the court held that the six months commenced to run at the date of the retirement, and continued without reference to the termination of the annual period,—a conclusion which is justified by the terms of the contract. The judgment of the circuit court is affirmed, with costs.

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GRACE & HYDE CO. v. KENNEDY.

(Circuit Court of Appeals, Second Circuit. January 24, 1900.)

No. 58.

1. MASTER AND SERVANT—SAFE PLACE TO WORK.

A master was building a shed over the width of the sidewalk in front of a building in a city. Twenty-six foot posts were placed on the inside and on the outside of the sidewalk, on which were fastened wooden girders parallel with the street, and boards were nailed on such girders. The work was done at night, in consequence of the public use of the street in the daytime. Two derricks were used, which were secured by guy lines, some of which ran across the street, where they were secured. About 5 a. m. a wagon struck against one of the guys, which threw plaintiff's servant from the top of the post on which he was standing, and to which he was spiking a girder. *Held*, that the master cannot escape liability under the rule that the duty of the master to provide safe places does not apply where the place originally furnished is safe, and becomes unsafe in the progress of the work, or because of the manner in which the work is done, since it cannot be said that the place (the street) originally furnished was safe unless it was protected by danger signals or watchmen.

2. SAME.

Work was done at night on a structure where guy ropes were run into and across the street. A wagon of a third person ran against one of the ropes, which caused plaintiff to fall from where he was working on the structure. There were no lights or watchmen in the street near the ropes. *Held*, that the fact that when the workmen on the job began work sufficient appliances in the way of lamps were furnished does not exonerate the master within the rule that when the working place originally, and when the employe was sent to do the work there, was reasonably safe, but became unsafe at the particular time of the accident by causes that could not have been anticipated, the master is not liable, since the place could not be considered reasonably safe when the workmen began their night's work unless an adequate system was adopted for their protection against dangers easily to be anticipated.

3. SAME—WEIGHT AND SUFFICIENCY OF EVIDENCE.

The usual practice as to guarding obstructions at night in the streets of a city where men were at work was to place red lamps on the obstruc-

tion, or to employ a watchman. A master had provided four red lanterns, two of which had been broken before the night of the accident, and the other two had been placed on that night at one obstruction, but there were none on the obstruction which a third person encountered, thereby injuring a servant. The evidence as to whether a watchman had been designated to give warning was conflicting. *Held*, that the question of whether the obstruction was sufficiently protected was for the jury.

4. SAME—ASSUMPTION OF RISKS.

A servant does not assume the risk of the employer's neglect to furnish a reasonably safe system of protection against the danger from injury by passing vehicles coming in contact with guy ropes extending from the place where the servant is working out into and across the street.

In Error to the Circuit Court of the United States for the Southern District of New York.

Chas. C. Nadal, for plaintiff in error.

Gilbert D. Lamb, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Daniel Kennedy, an employé of the Grace & Hyde Company, a corporation, brought an action at law in the circuit court for the Southern district of New York against his employer to recover damages for the injuries caused by its alleged negligence, and recovered a verdict for \$2,500. To review the judgment which was entered upon the verdict this writ of error was brought.

The defendant, in the month of August, 1897, was building a shed or barricade over the width of the sidewalk in front of the Grand Central Depot, on the east side of Vanderbilt avenue, in the city of New York. The sidewalk was about 12 feet wide, and the barricade, of about 26 feet in height, consisted of two rows of upright posts,—one row along the wall of the depot, and the other along the outer edge of the sidewalk,—upon which were fastened wooden girders parallel with the street, and upon the girders a covering of boards was nailed. In consequence of the extent of the public use of the street in the daytime, the work was done at night. These posts were 10 feet apart. Two derricks, one on the inside of the sidewalk and the other on the outside, were used to place the posts and girders in position, and each derrick was secured by two back guy lines and one head guy. At the time of the accident the inside derrick was secured by a head guy line running down to the stair rail of the basement stairs of the depot. The other two lines ran across the street. One was fastened to a lamppost at the corner of Forty-Third street and Vanderbilt avenue, and the other was fastened to a hydrant. These two lines had been secured across the street from the time of the commencement of the work. To a large beam in the street between the east curb and the car track one of the guys of the outside derrick had been fastened from time to time. The work began at Forty-Fourth street, and the derricks were moved forward from time to time in order to place the posts and girders in position, and when they were moved the position of the guys was changed. At about half past 4 or 5 o'clock in the morning of August 19, 1897, a mail van, which was coming through Van-



derbilt avenue from the depot yard to Forty-Second street, struck against one of the guys of the inside derrick, caused it to sway over, and one of the ropes threw Kennedy from the top of the post on which he was standing, and to which he was spiking a girder. He was thrown upon the sidewalk, and his kneecap and one arm broken. The case was presented to the jury by the plaintiff upon the theory that, inasmuch as the work was necessarily done at night, upon a street which was frequently occupied by passing vehicles of various kinds, and as the necessary guy ropes which extended into the street must be fastened where they were in danger of collision with a passing vehicle, if unobserved in the darkness by the driver of the vehicle, it was the duty of the defendant to take such precautions against injury to his employes as to render the place of their work reasonably safe. The court charged upon the duty of the defendant as follows:

"Did the defendants fulfill their duty, which was to provide what was reasonably safe and proper by way of precaution from such a thing as this mail wagon, or anything of that sort, coming along? If they did,—did everything that was reasonable in that behalf,—you may return a verdict for the defendants, because, if they did, that is enough. That is all they were required to do."

The defendant insists that the rule of law which directs the master to provide his servant "with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged" (*Railroad Co. v. Peterson*, 162 U. S. 346, 353, 16 Sup. Ct. 848, 40 L. Ed. 944), is inapplicable, because the street was a safe place, and the rule as to safe places does not apply when the place originally furnished is safe, and becomes unsafe in the progress of the work, or because of the manner in which the work is done. The argument rests upon the incorrect assumption that the place originally furnished was safe. The place was an avenue extensively used for travel, in which a substantial shed was to be erected at night by the use of derricks secured by ropes stretching somewhere in the avenue. It was eminently unsafe unless protected either by danger signals or watchmen. It is said, however, that when the workmen began work sufficient appliances in the way of lamps were furnished, and that it became unsafe by the way in which the work was done. This subject was considered by this court in *Baird v. Reilly*, 35 C. C. A. 78, 92 Fed. 894, in which, after saying that an employer cannot escape responsibility for injuries to an employe by alleged failure to make the working place reasonably safe, by proof that he had furnished a competent foreman with necessary appliances and needful instructions, the court said:

"When, however, it appears that the working place originally, and when the employe was sent to do the work there, was reasonably safe, but became unsafe at the particular time of the accident by causes that could not have been anticipated, by exigencies created in carrying on the details of the work, or by the neglect of a fellow servant, a different rule is applicable."

The facts of the case do not bring it within the exceptions. The place could not be reasonably safe when the workmen began their night's work unless an adequate system was adopted for their protection against dangers which were easily to be anticipated; nei-

ther did danger spring out of sudden exigencies, or sudden neglect or mistake of a foreman or workman. The negligence, if it existed, arose from the insufficiency of the means for the protection of the workmen which were originally adopted. *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. 464, 39 L. Ed. 464.

The defendant's assignments of error seek to introduce into the case the doctrine of nonliability for an injury caused by a co-servant, and it is urged that the danger was created by the workmen themselves; for it did not appear that there was a necessity for tying the guy lines on the other side of the street, and that occasion for warning or signals arose only in consequence of the act of the men in thus extending the ropes. The defect in the argument is a continuance of the omission to recognize the ordinary necessity for the protection of the employes, and that the absolute duty of the master to provide a safe place is not avoided by the neglect of his representative or servants to do the things which will obviously prevent the known original danger. *Howard v. Railway Co.* (C. C.) 26 Fed. 837; *Railroad Co. v. Peterson*, supra. In regard to the fact of the insufficiency of the means of protection, competent testimony was introduced to show that the usual practice with respect to guarding obstructions at night in the street where men are at work is to place red lamps upon the obstructions, or to employ a watchman for the purpose of warning against the danger. *Baird v. Reilly*, supra. The defendant had provided four red lanterns. Two of these had been broken before the night of the accident, and the other two were on that night placed one upon each end of the beam on the street which has been spoken of, but there were none upon the guys of the injured derrick. There was also testimony upon the part of the plaintiff that no person had been specially designated as a watchman to give warning to drivers of vehicles, and upon the part of the defendant that the foreman and another person attended to this service in addition to their other duties. The conflict of evidence on the subject was sufficient to compel the submission of the question to the jury.

The subject which is contained in the defendant's assignment of error that the plaintiff assumed the risk of his position and of the conditions as they existed was fully considered in *Railway Co. v. Archibald*, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, and it is sufficient to say that the plaintiff did not assume the risk of the employer's neglect to furnish a reasonably safe system of protection against the danger from injury by passing vehicles, and that there is no adequate evidence that he continued to remain at work with the knowledge of the insufficiency of the protection which was actually furnished. The judgment is affirmed, with costs.

PHELPS v. CHURCH OF OUR LADY HELP OF CHRISTIANS.

(Circuit Court of Appeals, Third Circuit. January 30, 1900.)

No. 24.

1. VENUE—ACTION TO RECOVER VALUE OF STONE TAKEN FROM LAND.

One holding a right of property in the stone and other valuable substances contained in land in New York may sue in New Jersey a trespasser who quarries stone from such land, and removes it to New Jersey, and there converts it, to recover the value of the stone.

2. ACTIONS—WAIVER OF TORT.

Where a trespasser has quarried and removed stone belonging to plaintiff, the latter can waive the tort, and sue in assumpsit, especially where the trespasser has not only actually applied the stone to his own beneficial use, but has so used the stone that it cannot be reclaimed.

3. ASSUMPSIT—QUESTIONS CONSIDERED—TITLE TO LANDS.

Defendant entered on and quarried stone from land which plaintiff had leased of a third person for such purpose, and plaintiff brought assumpsit to recover the value of the stone. Plaintiff was in possession by virtue of a judgment in forcible entry and detainer against defendant, when the action was brought, and has since retained possession. Defendant had no evidence of title to the land, but, on the contrary, was a mere trespasser. *Held* that, though a question of title to land could not be tried in the action, no such question was involved.

In Error to the Circuit Court of the United States for the District of New Jersey.

Robert H. McCarter, for plaintiff in error.

David McClure, for defendant in error.

Before ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. By an indenture made November 25, 1892, between Mary Brady, party of the first part, and James W. Carpenter, Jr., and James A. Phelps, parties of the second part, the first party "demised and leased" unto the second parties, "their heirs or assigns," for the "full term of fifty years," a tract of land described by metes and bounds, "with the right to dig, mine, quarry, use, remove, appropriate, and convert, to the sole use and benefit of the said parties of the second part, their heirs and assigns, all or any marble, stone, or other valuable material or substance to be found on, in, or under said lands," and with the further right to "erect, maintain, operate, use, remodel, or remove any buildings, machinery, or other structures that the said parties of the second part may desire." The deed contains a covenant on the part of the first party for the quiet and peaceable possession and enjoyment by the second parties of the demised premises, and a covenant by the second parties to pay to the first party a royalty of 20 cents per cubic yard "for each and every yard of marble, stone, or other valuable material or substance removed or shipped from, appropriated and converted to the use and benefit of the said parties of the second part, their heirs and assigns, during the continuance of this lease." And the deed reserves to the first party "the occupancy of the present buildings, and the right to cultivate the land not occupied, used, or required for the proper prosecution of the business operations of the parties of the second part."

Manifestly, under this indenture, the parties of the second part, or their assigns, are not mere licensees, clothed simply with a right to quarry stone or other valuable substance from the land described. According to all the authorities, this deed operated to convey an estate in the land for the specified term of 50 years, and its legal effect was to pass to the parties of the second part and their assigns a right of property in the stone and other valuable substances contained in the land. *Bainb. Mines* (Dallas' Ed.) p. 261; *Doe v. Wood*, 2 Barn. & Ald. 724, 738; *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 13 N. J. Eq. 322, 341; *Gartside v. Outley*, 58 Ill. 210; *Ganter v. Atkinson*, 35 Wis. 48; *Baker v. Hart*, 123 N. Y. 470, 25 N. E. 948; *Chicago & A. Oil & Mining Co. v. U. S. Petroleum Co.*, 57 Pa. St. 83; *Appeal of Stoughton*, 88 Pa. St. 198, 201; *Duke v. Hagne*, 107 Pa. St. 57; *Brown v. Beecher*, 120 Pa. St. 590, 603, 15 Atl. 608.

On November 28, 1892, the above-mentioned lease was duly assigned to the *Oswegatchie Company*, which company, on June 25, 1895, sublet unto the *Metropolitan Marble Company*, for the term of 20 years, the said tract of land, together with all the rights, benefits, liberties, and privileges thereto belonging, and, specifically, "the right to dig, mine, quarry, use, remove, appropriate, and convert, to the sole use and benefit" of the said sublessee, "all or any marble, stone, or other valuable material or substance to be found on, in, or under the land." Under the sublease to it, the *Metropolitan Marble Company* entered into possession of said land, which is situate in Lewis county, in the state of New York, and operated a stone quarry which previously had been opened thereon.

In this action of assumpsit, the receiver of the *Metropolitan Marble Company* seeks to recover the value of certain stone which, as he alleges and claims to have shown, was wrongfully mined from and taken out of the said quarry during his company's ownership thereof, as lessee, by one John J. Sullivan, who was acting for the defendant, and was a naked trespasser, as against the *Metropolitan Marble Company*; which stone was brought by the defendant to East Orange, in the state of New Jersey, and was there actually appropriated by the defendant, and used in building its church.

Now, if the true state of facts be as above alleged, it seems to us, under the authorities, that the plaintiff can maintain a personal action in this jurisdiction against the defendant to recover the value of this stone. *Hoy v. Smith*, 49 Barb. 360; *Hughes v. United Pipe Lines*, 119 N. Y. 423, 23 N. E. 1042; *Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co.*, 55 N. J. Law, 350, 357, 26 Atl. 920. And we think that the plaintiff could waive the tort, and sue in assumpsit, especially in view of the fact that the defendant had not only actually applied the stone to its own beneficial use, but had so used the stone that it cannot be reclaimed. *Terry v. Munger*, 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216; *Dundas v. Muhlenberg's Ex'rs*, 35 Pa. St. 351, 353; *Halleck v. Mixer*, 16 Cal. 574, 578; 2 Greenl. Ev. § 108.

The rulings of the court below did not directly contravene any of the legal principles we have discussed; but upon the conclusion of the plaintiff's case, and without any evidence having been offered by

the defendant, the learned judge instructed the jury to find a verdict in favor of the defendant, on the ground that the case involved a question of title to the land from which the stone was taken, which question could not be determined in this action. Was the court justified in thus taking the case from the jury?

Now, the court of errors and appeals of New Jersey, in *Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co.*, *supra*, after stating that the owner of land can generally maintain trover against a person who severs and converts to his own use what is part of the realty, such as ores, etc., added this qualification:

"But there is a considerable line of cases holding that if the defendant, at the time of the severance, is in adverse possession of the realty, under a bona fide claim of title, the thing severed becomes his property, so that the owner of the land cannot maintain trover or replevin therefor, but must resort to his remedy for the possession of the land and mesne profits."

The earliest case in this line is *Mather v. Ministers*, 3 Serg. & R. 509, in which the supreme court of Pennsylvania ruled that trover for stone and gravel dug from land does not lie, by one who has the right of possession, against the person who has the actual adverse possession of the land and sets up title to it. From the later decision by the same court, in *Harlan v. Harlan*, 15 Pa. St. 507, 513, 514, it appears that the possession, to defeat such personal action, is not the occupancy of a mere intruder, but actual adverse possession, maintained under a bona fide claim of title. In *Halleck v. Mixer*, 16 Cal. 574, the rule is thus stated:

"The plaintiff, out of possession, cannot sue for property severed from the freehold, when the defendant is in possession of the premises from which the property was severed, holding them adversely, in good faith, and under claim and color of title. In other words, the personal action cannot be made the means of litigation determining the title to real property, as between conflicting claimants; but the rule does not exclude the proof of title on the part of the plaintiff in other cases; for it is, as we have already observed, upon such proof that the right to recover rests. It is because the plaintiff owns the premises, or has a right to their possession, that he is entitled to the chattel which is severed; and that must, of course, in the first instance, be established. A mere intruder or trespasser is in no position to raise the question of title with the owner, so as to defeat the action."

Here it appears, from the certified exemplification of the record in evidence, that James A. Phelps, as receiver of the Metropolitan Marble Company, instituted before the county judge of Lewis county, N. Y., a summary proceeding against John J. Sullivan and his associates, charging them with unlawful and forcible entry into, and unlawful and forcible detainer of, the aforesaid tract of land, which proceeding, on December 21, 1897, resulted in a judgment dispossessing Sullivan, and restoring possession to Phelps, the receiver of said company. Accordingly, and before this suit was begun, possession of the land was restored to this plaintiff, who was in possession when he brought this action, and has retained possession. Moreover, upon an attentive examination of the record in this case, we fail to discover any evidence of title in the defendant or in Sullivan to the locus in quo. Sullivan appears in the light of a mere trespasser, who had been in the temporary unlawful occupancy of the premises. The case, as presented by this record, is not one of con-

flicting titles to the land. It will be observed that, at the time the court gave peremptory instructions against the plaintiff, the defendant had not put in any evidence whatever. We are therefore constrained to hold that, as the case then stood, those instructions were unwarranted and erroneous.

With respect to the second class of assignments of error, we content ourselves with saying that the materiality of the evidence to which these assignments relate is not clear to us. The judgment of the circuit court is reversed, and the case is remanded to that court, with direction to grant a new trial.

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In re MCBRYDE.

(District Court, E. D. North Carolina. December 4, 1899.)

1. **BANKRUPTCY—CONTEMPT OF COURT—THREATENED LEVY.**

A mere threat by a judgment creditor of a bankrupt to levy execution on his property, pending the bankruptcy proceedings, does not constitute a contempt of the court of bankruptcy or its process, where there has been no actual levy made on such property, nor any interference with it by the creditor after the adjudication in bankruptcy.

2. **SAME—HOMESTEAD EXEMPTION—REVALUATION.**

Where a trustee in bankruptcy, in setting off to the bankrupt the property claimed as his homestead, has adopted the value placed upon it by appraisers 15 years before, when it was allotted to the bankrupt as a homestead under process of a state court, but it appears that the property has since increased in value beyond the amount allowed as exempt by the laws of the state, the court of bankruptcy will direct the trustee to revalue the property, and set apart to the bankrupt so much thereof as shall not exceed in value the amount so allowed.

3. **SAME—DISCHARGE OF BANKRUPT—POSTPONEMENT.**

Action will be suspended upon the bankrupt's application for discharge until such reallocation of the homestead has been made by the trustee.

4. **SAME—PROVABLE DEBT—JUDGMENT.**

Where a creditor holding a valid and provable debt against a bankrupt at the date of the adjudication thereafter brings suit in a state court and recovers judgment, he may prove such judgment as an unsecured claim against the bankrupt's estate, "less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgment," as provided in Bankr. Act 1898, § 63a, subd. 5.

5. **SAME—SUITS AGAINST BANKRUPT—EFFECT OF JUDGMENT.**

A creditor holding a promissory note, valid and enforceable against the maker at the date of the latter's adjudication in bankruptcy, but against which the statute of limitations has nearly run, may reduce the same to judgment by suit brought in a state court after such adjudication; and such judgment will establish the claim and stop the running of the statute, though it will not give the creditor a lien or priority, nor entitle him to levy on the bankrupt's property.

6. **SAME—OBJECTIONS TO DISCHARGE—FALSE OATH.**

A bankrupt's application for discharge will not be denied, on the ground of his having concealed property or made a false oath in bankruptcy, where it appears that he listed all his property in his schedules, and affixed thereto the valuation placed upon his real estate by appraisers who valued it several years before under process of a state court, although such value may actually be much below the present market value of the property.

**In Bankruptcy.** On review of decision of referee in bankruptcy.

The referee reported as follows:

The undersigned, referee in bankruptcy, respectfully reports: At Fayetteville, in said district, at a creditors' meeting called to consider bankrupt's application for discharge (present, D. E. McBryde, bankrupt, and his attorney, B. F. McLean, Esq., and the Navassa Guano Company, a judgment creditor, and John Leach, creditors whose claims have been filed and allowed, by their attorney, John H. Cook, Esq.), the following proceedings were had: John Leach, by his attorney, offered to file proof of claim for fifty five and  $\frac{41}{100}$  dollars; the same being based upon a judgment rendered in a suit instituted in state court, which was begun after the adjudication that McBryde is a bankrupt. Objected to by the bankrupt. Objection sustained, and creditor, Leach, excepted. Upon an intimation of the referee, Leach then struck out all that part of his proof of claim which referred to the said judgment, treating the said judgment as a nullity, and again offered to file his proof of claim. The bankrupt again objected, for the reason that the same was barred by the three-years statute of limitations. The referee finds the following agreed facts: The said proof of claim is based upon a promissory note which fell due less than three years prior to the institution of the bankruptcy proceedings, and less than three years before the adjudication in bankruptcy, but more than three years prior to this date (November 15, 1899), when it is filed. The referee overruled the objection and filed the claim, and the bankrupt excepted. John H. Cook, Esq., attorney as aforesaid, filed a petition praying the reallocation of bankrupt's homestead, accompanied by the affidavits of three disinterested freeholders in Robeson county, where the said homestead lies, setting forth that in their opinion the homestead (which was laid off about 15 years ago) has increased in value more than 50% since last allotment. The referee held a reallocation should be granted upon the strict compliance, as far as may be, with the requirements of chapter 149, Laws N. C. 1893, entitled "An act to provide for the reallocation of homesteads;" that this act, and all other laws of North Carolina relating to the homesteads, by section 6 of the bankruptcy act are made a part of the national bankruptcy law. To this ruling the bankrupt excepted. The said John H. Cook, Esq., attorney as aforesaid, gave notice of his objection to the granting of the discharge to D. E. McBryde, bankrupt, until the question of the reallocation of the homestead can be passed upon by the judge. The referee recommends that the discharge be held up until the homestead question be decided; for, if the discharge be granted, the bankruptcy court would have no jurisdiction to reallocate the homestead if it is determined that such a course is legal. And Cook, attorney, objects to the granting of the discharge for the reason that the bankrupt has knowingly scheduled his real estate at far below its real value. As it appears that the bankrupt adopted the valuation placed upon his real estate by the appraisers who laid off his homestead in the state court about 15 years ago, the referee is of the opinion that this does not constitute a valid objection to the granting of the discharge. It is not contended that bankrupt failed to list any of his property. It is therefore recommended by the referee that the discharge be granted as soon as the homestead can be reallocated, if it is decided it should be reallocated. Petitions setting forth matters which the judge is asked to review are herewith attached. Petition by B. F. McLean, Esq., attorney for the bankrupt, is marked "Exhibit A." and the petition of John H. Cook, Esq., attorney for creditors, is attached, and marked "Exhibit B." The report of trustee as to property set apart as exemptions is also attached, and marked "Exhibit C." Proof of conformity and record in the matter is also herewith sent, with blank certificate of discharge in duplicate.

Respectfully submitted,

S. H. MacRae, Referee in Bankruptcy.

B. F. McLean, for bankrupt.

John H. Cook, for creditors.

PURNELL, District Judge. This cause coming on to be heard this, the 4th day of December, 1899, and being heard, after argument by counsel, it is ordered and adjudged:

1. That there having been no levy on the property of the bankrupt

by the sheriff, George B. McCleod, or his deputy, W. F. Henderson, or John Leach, nor any interference with said property after the adjudication in bankruptcy, but simply a threat to levy, said George B. McCleod, W. F. Henderson, and John Leach have not been guilty of a contempt of this court or its process.

2. That the homestead of the bankrupt, laid off some years ago under process of the state court, having enhanced in value beyond that allowed by and under the law of North Carolina, be reallocated by the trustee, as provided by the act of July 1, 1898, § 47, subsec. 11, allowing said bankrupt real estate of the value of \$1,000 and no more.

3. That the costs incurred in consequence of the contempt proceedings be paid by the trustee out of the estate; said costs to be taxed by the clerk of this court.

4. D. E. McBryde is entitled to a discharge in bankruptcy when the homestead is reallocated, and the granting of the same is deferred for this purpose. The former order in the contempt proceedings, requiring the sheriff, his deputy, and Leach to show cause, is modified in accordance herewith, and this cause retained for further order.

Subsequently (December 28, 1899) the following opinion was rendered by the court:

PURNELL, District Judge. On the exceptions to the rulings of the referee certified for review, it is held, adjudged, and ordered:

That the first exception be, and the same is, sustained. While a judgment in a state court after or within four months of an adjudication creates no lien and confers no additional rights, the statute recognizes two classes of judgment debts which may be proved: First, a debt evidenced by judgment obtained prior to the commencement of bankruptcy proceedings (section 63a, subd. 1); and, second, a debt founded on a provable debt reduced to judgment pending bankruptcy proceedings (Id. 5). The latter class of debts are provable, "less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgment." This is not a new debt created during bankruptcy, but retains the character of the indebtedness out of which it arose. *Boynton v. Ball*, 121 U. S. 457, 7 Sup. Ct. 981, 30 L. Ed. 985. And the conflict of opinion which arose under the act of 1867 on the question of merger could not arise under the act of 1898, even if the supreme court had not settled it in the decision cited; for the act expressly provides for the proving of such debts in the sections quoted. The purpose of the act seems to be to meet cases like the one at bar. At the time the petition in bankruptcy was filed, John Leach held a note signed by McBryde, not under seal. It was not then barred. October 1, 1899, one day before barred by the state statute, he obtained judgment. This established the debt, and stopped the running of the statute of limitations. The filing of the petition might have done this, but the creditor was vigilant, and not willing to trust to a theory when there was a way certain. He obtained a judgment, as he had a legal right to do, which, as to his debt, gave him all the rights under the state law,—established his debt, stopped the running of the statute,—except the right to inter-



fere with the bankruptcy proceedings by a levy, or to establish a priority. The debt is provable as other unsecured debts are provable.

Second exception is overruled. The discharge of the bankrupt is provided for in section 14a, and none of the reasons for refusing such discharge are shown or alleged. Section 14b. It appearing, however, that the homestead allotment made several years ago under process of a state court was adopted by the trustee, and the same has been enhanced in value in excess of that allowed by the laws of North Carolina, the discharge will not be granted until there is a reallocation of the homestead exemptions, and the bankrupt has otherwise fully complied with the provisions of the statute. This ruling disposes of the third exception. Except as herein modified, the report and rulings of the referee are affirmed.

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In re KAISER.

(District Court, D. Minnesota, Fifth Division. December 11, 1899.)

**1. BANKRUPTCY—APPLICATION FOR DISCHARGE—AUTHORITY OF REFEREE.**

Where a bankrupt's application for discharge, with specifications in opposition thereto by creditors, is referred to a referee in bankruptcy, the authority of the latter is not limited to the taking and reporting of the evidence adduced on the hearing and ruling as to its admissibility, but he should also report findings and recommendations.

**2. SAME—SUFFICIENCY OF SPECIFICATIONS.**

A specification in opposition to a bankrupt's application for discharge on the ground of his having concealed property from his trustee is fatally defective if it fails to allege that the offense was committed "knowingly and fraudulently," or to charge any of the essential facts necessary to show the commission of the offense, though these need not be pleaded with the technical certainty required in an indictment.

**3. SAME—EVIDENCE.**

When a bankrupt's application for discharge is referred to a referee in bankruptcy, a sufficient specification of objections is a necessary prerequisite to the introduction of any evidence by the objecting creditors on the hearing before the referee, and the evidence should be confined to the material facts alleged in the specifications.

**4. SAME.**

A referee in bankruptcy, to whom a bankrupt's application for discharge has been referred, with specifications in opposition thereto by creditors, has authority to rule upon the sufficiency of the specifications, and should not receive evidence on any specifications which are clearly insufficient.

**5. SAME—AMENDMENT OF SPECIFICATIONS.**

An application for leave to amend specifications filed in opposition to a bankrupt's application for discharge should be made to the judge of the court of bankruptcy, not to the referee.

**In Bankruptcy.** On report of referee in bankruptcy on bankrupt's application for discharge and opposition thereto by creditors.

The report of the referee was as follows:

The following objections to the bankrupt's application were specified by creditors: "(1) That he has committed an offense punishable by imprisonment, as provided by the existing bankruptcy law, in this: that he has concealed, and now conceals, while a bankrupt, from his trustee, the following mentioned property belonging to his estate, to wit, certain real estate inherited from his

father, lately deceased, and situated in the county of Tuscarawas, state of Ohio, of the value of \$2,700, a more particular description of which the objector is now unable to give. (2) That he has committed an offense punishable by imprisonment, as provided by the existing bankruptcy law, in this: that he has made a false oath to his schedule of assets on file herein, particularly to Schedule B (1), and to his petition in said proceedings, by omitting therefrom any reference to said real estate." The report of the undersigned referee respectfully shows: That said William Kaiser was duly adjudicated a bankrupt upon June 19, 1899; that upon September 23, 1899, he made his application to the court for a discharge from his debts; that upon said date M. S. Stokely, a creditor of said bankrupt, appeared, and gave notice of opposition to said application; that upon October 3, 1899, said creditor duly filed with the clerk of said court a specification of his grounds of opposition to said application; that upon said last-mentioned date, pursuant to the rules of court, the application was referred by the court to the undersigned referee; that the referee, by order duly made and entered herein, fixed the hearing upon said application for October 26, 1899, at 10 o'clock a. m.; that at the time and place fixed for said hearing said bankrupt and said opposing creditor appeared in person and by counsel; that to prove the specifications of objections to the bankrupt's discharge said opposing creditor thereupon called as a witness, and had sworn, the bankrupt, and proceeded to examine him; that thereupon said bankrupt, by his counsel, objected to the receipt of any evidence under said specifications, on the ground that said specifications, or either of them, did not state facts sufficient to constitute any ground for the refusal of a discharge. The referee sustained the objection, and said creditor excepted. Said creditor then moved upon affidavits for leave to amend the specifications, and presented the amended specifications herewith returned. The bankrupt objected on the ground that the referee had no authority to amend specifications. The referee sustained the objection, and the creditor excepted. The referee thereupon adjourned the hearing to November 9, 1899, at 10 o'clock a. m., for the purpose of certifying the proceedings to the judge. Said opposing creditor thereupon duly filed his petition for review. Wherefore I hereby certify that in the course of the proceedings in said cause before me the following questions arose pertinent to said proceedings: (1) Is the authority of the referee limited to the mere taking and reporting of the evidence and making rulings on its admissibility, or is the referee expected to make findings and recommendations? (2) Was the original specification herein sufficient, the words "knowingly and fraudulently" being omitted from the allegations describing the offenses alleged to have been committed by the bankrupt, or must those words be included in such specifications, or must the offense charged be stated with the certainty of an indictment? (3) Was any specification of objections a necessary prerequisite to the introduction of any evidence in opposition to the application for discharge, or should the referee, regardless of specifications, have proceeded to "investigate the merits of the application" by taking the evidence offered, if any, in reference to offenses preventing a discharge? (4) Had the referee authority to rule upon the sufficiency of the specification of objections, or to permit amendments thereof, or are those questions exclusively for the judge? For his opinion thereon, the above questions, together with said application, the original and amended specifications of objections, said affidavits, and the petition for review, are hereby respectfully certified to the Honorable William Lochren, judge of said court. In case the decision of the referee is approved, it is recommended that the opposing creditor be allowed, notwithstanding, to amend his original specifications of objections.

H. F. Greene, Referee.

Dated November 3, 1899.

Dibell & Reynolds, for creditors.

Pealer & Fesler, for bankrupt.

LOCHREN, District Judge. In this matter the referee has asked the direction of the judge in respect to questions of practice which have arisen in this case. To the questions of the referee the following answers are returned:

1. The authority of the referee is not limited to the taking and reporting of the evidence and ruling as to its admissibility. In addition to that, it is competent and desirable that he shall report findings and recommendations.

2. The original specification in this case was insufficient, and without an averment of scienter it failed to allege facts showing that the bankrupt had committed an offense punishable by imprisonment, etc. The scienter must be charged, and also all essential facts necessary to establish the commission of the offense; not necessarily with the technical certainty required in an indictment.

3. A specification of objections is a necessary prerequisite to the introduction of any evidence by the objecting creditors. The referee should not disregard the specifications, and should confine the evidence to the material facts alleged in the specifications.

4. The referee has authority to rule upon the sufficiency of the specifications of objections, and should not take evidence on such as are clearly insufficient. Application to amend specifications should be made to the judge.

5. The application to amend the specification as proposed is hereby granted.

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In re MYERS et al.

(District Court, D. Indiana. February 19, 1900.)

No. 433.

1. **BANKRUPTCY—PROOF OF DEBT—AMENDMENT.**

A court of bankruptcy has discretionary power to allow a proof of debt against the bankrupt's estate to be amended, and will generally grant leave to amend, in cases of mistake or ignorance of law or fact, in the absence of fraud, when justice seems to require that the amendment should be made, and when all parties can be placed in the same situation they would have occupied if the error had not occurred.

2. **SAME.**

Where a bankrupt had money on deposit in a bank, and was indebted to the bank on promissory notes for a larger sum, and the cashier of the bank made proof against the bankrupt's estate for the entire amount of the notes, omitting, through mistake or forgetfulness, to offset the amount of the deposit, *held*, that the bank should be permitted to amend its proof so as to retain the amount of the deposit, credit the same on the notes, and prove a claim for the balance.

3. **SAME—SET-OFF OF MUTUAL DEBTS.**

Under the provisions of the bankruptcy law relating to the set-off of mutual debts, money on deposit in a bank to the credit of a bankrupt may be set off against the indebtedness of the bankrupt to the bank on promissory notes.

4. **SAME—RESTORATION OF FUNDS.**

Where a bank held money on deposit to the credit of a bankrupt, and, on his order, transferred the account on its books to the name of the receiver appointed to take charge of his estate, and afterwards to the name of the same person as trustee in bankruptcy, but with no actual payment of the money nor any change in its possession, *held* that the bank, being entitled to retain the amount of the deposit as a set-off against notes of the bankrupt which it held, might deduct the amount thereof from the funds of the estate placed on deposit with it by the trustee in bankruptcy.

**In Bankruptcy.** On review of decision of referee in bankruptcy on petition of First National Bank of Crawfordsville for leave to amend proofs of debt.

Baker & Daniels, for petitioner.

Bamberger & Feibelman, for trustee in bankruptcy.

**BAKER**, District Judge. On December 18, 1899, Noah E. Myers and Julius L. Charni were adjudged bankrupts by this court on their own petition. On the same day the matter was referred to Henry H. Vinton, a referee in bankruptcy for the Eighth district of Indiana. On December 21, 1899, Henry Campbell was, on the petition of certain creditors, duly appointed receiver of all the estate of the bankrupts, and on the same day said Campbell qualified as such receiver by giving bond and taking the proper oath of office. At the time said Myers and Charni were adjudged bankrupts they had on deposit in the First National Bank of Crawfordsville, Ind., the sum of \$777.66, and said bankrupts were then indebted to said bank for borrowed money evidenced by notes not then due in the sum of \$5,000. On the 22d day of December, 1899, said bankrupts presented to the First National Bank of Crawfordsville a receipt acknowledging that they had received the sum of \$777.66 to be charged to their account, and ordered the said sum of money to be transferred on the books of the bank from the account of Myers and Charni to that of Henry Campbell, receiver. At the first meeting of creditors, on the 4th day of January, 1900, said Campbell, receiver, was duly elected trustee in bankruptcy, and said sum of \$777.66 was on the 5th day of January, 1900, transferred on the books of the bank from his account as receiver to his account as trustee. On the 4th day of January, 1900, the First National Bank of Crawfordsville, by James E. Evans, its cashier, filed the proof of its claim against said bankrupts in the sum of \$5,000, which was duly allowed by the referee. At the meeting when said Campbell was elected trustee of the estate of the bankrupts, the bank voted said \$5,000 for said Campbell for trustee, but no other person was nominated or voted for as trustee, and the vote of said bank did not in any wise affect the result. From the time that the petition in bankruptcy was filed down to the present time the said sum of \$777.66 has remained in the possession of the First National Bank of Crawfordsville, and the only change that has been made in the disposition of said sum is the mere bookkeeping change of the amount from the account of Myers and Charni to Campbell as receiver, and from Campbell as receiver to Campbell as trustee.

On the 18th day of January, 1900, the First National Bank of Crawfordsville filed its verified petition with the referee, praying that it might be permitted to withdraw and amend the proofs of its claim by stating therein the amount of said deposit due from it to said bankrupts, and deducting the same from the amount of its said claim, and that it be permitted to amend said proofs by stating therein the amount of said debt to said bankrupts, to wit, \$777.66, as a set-off against its said claim and demand, and that it be permitted to prove the residue, to wit, \$4,222.34, as its claim, and that it be permitted to withhold and deduct said sum of \$777.66 from and out of the sum of

\$3,625.49 then on deposit in the petitioners' bank to the credit and in the name of Henry Campbell, trustee, and that said Campbell, as trustee, be ordered and directed to allow the petitioner to deduct said sum of \$777.66 out of the amount of \$3,625.49 standing to his credit on the books of the bank. The petition of the bank, verified by its cashier, shows that he was suddenly called upon to make proof of the claim of the bank against the bankrupts' estate, and that in making said proof he forgot and overlooked the fact that the petitioner was indebted to said bankrupts in said sum of \$777.66, then on deposit in said bank to the credit of said bankrupts, as shown by the books of the bank.

On hearing this petition, the referee found the facts to be substantially as stated above, but was of opinion that the bookkeeping entries made on the books of the bank, as above stated, were equivalent to the actual payment of the amount owing by the bank to the bankrupts with full knowledge of the facts, and operated as an abandonment and waiver by the bank of all right to set off mutual debts.

The bankruptcy act provides that, in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated, and one debt shall be set off against the other, and the balance only shall be allowed or paid. A deposit in a bank becomes, upon the bankruptcy of the depositor, a security for, and payment pro tanto of, his liability to the bank by the operation of the law of mutual credits. The court undoubtedly possesses the power, in its discretion, and in a proper case, to allow proofs of debts to be amended, and in case of mistake or ignorance, either of fact or law, will generally exercise that power, in the absence of fraud, and when all the parties can be placed in the same situation that they would have been in if the error had not occurred, and where justice seems to demand that the amendment should be made. This would seem to be such a case. The bank was entitled to retain the amount on deposit to the credit of the bankrupts, and apply the same upon the indebtedness of the bankrupts to the bank. The changes made in the account touching the deposit, originally standing in the name of the bankrupts, have wrought no change in the actual possession of the money on deposit. It has at all times since the bankruptcy occurred remained in the control and possession of the First National Bank. If the other creditors of the bankrupts should be held to be entitled to participate in this fund, they would receive, to that amount, so much more than in equity and good conscience they were entitled to. By allowing the bank to retain the sum of \$777.66, the general creditors of the bankrupts will not be injured.

As was said in the case of *Oil Co. v. Hawkins*, 20 C. C. A. 468, 74 Fed. 395, 33 L. R. A. 739:

"Restoration for diversion of funds, whether from design or through mere error, is not to be denied, unless the diversion has occurred through the wrong or error of the party seeking restoration, and when, in the case of error, there has been wrought legal detriment to the opposing right. This is certainly true with respect to trustees and officers of the law, who are not permitted to assert a mere mistake of law as an excuse for the denial of justice, and who are required to act as any high-minded man would under the like circumstances."

In *Ex parte James* (In re Condon) 9 Ch. App. 609, a creditor had obtained judgment, and issued execution, which was levied by the sheriff upon certain personal property of the defendant, and upon its sale the proceeds were paid to the judgment creditor. Thereafter, the debtor being adjudged a bankrupt, the assignee demanded the proceeds of the sale. The judgment creditor, supposing the assignee entitled thereto, paid over the same to him. Being afterwards advised that he had a right to retain the money, the creditor filed a petition against the trustee in bankruptcy for restoration, and restoration was decreed. The court observed that:

"A trustee in bankruptcy is an officer of the court. He has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among creditors. The court, then, finding that he has money in his hands which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion, a court of bankruptcy ought to be as honest as other people."

The case of *Oil Co. v. Hawkins*, *supra*, was one where the company, on the day and within a few minutes of the closing of the bank, in ignorance of the insolvent condition of the bank, and believing it to be solvent, deposited in the bank the sum of \$1,746.71, consisting of a small amount of money, and the balance in checks and drafts and other evidences of debt. The company filed proof of its claim against the insolvent bank with the receiver as a general claim entitled to no preference. The receiver allowed such claim, with others, which he reported to the comptroller of the currency, where said claim, with others, was entered upon the books of the comptroller of the currency. A dividend was declared among the several creditors of the insolvent bank, including the Standard Oil Company, and the money so received by the bank, with other moneys in the hands of the receiver, was paid out upon the dividends so declared. A check for the amount of its dividend was forwarded to, and received by, the Standard Oil Company, which check, shortly after its receipt, was returned to the receiver. Thereupon the Standard Oil Company filed its claim with the receiver, asking to be allowed to establish its claim as one entitled to be paid in preference to the general creditors of the insolvent bank, and the circuit court of appeals for this circuit held that it was entitled to such payment out of other assets of the bank in the hands of the receiver. This case carries the equitable doctrine of allowing a restoration, where no injustice will be done, to a much greater length than is necessary in the present case. For these reasons the court is of opinion that the decision of the referee should be reversed, and the referee directed to permit the credit to be made, and the amended proofs filed and allowed, as prayed for by the petitioner.

**BEERS v. HANLIN.**

(District Court, D. Oregon. February 22, 1900.)

No. 233.

**1. BANKRUPTCY—ACTS OF BANKRUPTCY—PREFERENCE.**

A transfer of property by an insolvent debtor to a creditor is not an act of bankruptcy, as being made "with intent to prefer such creditor over his other creditors" (Bankr. Act 1898, § 3a, subd. 2), unless there was, at the time of the transfer, some other creditor holding a claim or demand against the insolvent such as would be provable in bankruptcy.

**2. SAME—PROVABLE DEBTS—RIGHT OF ACTION FOR TORT.**

A right of action for damages for an assault and battery, not reduced to judgment nor otherwise liquidated under direction of the court, is not a debt or demand provable in bankruptcy, and does not make the injured party a "creditor" of the tortfeasor, within the meaning of the bankruptcy law.

In Bankruptcy. On demurrer to petition in involuntary bankruptcy.

M. L. Pipes, Waldemar Seton, and Claude Strahan, for petitioner.

H. H. Northup, for respondent.

BELLINGER, District Judge. The averments of the petition are, in effect, that the respondent transferred his property, being insolvent, to one Aylsworth, with intent to prefer said Aylsworth to his other creditors. It appears that there were no other creditors than the petitioner, and that she was not a creditor at the time the alleged act of bankruptcy was committed, unless an unliquidated claim or right of claim for damages for an assault and battery is sufficient to constitute her a creditor. She avers that the assault and battery was committed on April 22, 1898; that she brought her action therefor on March 23, 1899, and recovered judgment October 28, 1899. The transfer by the respondent to Aylsworth was made on January 22, 1899. The petition in bankruptcy was filed on January 20, 1900. Unless the petitioner was a "creditor" at the time of the transfer to Aylsworth, such transfer did not constitute an act of bankruptcy. A creditor, under the bankrupt act, is one who owns a demand or claim provable in bankruptcy, and this was not such a demand or claim. An unliquidated claim is not provable in bankruptcy. A claim like this, arising out of a tort, must be reduced to judgment, or, pursuant to application to the court, be liquidated in such manner as the court shall direct, in order to be proved against a bankrupt's estate. The demurrer is sustained.

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In re EAGLES et al.

(District Court, E. D. North Carolina. February 16, 1900.)

**1. BANKRUPTCY—ELECTION OF TRUSTEE—VOTE OF SECURED CREDITOR.**

In the election of a trustee in bankruptcy, a secured creditor may surrender his security, and vote as on an unsecured claim; but, failing this, he will not be entitled to vote unless his claim exceeds the value of the security which he holds, and then only for such excess as shall be allowed by the court.

**2. SAME—VOTING BY AGENT OR ATTORNEY.**

An attorney, agent, or proxy, representing a creditor of a bankrupt, may cast the vote of such creditor in the election of a trustee, upon producing a written authority from the creditor for that purpose, which authority will be filed by the referee as a part of his record in the case.

**3. SAME—OBJECTIONS TO CLAIM—HEARING.**

If objection is made to the allowance of a claim presented at a meeting of the creditors of a bankrupt, the question of its allowance should be heard as soon as feasible, and, if the court is not satisfied with the weight of evidence, the hearing may be adjourned to a future time; the final decision, for or against the allowance of the claim, being appealable to the circuit court of appeals, if the claim amounts to \$500 or more.

**4. SAME—SETTING ASIDE ELECTION.**

Where claims offered for proof and allowance at a meeting of creditors of a bankrupt are excluded from voting in the election of the trustee, being postponed for future consideration, or disallowed, and are afterwards allowed on hearing or on appeal, the court may set aside the election, and order a new vote to be taken, if it is made to appear that the result would be changed by allowing votes to be cast on such claims, but not otherwise.

**5. SAME—PROOF OF DEBT—WHO ENTITLED.**

Where one of the partners in a bankrupt firm has a claim against the firm, which he has assigned to a third person as collateral security for a debt, the holder cannot prove the claim nor vote on it in the election of a trustee, not being the owner of the claim, and, for a similar reason, the bankrupt partner cannot prove it.

**In Bankruptcy.** On review of decision of referee in bankruptcy.

Gilliam & Gilliam, for bankrupts and certain creditors.

Howard & Howard, for other creditors.

**PURNELL**, District Judge. The referee certifies for review the following record:

"I, C. C. Fagan, one of the referees in bankruptcy of said court, do hereby certify that the first meeting of the creditors herein was held in Tarboro, N. C., on February 12, 1900, at which claims were proven, and the election of a trustee entered upon; that nine (9) creditors, whose proven claims amounted to two thousand and eighty-four and  $\frac{97}{100}$  dollars, voted for Stamps Howard, Esq., as trustee, and twenty-six (26) creditors, whose proven claims amounted to two thousand and eight hundred and twenty-five and  $\frac{52}{100}$  dollars, voted for Henry Gilliam, Esq., as trustee; that questions arose as to the right of Howard & Co. and George Howard to vote, in the selection of the trustee, \$712 due the former, and \$1,000 due the latter, both of which claims are reported and proven as secured by the assignment of collaterals of bankrupts, fully set forth in schedule; that question also arose as to who was entitled to vote a certain indebtedness duly proven by B. F. Eagles, and due him by Eagles and Crisp, bankrupts, for \$2,886.36, and which is hypothecated with George Howard as collateral security for the sum of one thousand dollars, the amount due and secured to George Howard as above. Howard & Co. and George Howard claimed the right to vote their debts of \$712 and \$1,000 in the election of a trustee, and offered to vote the same for Stamps Howard, Esq. The referee was of opinion that the said creditors, being secured by collaterals, were not entitled to participate in the selection of a trustee, unless they first surrendered their securities. George Howard claimed the right to vote the debt of \$2,886.36 due to and proven by B. F. Eagles, and deposited with him as collateral security for \$1,000 due by bankrupts as aforesaid, and offered to vote the said indebtedness for Stamps Howard as trustee. B. F. Eagles, to whom the debt is due, claims the right to vote said indebtedness, and offers to vote the same for Henry Gilliam, as trustee. The referee was of opinion that B. F. Eagles was entitled to vote said indebtedness in the selection of a trustee, and the same was voted for Henry Gilliam. The referee declared Henry Gilliam duly elected trustee, and fixed his bond at the



sum of \$2,500. Attorneys for the said Howard & Co. and George Howard object to the above rulings and decision of the referee, and ask that the same be certified to the judge of the district court for review."

It would not be inappropriate for referees to follow the familiar practice of "explaining the object of the meeting" to creditors and attorneys not familiar with the practice in the courts of bankruptcy. Many questions similar to those presented may thus be solved, thus saving time, frequently so essential in a proper adjustment of estates. The meeting is for business, and must be held in strict accordance with the notice, at the time and place specified, not at some other time, sooner or later, or another place, though near by. Adjournments may be had if the business requires it, but all adjournments are the same meeting, in contemplation of law. If no creditor appears, the meeting is as effectual as if they were present or represented. The court, judge, or referee is not authorized or required to wait for or "count a quorum." If, in such case, the schedules disclose no assets, the court may order that no trustee be appointed. Rule 15.

The referee should be punctually present at the time and place specified in the notice. He or the judge presides, and his duties are judicial. He does not otherwise participate. The bankrupt is required and should be actually present at the first meeting. It is a creditors' meeting, and they (the referee and bankrupt) are there to assist the creditors,—the first as an officer of the law, and the other to aid him in so doing. Thus aided, the referee should, in most cases, be able to pass upon all claims which have been or may be presented at the meeting. Bankr. Act, § 55c. Having thus passed upon the claims presented, a creditor to participate in and vote at such meeting must own an unsecured claim, provable in bankruptcy, and must not only have proved such claim, but had it allowed. *Id.* §§ 56a, 56b; *In re Hill*, Fed. Cas. No. 6,481; *In re Altenheim*, *Id.* 268. Secured creditors cannot vote at such meetings, unless their claims exceed the amount of the security held by them, and then only for such excess as shall be allowed by the court. Bankr. Act, § 56b. An attorney, agent, or proxy can represent and vote for such creditors, but, before being permitted to do so, should be required to produce and file written authority from the creditor, which should be filed by the referee as a part of his record. *In re Sugenheimer* (D. C.) 91 Fed. 744. Creditors holding claims which are secured or have priority are not, in respect to such claims, entitled to vote. To do so, such security or priority must be surrendered. *In re Saunders*, Fed. Cas. No. 12,371; Bankr. Act, § 57g; *In re Conhaim* (D. C.) 97 Fed. 924. This provision illustrates the homely maxim, of Heywood, hoary with the age of over four centuries, that one cannot eat his cake and have his cake too. The creditor must decide. He can make a surrender, thus becoming an unsecured creditor, and participate with other creditors in the management of the estate, or he can stand on his security or priority. He cannot do both. He cannot run with the hare and hold with the hounds, as boys who run rabbits would express it, quoting a sixteenth century authority.

Assisted as indicated by the schedules, the bankrupt, and others interested, creditors present, it would seem the court could pass on all or most of the claims without difficulty or delay. If a particular claim is objected to, the question should be heard as soon as feasible, and, if the court (judge or referee) is not satisfied with the weight of evidence, the hearing may be postponed, and heard at some subsequent time. The act of 1867 provided expressly for such postponement, and the act of 1898 does not prohibit, but, by lodging a large discretion in the court, warrants and contemplates it. On a decision, the allowance or rejection of a claim of \$500 or over, both may be reviewed by the court of appeals. Bankr. Act, § 25, subd. 3. The effect of allowing or postponing the hearing on a particular claim affects only the creditor's right to vote at the first meeting of creditors. If made to appear the result would be changed by such vote or votes, the judge or referee may set aside the result, and order a new vote to be taken. When it appears the right to vote would not affect the business of the estate, the proceedings would not be disturbed to allow a creditor to exercise the right to vote when it would be barren of results. A creditor who has received a preference must surrender such preference before he can participate in a meeting of creditors. By the adjudication, the estate of the bankrupt is in the custody of the court. If the preference is by the assignment of securities, the creditor cannot realize on such securities, or release the debtor of the bankrupt, except through the bankrupt court. See *In re Cobb* (D. C.) 96 Fed. 821, and authorities cited. Such creditor should prove and file his claim, and his preference, if valid, will be protected by the court, but he cannot participate in meetings as an unsecured creditor. In a proceeding like the one at bar, the creditors of the partnership elect the trustee, but an individual creditor of one of the partners cannot vote for a trustee of the partnership. Bankr. Act, § 5b.

Applying the foregoing principles, which are thus fully discussed for the benefit of referees, to the case at bar, the rulings of the referee are affirmed. The claim of \$712 due Howard & Co., and that of \$1,000 due George Howard, "reported and proven as secured by the assignment of collaterals of bankrupt, fully set forth in schedule," are not such claims as would entitle the creditor holding such claim to participate in the first meeting of creditors or vote for a trustee.

The question propounded, but not presented in such a way as to be properly passed upon, as to who is entitled to vote the claim of B. F. Eagles, due him by Eagles and Crisp, bankrupts, for \$2,886.36, may be settled by an answer to the question, was such claim allowed? If not, no one can vote it. B. F. Eagles was a member of the bankrupt firm, and schedules his individual property. Section 5g of the bankrupt act provides:

"The court may permit the proof of the claim of the partnership estate against the individual estates, and vice versa, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates."

The schedules disclose the fact that the \$1,000 debt due George Howard by B. F. Eagles, partner, is secured by the hypothecation

of a note of A. H. Crisp (not of the bankrupt firm), which note is secured by real-estate mortgage and other collaterals. Other questions as to this claim may arise hereafter, which are not now presented for review, as contemplated by the bankrupt act, and even the question of who is entitled to prove and vote the claim is not so presented. Howard cannot prove or vote the claim, for he does not own it. It is only assigned as collateral security. If, when reduced to money, the proceeds are in excess of his claim, which he cannot vote, the excess would, in a marshaling of assets, go to the estate, and, if not sufficient to satisfy his claim, then he would be entitled to prove, as an unsecured creditor, any excess. How this may be cannot now be determined. B. F. Eagles cannot prove the claim, because he does not own it. Aliunde the bankrupt proceedings, he would own an equitable interest, but has assigned the legal title to the claim. Nor does the report of the referee and the schedules correspond in some essential particulars as to this claim. Only the right to prove and vote the claim, which is not properly presented, is now considered, and the many questions which may arise are not intended to be passed upon. It will be in apt time to adjudicate such questions should they arise in the course of the administration of the estates of the firm and the partners.

It is impossible to say from the report which claims are included in the vote for trustee. If the claims not entitled to vote were included in the vote for Mr. Gillaim or Mr. Howard, they must be eliminated, and the one who thus has a majority in number and amount of the claims proved and allowed will be declared trustee. Such trustee will at once file the bond fixed by the creditors, and proceed with the administration of the estate according to the statute.

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RUMSEY & SIKEMIER CO. et al. v. NOVELTY & MACHINE MFG. CO.  
et al.

(District Court, E. D. Missouri, E. D. November 6, 1899.)

**1. BANKRUPTCY—ACTS OF BANKRUPTCY—PREFERENCES.**

Where an insolvent debtor conveys all his property to a trustee, with directions to convert the same into money, and to apply the proceeds—First, to the payment of the costs and expenses; second, to the payment of such of the grantor's creditors as are entitled to priority under the laws of the state; third, to the payment of the grantor's general creditors according to a schedule set forth in the deed; and, finally, to return to the grantor any balance that may remain,—such conveyance is not a transfer of property with intent to prefer a creditor or creditors, within the meaning of Bankr. Act 1898, § 3a, cl. 2, and therefore is not, on that ground, an act of bankruptcy.

**2. SAME—ASSIGNMENT FOR CREDITORS.**

A conveyance of property to a trustee, with directions to convert the same into money, and apply the proceeds in payment of the debts of the grantor and the costs of administration, but reserving to the grantor the right to any balance that may remain, is not a "general assignment for the benefit of his creditors," within the meaning of Bankr. Act 1898, § 3a, cl. 4, providing that such an assignment shall constitute an act of bankruptcy, where it is not shown that the reservation of an equity to the

grantor is colorable or in bad faith, and for the purpose of evading the provisions of the bankruptcy law.

**3. SAME—FRAUDULENT CONVEYANCE.**

A voluntary conveyance of all his property by an insolvent debtor to a trustee, to be converted into money and distributed to the creditors of the grantor, though it is made for the equal benefit of all the creditors, without preferences and without actual fraud, and though it would be good at common law, is nevertheless an act of bankruptcy, as being a transfer of property with intent to hinder, delay, and defraud creditors, since its necessary operation is to deprive the creditors of the rights, advantages, and safeguards provided for them by the bankruptcy law.

**4. SAME—PRESERVATION OF PROPERTY—INJUNCTION.**

Where an insolvent debtor, who has conveyed all his property to a trustee, with directions to sell the same and distribute the proceeds to the creditors of the grantor, is adjudged bankrupt on involuntary proceedings against him, on the ground that such conveyance was intended to delay and defraud creditors, and is therefore voidable in bankruptcy, the court of bankruptcy, pending the appointment of a trustee, may enjoin the trustee under the deed from disposing of the property or exercising any of the powers given him by the deed, except to hold possession of the property and preserve it.

In Bankruptcy. On petition for adjudication in involuntary bankruptcy and for an injunction.

James M. Sutherland and Wm. B. Shields, for complainants.

Andrew M. Sullivan, for defendants.

ADAMS, District Judge. The bill, return to the order to show cause, and affidavits filed in support thereof, show that on October 11, 1899, the defendant the Novelty & Machine Manufacturing Company conveyed all its property to the defendant William L. Loker, in trust to sell the same, and out of the proceeds of the sale to pay—First, the cost and expenses of so doing; second, debts of a preferential character according to the laws of the state of Missouri; third, the claims of the several creditors of the company, all of whom, with the respective amounts due each, were set forth in the deed of conveyance; and, fourth, to pay any balance which might remain to said company, the grantor. Defendant Loker, immediately after receiving the deed of conveyance, proceeded to execute the trust thereby created. On October 19, 1899, the complainants in this case filed a petition in involuntary bankruptcy against said company, charging that the company had committed an act of bankruptcy by the execution of its deed to the defendant Loker, as hereinbefore stated. Afterwards, on October 21st, this proceeding was instituted by the petitioning creditors, the general object and purpose of which is to secure an injunctive order against Loker restraining him from further proceeding with the execution of the trust created by the deed of October 11th. The general grounds for such an order, as set forth in the bill, are—First, the deed constitutes a preference; second, that it is a general assignment for the benefit of creditors; and, third, that it was made with intent to hinder, delay, and defraud the creditors of the grantor.

Manifestly, the deed does not work a preference to any of the creditors, for all are treated alike, and, so far as it appears, it is not

a general assignment, within the purview of the bankruptcy act, inasmuch as there is a condition of defeasance and an equity reserved in the property to the grantor after the satisfaction of the claims of the beneficiaries mentioned therein. I use the words, "so far as it appears," in referring to the last matter, because I am not prepared to announce the proposition broadly that any conveyance which in terms contains a condition of defeasance, and the reservation of an equity to the grantor, is in all cases to be treated as a security for the payment of the debt, and for that reason protected from the consequences which follow a general assignment, under the provisions of the bankruptcy act.

It is possible that the insertion of such a clause in a deed may be made in bad faith, for the express purpose of evading the operation of the bankruptcy act, and with no real or bona fide intention of reserving any equity to the grantor. The facts of the case may clearly show that the real purpose of the deed, though in the form of a mortgage, is to absolutely and unconditionally appropriate the property conveyed to the satisfaction of the debts. In such case it would seem that the court, in administering the bankruptcy act, ought to construe the instrument or deed claimed to be an assignment according to the actual facts of the case, and not according to the false and misleading statements which may be employed to conceal the actual facts. But the case at bar does not now disclose any facts outside the terms of the deed, and for that reason I hold that the deed is not a general assignment, within the meaning of the bankruptcy law.

The next question is whether the deed is a conveyance by the company with intent to hinder, delay, and defraud its creditors, or any of them. It is contended that because it devoted all the debtor's property to the payment of its creditors' demands, pro rata and equally, and because there is no fraud of the kind requisite to avoid deeds at common law, or under the statutes of fraudulent conveyances, therefore this deed does not hinder, delay, or defraud creditors, within the meaning of the bankruptcy act. In considering this question, it must be borne in mind that the bankruptcy act confers certain peculiar rights and privileges upon creditors which were unknown to the common law, and unrecognized by state statutes concerning fraudulent conveyances. Among these are the right (1) to choose their own trustee; (2) to examine the bankrupt; (3) to have notice of all the important steps in the administration of the estate; and (4) to have the assets converted into money and distributed under the supervision and control of a court of bankruptcy. Any course of procedure by an insolvent, like that resorted to in this case, whereby he conveys all his property to some trustee of his own selection, with power to dispose of it according to his own judgment, and with none of the safeguards provided by the bankruptcy act, clearly deprives the creditors of the valuable rights accorded to them by that act. In addition to this, if such a course of procedure is open to an insolvent, he may in all cases resort to it in anticipation of bankruptcy, and thereby altogether defeat the operation of the involuntary provisions of the act.

Considerations like these lead me to the conclusion that such a course of procedure, even though invulnerable at common law and unattended with fraud in fact, inevitably operates to hinder, delay, and defraud the creditors with respect to their rights under the bankruptcy act. The rights above enumerated are taken from them, and they are deprived of all such safeguards, in their effort to secure from the wreck of business some part of what is justly due them. Such being the necessary consequences of the act of the insolvent in making a voluntary conveyance of his property for the benefit of his creditors, it follows that he must have intended such consequences in making such a conveyance.

The bankruptcy act of 1867 (section 39) made a conveyance of property with intent to hinder, delay, or defraud creditors an act of bankruptcy, practically the same as section 3 of the act of July 1, 1898; and although by the act of 1867 the disposition of property, with intent to defeat the operations of the act, constituted an act of bankruptcy, the courts in construing that act held that the conveyance of property by a debtor to a trustee of his own selection, for the equal benefit of his creditors, was a conveyance with intent to hinder, delay, and defraud the creditors, within the purview of the act. *Globe Ins. Co. v. Cleveland Ins. Co.*, 10 Fed. Cas. 488 (No. 5,486), and cases there cited. And, so far as authoritative decisions have been brought to my attention, the same conclusion appears to have been reached in construing the recent act of July 1, 1898. In the case of *Davis v. Bohle*, 34 C. C. A. 372, 92 Fed. 325, decided by the circuit court of appeals of the Eighth circuit, Judge Thayer, in delivering the opinion of the court, says:

"The thirty-ninth section of that act (March 2, 1867) declared, in substance, that if one who was insolvent, or in contemplation of insolvency, should make any gift, grant, sale, conveyance, or transfer of his property, with intent by such disposition thereof to defeat or delay the operation of the act, he should be deemed to have committed an act of bankruptcy; and it was repeatedly held that a general assignment by an insolvent debtor for the equal benefit of all his creditors was an act of bankruptcy, within the meaning of this provision, because of its tendency to defeat or delay the operation of the act by providing a different method of administration than that contemplated by the act, and that the same conclusion would have followed, in view of the English decisions construing the English bankruptcy act, from which ours was in part borrowed, even if our act had stopped with the single declaration that conveyance by an insolvent debtor with intent to delay, defraud, or hinder his creditors should be deemed an act of bankruptcy."

While in that case the court was considering a general assignment made in accordance with the provisions of the statutes of the state of Missouri, it seems that the reasoning there employed would be equally applicable to a conveyance of any kind by an insolvent debtor for the equal benefit of all his creditors. In the case *In re Gutwillig*, 34 C. C. A. 377, 92 Fed. 337, decided by the circuit court of appeals for the Second circuit, the same reasoning was employed as is found in *Davis v. Bohle*, *supra*, and the same result reached.

As a result of the foregoing, it must be held in this case that the conveyance by the Novelty & Machine Manufacturing Company to Loker was made with intent to hinder, delay, and defraud the creditors of the grantor, within the true meaning of the act of July 1,

1898, and as such is an act of bankruptcy, and, being such, the conveyance is voidable at the instance of the trustee in bankruptcy. Inasmuch as no trustee has as yet been appointed, it becomes the duty of the court to protect the property conveyed from loss or depreciation until such time as a trustee may be appointed to care for it.

From the showing made in the bill and affidavits, I do not think it necessary to take the custody of the property out of the hands of the defendant Loker, but will make an order as prayed for, restraining him, until the further orders of this court, from disposing of the property or exercising any of the powers purporting to be vested in him by the deed of conveyance made to him, except only holding the possession of the property, and taking due care for the preservation thereof.

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In re WETMORE.

(District Court, E. D. Pennsylvania. February 19, 1900.)

No. 27.

**1. BANKRUPTCY—OPPOSITION TO DISCHARGE—BURDEN OF PROOF.**

Creditors opposing a bankrupt's application for discharge, on the ground of his having concealed property from his trustee, must sustain the burden of proving, to the satisfaction of the court, that such concealment was fraudulent on the part of the bankrupt, and with his knowledge; and a discharge will not be refused on evidence which leaves in doubt the existence of a fraudulent intent.

**2. SAME—CONCEALMENT OF ASSETS.**

A testator bequeathed a sum of money to trustees, in trust to pay the income to his wife during her life, with power to her to dispose of the principal by will, and added that, in default of such disposition by her, "I give the said trust fund, upon her decease, to my own then surviving next of kin." After the death of the testator, his son was adjudged bankrupt; and thereafter the testator's wife died, having exercised the power of appointment by bequeathing the fund to the bankrupt unconditionally. The bankrupt did not list this property in his schedule of assets, nor offer to surrender it to his trustee. *Held* that, in view of the doubtful questions of law, whether the bankrupt's interest in the trust fund at the date of the adjudication was a vested interest such as would pass to his trustee, and whether his title thereto, after his mother's decease, was derived from her will or from the prior will of his father, it could not be said that he had "knowingly and fraudulently" concealed property from his trustee, so as to forfeit his right to a discharge.

**In Bankruptcy.** On bankrupt's application for discharge, and exceptions thereto by creditors.

Richard C. Dale, for exceptant.

Hatch & Wickes, for bankrupt.

**McPHERSON, District Judge.** At the time the bankrupt filed his schedules, he did not include therein such interest as may have then existed under the following clause of his father's will:

"I give and bequeath to my executors hereinafter named, other than my wife, the sum of \$100,000 (in cash, or in securities or stock valued by my executors at that sum), upon trust to keep the same invested, and to receive the income thereof, and that, after deducting reasonable charges for the management of

the said trust, to apply the net amount of such income, from time to time as it shall accrue, to the use of my wife, Sarah Taylor Wetmore, so long as she shall live; and I empower my said wife to dispose of the principal sum so held in trust, and any accumulations thereof, by last will and testament, duly executed by her, and in such manner as she shall think proper; and, in default of such disposition by will, I give the said trust fund, upon her decease, to my own then surviving next of kin, in like manner and shares as if the same were to be then distributed as my own proper estate, dying at time intestate."

He was adjudged a bankrupt on January 13, 1899, and in the following March his mother died, having exercised the foregoing power of appointment by bequeathing to the bankrupt unconditionally the principal sum of \$100,000. The bankrupt has made no application to amend the schedule so as to include this property, and does not offer to surrender it to the trustee as an asset of the estate. The opposition to the discharge is based upon the foregoing facts; the argument being that a discharge should be refused, because section 14 of the bankrupt act requires a refusal if the applicant has committed an offense punishable by imprisonment under section 29, and because such an offense has been committed by the present applicant, namely, the crime described in section 29b, par. 1, of "having knowingly and fraudulently concealed, while a bankrupt, \* \* \* from his trustee any of the property belonging to his estate in bankruptcy."

The referee before whom the bankrupt was examined, upon the hearing of these exceptions, did not decide the questions now urged upon the court, namely, whether the estate acquired by the bankrupt under his father's will was or was not a vested estate, and whether the title of the bankrupt to the trust fund, after his mother's death, was derived from her will, or from the prior will of his father. The referee found as a fact that whatever might be the quality of the bankrupt's interest in the fund, and from whatever source that interest might be held to be derived, he had not knowingly and fraudulently concealed any property from the trustee. If this finding is correct, the referee was right in concluding that the nature of the bankrupt's estate need not now be determined; and I have therefore examined the testimony upon this point with care, reaching the same result as was reached by the referee. The burden is upon the exceptant to prove the allegation of fraud to the satisfaction of the court, and this burden she has not sustained. The best that can be said about the testimony is that the existence of a fraudulent intent to conceal may be in doubt. But, considering the technical nature of the arguments in support of the propositions that the interest of the bankrupt under his father's will was a vested interest, and that he now derives his title to the fund from that instrument and not from the will of his mother, the bankrupt can hardly be charged with fraudulent concealment of his interest because he may not have understood its true legal paternity. Merely to omit property from his schedule of assets would rarely be enough to prove a fraudulent intent on the part of the bankrupt. Especially does the omission lack probative force when it also appears that no one yet knows—or will know, until some court decides the point—whether such interest as the bankrupt may have had in this fund at the date



of adjudication can be correctly described as "property" at all that was capable of being transferred.

For the purposes of this decision, I assume that the bankrupt's estate might have been vested, and may be derived from his father's will, but I do not decide the question, leaving it open for future consideration. It can be raised directly in appropriate proceedings to be brought by the trustee.

The exceptions are overruled.

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In re GREENEWALD et al.

(District Court, E. D. Pennsylvania. February 21, 1900.)

No. 93.

**BANKRUPTCY—PRIORITY OF CLAIMS—WAGES OF LABOR.**

A traveling salesman is not a workman, nor a clerk or servant of his employer, within the meaning of Bankr. Act 1898, § 64b, cl. 4, according priority of payment out of bankrupts' estates to "wages due to workmen, clerks, or servants, which have been earned within three months before the date of the commencement of proceedings, not to exceed \$300 to each claimant."

In Bankruptcy. On review of decision of referee in bankruptcy.

Samuel B. Huey, for petitioning creditor.

Charles Hoffman, for exceptant.

MCPHERSON, District Judge. The question for decision certified to the court by the referee is whether a traveling salesman is a workman, clerk, or servant, within the meaning of section 64b, par. 4, of the bankrupt act, and is therefore entitled to priority of payment to the extent of \$300. The referee followed *In re Scanlan* (D. C.) 97 Fed. 26, and rejected the claim of priority. I agree with the result reached by Judge Evans in that case, although I incline to believe that the meaning of "workmen, clerks or servants" may perhaps be somewhat more extensive than his opinion seems to allow. The scope of these words is to be determined, I think, not exclusively by the lexicographers, but in part, at least, by modern usage, which is continually modifying the content of words and phrases. "Clerk," for example, has come to include, not only a subordinate who writes letters or keeps books, but also a salesman in a retail store. Mr. Justice Fell, in *Mulholland v. Wood*, 166 Pa. St. 486, 31 Atl. 248, recognizes this enlargement of meaning, while declining to regard the phrase "Clerk employed in a store, or elsewhere," as broad enough to include a traveling salesman. The Pennsylvania statute which he was then considering is broader than the bankrupt act. The federal statute says "clerk," without more; and no one, I think, would understand that word, standing by itself, to include an employé whose duties call him habitually away from his employer's store or factory, and require him to travel frequently for the purpose of selling goods.

Nor would such an employé be ordinarily thought of as included in the word "workmen." The essential idea conveyed by this word,

as commonly used, is the idea of a subordinate, whose occupation has nothing to do with correspondence or books of account, but requires him to use his hands to a considerable degree in manufacturing or building, or in similar pursuits. He may be skilled or unskilled; he may, or may not, be aided by tools or machinery; but he does not belong to the same class as the man that is neither making goods nor erecting buildings, nor accomplishing similar results, but is exclusively engaged in the sale of a finished product.

"Servants" is a more indeterminate word. It includes, I think, other than domestic servants, or those who receive small wages for doing work of an inferior grade; for the act contemplates that "servants" may be receiving at least \$100 a month, and this sum of itself shows that the word is not narrowly restricted in its meaning. Where the line is to be drawn, I am unable to say. A particular context might indicate a very broad meaning indeed; for example, if one should speak of "an employer and all his servants," the sense there might well be, all who serve the employer in any capacity. But this cannot be the meaning in the paragraph under consideration. If it were, "clerks" and "workmen" would be superfluous, and therefore the use of the three words in one phrase seems to indicate that congress had in mind three classes of employés, substantially distinct, although here and there a particular employé might perhaps be properly included in more classes than one. A farm laborer might, I think, be indifferently regarded as a servant or a workman, and other examples will readily present themselves. Taking "servants," then, as used in the act, to refer to a restricted class of subordinates, I am of opinion that the common usage of the word does not permit the inclusion of a traveling salesman.

There is some hardship in this result, for the act apparently gives priority to a salesman or clerk who sells at retail in a store, but does not give priority to a salesman who sells in large quantities to customers elsewhere. The conclusion seems inevitable, however, if the ordinary meaning of the words is to prevail.

The decision of the referee is approved.

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In re SHERTZER.

(District Court, E. D. Pennsylvania. February 19, 1900.)

No. 133.

**BANKRUPTCY—OPPOSITION TO DISCHARGE—FAILURE TO KEEP BOOKS.**

Creditors opposing a bankrupt's application for discharge, on the ground of his having failed to keep proper books of account, must sustain the burden of proving that such failure was "with fraudulent intent to conceal his true financial condition."

In Bankruptcy. On bankrupt's application for discharge, and exceptions thereto by creditors.

Coyle & Keller, for exceptants.

Benjamin F. Davis, for bankrupt.

McPHERSON, District Judge. The exceptions to the bankrupt's discharge must be overruled. He may have failed to keep proper books of account in 1896, but the evidence is not sufficient to establish the charge that such failure was "with fraudulent intent to conceal his true financial condition." He was no doubt insolvent at that date, and it has been argued that his failure then to keep proper books was an omission "in contemplation of bankruptcy," although the act had not yet been passed. I was urged to decide the point, but, as a fraudulent intent has not been proved, it is unnecessary to consider the argument. In other districts it has been ruled several times during the past year that the "bankruptcy," in the debtor's contemplation, must be, not insolvency merely, but bankruptcy under the present act. In *re Holman* (D. C.) 92 Fed. 512; In *re Shorer* (D. C.) 96 Fed. 90; In *re Dews*, Id. 181; In *re Hirsch*, Id. 471; In *re Carmichael*, Id. 594.

The exceptions are dismissed.

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FRAZIER et al. v. SOUTHERN LOAN & TRUST CO.

(Circuit Court of Appeals, Fourth Circuit: February 19, 1900.)

No. 334.

1. **BANKRUPTCY—JURISDICTION—PROPERTY IN POSSESSION OF STATE COURT.**

Judgment creditors brought suit in a state court of competent jurisdiction against their debtor and against his assignee for the benefit of creditors, assailing the assignment as fraudulent and void, and a receiver was appointed to take possession of the property. More than four months thereafter the debtor was adjudged bankrupt. Subsequently the state court rendered a decree avoiding the assignment, establishing the liens of the plaintiffs on the property affected, and ordering the sale of the same by a commissioner appointed for the purpose. The court of bankruptcy afterwards made an order requiring the bankrupt to surrender the property to his trustee, enjoining the sale by the commissioner, and directing a sale by the trustee instead. *Held*, that such order was an unwarranted interference with the jurisdiction of the state court and its possession and control of the property in question, and must be revoked.

2. **SAME—POSSESSION OF RECEIVER.**

The fact that the receiver had not acquired actual possession of the property would not justify such an order of the court of bankruptcy, for the order appointing the receiver brought the property within the custody and control of the state court.

3. **SAME—CONCLUSIVENESS OF DECREE.**

The validity of a decree of a state court rendered in a suit by judgment creditors against their debtor and his assignee, setting aside the assignment as fraudulent and void, establishing the liens of the plaintiffs on the property, and ordering its sale, cannot be impeached by the debtor's trustee in bankruptcy, in a proceeding in the court of bankruptcy to obtain possession of the property and have it sold by the trustee, on the ground of fraud and collusion between the parties in the suit in the state court, where the trustee had opportunity to intervene in such suit, and there allege such fraud.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of North Carolina, at Greensboro, in the Matter of the Estate of D. W. C. Benbow, Bankrupt.

James T. Morehead and R. R. King (King & Kimball, on the brief), for petitioners.

John N. Wilson and E. K. Bryan (John Sprunt Hill, George Rountree, L. M. Scott, McNeill & Bryan, and J. N. Wilborn, on the briefs), for respondents.

Before SIMONTON, Circuit Judge, and PAUL and BRAWLEY, District Judges.

PAUL, District Judge. This case is brought here on petition to superintend and revise certain orders of the district court for the Western district of North Carolina in the matter of D. W. C. Benbow, bankrupt. 96 Fed. 514. The questions of law to be considered by this court arise from the following facts, as they appear in the record:

On the 23d day of January, 1894, D. W. C. Benbow, the bankrupt, executed a deed of assignment to J. S. Cox, conveying to him, in trust for the benefit of said Benbow's creditors, all of his real and personal property. Very soon after the execution of the deed of assignment, a number of the creditors of said Benbow obtained judgments against him on their various claims, amounting in the aggregate to over \$350,000. These judgments were docketed in the superior court of Guilford county, N. C., thus constituting liens on the real estate of said Benbow, the judgment debtor. In April, 1894, a number of the judgment creditors of said Benbow filed creditors' bills in the superior court of Guilford county, assailing the deed of assignment made to Cox as fraudulent and void, made for the purpose of obstructing, hindering, and delaying the creditors of said Benbow, asking that the same be declared void, and that they might secure a priority over other creditors having docketed judgment liens. At the May term of said court, 1894, on motion of the plaintiff in one of these causes, the court appointed W. H. Ragan receiver "of all the property and estate, including choses in action, of the judgment debtor, D. W. C. Benbow, whether subject or not to be sold under execution, except the homestead and personal property exemption, and that such receiver be invested with all the powers of receivers in cases of proceedings supplemental to execution." The order appointing the receiver enjoined the judgment debtor, D. W. C. Benbow, and other defendants therein named, from transferring or disposing of the property of the judgment debtor, including certain notes designated as the "Fisher" and "Ross" notes, theretofore assigned by said D. W. C. Benbow. At the June term, 1899, of the superior court of Guilford county, the issue in each of the causes made by the creditors' bills being the same, they were consolidated. The issue was submitted to a jury, which rendered a verdict in favor of the plaintiffs, and the court thereupon entered a decree declaring said deed null and void, and that the plaintiffs in the several suits have priority of lien on the property described in the deed of assignment over all other creditors. It decreed that the property be sold to satisfy the liens thereon, fixing the terms of sale, and appointing C. P. Frazier commissioner to make the sale. Said Frazier, as commissioner, advertised the sale of the real estate for August 7, 1899. The

bankrupt, D. W. C. Benbow, was adjudicated such on the 5th day of April, 1899, and received his discharge in bankruptcy on the 31st day of May, 1899. The Southern Loan & Trust Company was appointed trustee of the bankrupt's estate on the 20th day of April, 1899. On the 5th day of August, 1899, the said Southern Loan & Trust Company, trustee, filed a petition in the district court for the Western district of North Carolina, praying for an order directing the trustee to sell the real estate formerly belonging to the bankrupt, which had been decreed by the state court to be sold, and which had been advertised by the commissioner appointed by the state court to sell the same. Also for a restraining order enjoining Frazier, the commissioner of the state court, the bankrupt, and C. D. Benbow, who held by assignment several judgments against the bankrupt, the plaintiffs in the several bills in the state court under which the decree of sale had been entered, their agents and attorneys, from making the sale ordered by the state court, or from in any way interfering with or disposing of the property of the bankrupt. The petition alleged that the verdict of the jury in the state court finding that the deed of assignment from Benbow, the bankrupt, to Cox, January 23, 1894, was made for the purpose of hindering, delaying, and defrauding certain creditors of said Benbow, was allowed and procured by the absence of said Benbow as a witness, and by his connivance. That the bankrupt had previously procured the assignment to his son, Charles D. Benbow, the judgments of the plaintiffs in the several actions pending in the superior court of Guilford county to set aside the deed of assignment to Cox made January 23, 1894, and that thus the bankrupt had practically secured to himself the entire proceeds of the property decreed by the state court to be sold for the satisfaction of the judgments. The petition further avers that on the appointment of the trustee title to all the property of the bankrupt was by law vested in the trustee, and that no title could pass by the decree of the superior court of Guilford county, as the trustee in bankruptcy was not a party to the proceedings in the state court, and that the effects of the bankrupt should be administered by the bankrupt court. It further alleges that a sale under the decree of the state court "will result in a sacrifice of the property at small and inadequate prices, and will immediately endanger the creditors of said bankrupt not embraced in said several suits." That it would give the bankrupt and the assignee of the judgments a great and undue advantage over other creditors of said bankrupt, as a sale so effected might not be attacked or defeated successfully after a sale made, and the only recourse left to the creditors of the bankrupt would be a contest over the proceeds of the sale, which, under the privileges given by the order of the sale in the state court, would be nothing more than the costs of the sale should the assignee of the judgments, C. D. Benbow, become the purchaser.

Upon the filing of this petition, the district judge issued a restraining order as follows:

"It is, upon motion, ordered and adjudged that an order issue commanding C. P. Frazier, commissioner, Chas. D. Benbow, assignee, D. W. C. Benbow,

their agents and attorneys, to refrain from selling or offering to sell any of the estate or effects, real or personal, of the bankrupt, D. W. C. Benbow, under the decree of the superior court of Guilford county, made at June term, 1899, in the several suits mentioned in the petition and affidavit, as advertised by the said commissioners, until the further order of this court; and it is further ordered that the said C. P. Frazier, commissioner, Chas. D. Benbow, assignee, and D. W. C. Benbow, appear before me on the 22d day of August, 1899, at Hendersonville, and show cause, if any they have, why an injunction should not be granted."

To this rule, Frazier, the commissioner of the state court, filed his answer, briefly reciting his appointment as such commissioner by the state court; that he is advised that the district court will not enjoin him from performing his duty as directed by the state court; that, had he not been restrained from selling the property on the 7th of August, it would have brought a full, fair, and reasonable price; that the state court will fully protect the rights of all persons interested in the property. The bankrupt, D. W. C. Benbow, and C. D. Benbow, the assignee of the judgments in the state court, filed their separate answers under oath to the rule. They deny that the verdict of the jury in the state court, finding the deed of assignment from D. W. C. Benbow, January 23, 1894, to have been made with intent to hinder, delay, and defraud the creditors of said Benbow, and the decree entered in pursuance thereof, were procured by the consent and connivance of either of them. They deny that the judgments assigned to C. D. Benbow were purchased with the money of D. W. C. Benbow, the bankrupt, or were assigned for or are held for his benefit. They aver that, as the judgment liens in the state court existed years before there was a bankrupt act, and that, as the creditors' bills were filed four years before its passage, the court of bankruptcy cannot interfere by injunction with the proceedings in the state court, and that its decree cannot be attacked in the bankrupt court. After the temporary restraining order had been granted by the district judge, the trustee, on the 17th and on the 19th of August, 1899, notified the bankrupt to deliver to it all of his deeds and other muniments of title to the lands directed to be sold by the decree of the state court, and certain shares of mining and railroad stocks, bonds, contracts, etc., and other personal property of the bankrupt. In compliance with these demands the bankrupt delivered the deeds and other muniments of title in his possession. As to the personal property, the bankrupt stated that it was under the control of the receiver appointed by the state court, and that he was restrained from transferring or interfering in any way with the same.

In the record is an uncompleted examination of the bankrupt before the referee, taken after the entry of the temporary restraining order. Its further taking was adjourned by consent until September 28, 1899, for cross-examination. On the 8th of September the district court entered the order brought here for review. Several ex parte affidavits were also filed as to the proceedings in the state court at the June term, 1899, when a decree for the sale of the property was entered, the purpose being to assail the bankrupt and his attorneys for the manner in which the defense was con-

ducted on the trial of the issue as to the validity of the deed of assignment from Benbow to Cox. The district court, on the 8th of September, 1899, heard the rule to show cause issued August 5, 1899, and entered the following order:

"It is therefore ordered that D. W. C. Benbow, the bankrupt, and all persons acting at his instance, at once comply with the written demands of the trustee, the Southern Loan & Trust Company, made on the 17th day of August, 1899, and on the 19th day of August, 1899. It is further ordered and adjudged that the said Southern Loan & Trust Company, trustee of the said D. W. C. Benbow, bankrupt, is hereby authorized and empowered to sell the property of the said bankrupt, D. W. C. Benbow, free from all incumbrances (first having set apart to him the exemptions allowed by law), for cash to the highest bidder, after having advertised the same in each county where said property may be located, in some newspaper published in the said county, for four successive weeks preceding said sale. It is further ordered and adjudged that the proceeds realized from said sale stand as a substitute for the lands and property sold, and be held by the trustee for the benefit of those holding bona fide claims and liens, to the extent of their interest therein, and as may hereafter be established." 96 Fed. 514.

The petitioners make the following assignment of errors:

"(1) In that the order requires the bankrupt, D. W. C. Benbow, to comply with the written demands of the trustee, made on the 17th and on the 19th of August, 1899; and in that he had no notice of the application for such an order, and it was not included or covered in or by the rule to show cause, and the property demanded is properly the property of W. H. Ragan, receiver, appointed by the state court, and said Benbow is under order to in no wise interfere with or transfer same. (2) In that it authorizes and directs the trustee to sell the property of D. W. C. Benbow, bankrupt, the same being in custodia legis by reason of the appointment of a receiver thereof by the superior court of Guilford county more than four years before the bankrupt act was enacted by the congress, and by the further reason that judgment creditors had filed creditors' bills in 1894 and 1895 in the superior court of Guilford, a court of competent jurisdiction, to have the deed of assignment of D. W. C. Benbow declared void, and to appropriate, by sale, the property described therein, which actions have been successfully prosecuted, and a decree obtained granting the prayer of complainants, and directing the sale of said property by its commissioner duly appointed; the filing of said bills constituting an equitable lien and *fi. fa.* on said property. (3) In that the bankrupt court cannot, by a rule to show cause, try rights of property, nor restrain a plaintiff in a court of competent jurisdiction, who has obtained judgment more than four months before the bankrupt filed his petition in bankruptcy, from pursuing his remedy to enforce his lien in a court of competent jurisdiction. (4) In that the said court did not discharge the rule and authorize the trustee to intervene in said creditors' bills in the superior court of Guilford, if, in the opinion of the court, the protection of the interest of any creditor requires such intervention."

The assignment of errors presents but one important question to be determined in this case; that is, whether a bankrupt court can, through a trustee, in a bankrupt proceeding such as was had in the district court, divest a state court of the possession and control of property in its custody by regular judicial proceedings instituted more than four months before the adjudication in bankruptcy. That the state court had complete jurisdiction of the parties and of the subject-matter in the several suits instituted years before the judgment debtor became a bankrupt, is not questioned. That it had the authority to appoint a receiver to take charge of the property pending the litigation for the enforcement of the judgment or execution

liens of the creditors is not disputed. The rule of comity that obtains between the federal and the state courts where the litigation involves the same subject-matter has been so frequently announced by the decisions of both that an extended citation of them is unnecessary. We will only refer to them so far as seems advisable for laying the foundation of our conclusion in the case under consideration. In *Covell v. Heyman*, 111 U. S. 182, 4 Sup. Ct. 358, 28 L. Ed. 392, the doctrine is thus clearly and forcibly declared, Justice Matthews delivering the opinion of the court:

"The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principle of comity, with, perhaps, no higher sanction than the utility which comes with concord; but between state courts and those of the United States it is something more. It is a principle of right and of law, and, therefore, of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and, although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by foreign process is futile and void. The regulation of process and the decision of questions relating to it are part of the jurisdiction of the court from which it issues."

There have been numerous decisions of the supreme court involving the same question, but none has held differently from the rule stated in the case just cited. The principle is of ready application to the facts in the case before us. The chancery suits in the state court, instituted in 1894, were pending when D. W. C. Benbow was adjudged a bankrupt. A receiver had been appointed several years before by the state court to take charge of his real and personal property. No order had been entered discharging the receiver, and the record shows that he was performing his duties at the special May term, 1899, of the court. A decree was entered directing a sale of the property, and appointing a commissioner to sell the same. The property had been duly advertised for sale by the commissioner when the restraining order was applied for by the trustee in bankruptcy to prevent the sale of the property under the decree of the state court. A temporary restraining order was granted, forbidding the sale under the decree of the state court until the further order of the bankrupt court, and an order was entered to show cause why an injunction should not be granted. On the return of the order to show cause the bankrupt court entered a decree directing the bankrupt to comply with the demands of the trustee to deliver to it, the trustee, all of the property surrendered by the bankrupt or alleged to be in his possession. This included all of the real estate directed to be sold by the decree of the state court. The bankrupt court decreed the property to be sold by the trustee, and that the proceeds realized from the sale should stand as a substitute in the hands of the trustee for the land and property sold, subject to the future order of the bankrupt court. By this decree entered on an order to show cause why an injunction should not be awarded, the district



court assailed the jurisdiction of the state court, took from it the property in its possession and under its control, annulling its proceedings, revoking its decree of sale, and inhibiting its officer, the special commissioner, from executing its orders. This proceeding by the bankrupt court is directly in conflict with the ruling of the supreme court in *Eyster v. Gaff*, 91 U. S. 521, 23 L. Ed. 403. The doctrine stated in that decision so completely covers the case before us that we cannot more clearly express our view than to quote from it. The court says:

"It is a mistake to suppose that the bankrupt law avoids of its own force all judicial proceedings in the state or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition. The court, in the case before us, had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding according to the law which governed such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending. It was the duty of that court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject-matter of the suit. Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void. It is almost certain that if, at any stage of the proceedings, before sale or final confirmation, the assignee had intervened, he would have been heard to assert any right he had, or set up any defense to the suit."

The judge of the district court, while recognizing the doctrine as just quoted, seeks to draw a distinction between that case and the one at bar. He says:

"It will be observed, in *Eyster v. Gaff*, and in all other cases above cited, that the property of the bankrupt was in the actual possession of the state courts or adverse claimants. Where the property in question is not covered by litigation, or is not in possession of the state courts, the jurisdiction of the bankrupt courts will not be ousted. It is the interference with the possession of another court that would ensue if jurisdiction was taken that prevents it from attaching."

The district court seems to have been of the opinion, and it is the contention of counsel for the respondent in this court, that the receiver must be in the actual possession of the property in order to place it in the custody of the court. This position is erroneous. "A court of equity, by its order appointing a receiver, takes the subject-matter of the litigation out of the control of the parties and into its own hands, and ultimately disposes of all questions, legal or equitable, growing out of the proceeding." High, Rec. § 4. As stated by the supreme court of appeals of Virginia in *Beverley v. Brooke*, 4 Grat. 187, "A decree appointing receivers levies upon the property an equitable execution." "The possession of the receiver is that of the court, of which he is the ministerial officer. Thus it is that, inasmuch as the receiver is merely an officer of the court appointing him, property in his possession is said to be in the custody of the law. \* \* \* And it is said to be immaterial in this respect that the receiver appointed declines to act, the property being, notwithstanding, in the custody of the law." Beach, Rec. § 221. Nor is it necessary for a court of equity to take possession of the property in

litigation, or to attempt to do so by the appointment of a receiver, where the object of the suit is to set aside a fraudulent conveyance, and enforce judgment liens against the land of the debtor. If proceedings have been commenced more than four months before the adjudication in bankruptcy, jurisdiction of the state court cannot be divested by the bankrupt court. This was the case in *Kimberling v. Hartly* (C. C.) 1 Fed. 571, and the court held:

"Where an action is pending in a state court of competent jurisdiction to enforce a specific lien on property of the debtor, the subsequent bankruptcy of the debtor does not divest the state court of its jurisdiction to proceed to a final decree in the cause, and execute the same. The assignee in bankruptcy may intervene in such action, but the jurisdiction of the state court and the validity of its decree is not affected by his failure to do so."

The class of decisions relied on by counsel for the respondents to sustain the proposition that a court of bankruptcy can enjoin proceedings in a state court in a case such as we have here does not support that contention. On examination it will be found that they do not go to the extent of holding that a bankrupt court can enjoin proceedings in a state court where the jurisdiction of the latter had been invoked more than four months before the adjudication in bankruptcy. Reference to a few of them will show this. In *re Smith* (D. C.) 92 Fed. 135, was a case where the bankrupt executed a deed of general assignment under the statute law of Indiana within four months before he was adjudicated a bankrupt. The court held:

"Where an insolvent debtor makes an assignment for creditors in pursuance of the terms of a state statute, the operation of which is suspended by the national bankruptcy law, and is afterwards adjudged a bankrupt, the court of bankruptcy has power, on a summary petition, to order the assignee to surrender the property in his possession to a receiver appointed by a court of bankruptcy."

*Carter v. Hobbs* (D. C.) 92 Fed. 594, is another case relied on by counsel for respondent. In this case, the bankrupt, within four months before adjudication in bankruptcy, had executed a mortgage. The trustee filed a petition in the bankrupt court alleging that the mortgage was executed with the fraudulent intent of giving one creditor a preference over his other creditors and to hinder, delay, and defraud them. The court held that the mortgage creditor, though he had not proved his claim, was a party to the proceedings in bankruptcy, and that the trustee seeking to set aside the mortgage might proceed by petition in the bankruptcy court, and need not resort to the state or federal circuit court.

In *Re Brooks* (D. C.) 91 Fed. 508, the trustee in bankruptcy filed a petition in the bankrupt court for an order directing the restoration to him of property of the bankrupt, unlawfully sold on foreclosure of a chattel mortgage after the adjudication in bankruptcy, and before the appointment of a trustee. The court held that it had jurisdiction of such a petition. The sale had been made by a constable under the statute laws of Vermont, and this was relied on as a defense to the petition. The court said:

"The petitioner sets up proceedings under the laws of the state for foreclosure of his mortgage in justification. These are not judicial proceedings in any court drawing to it jurisdiction of the subject-matter, but are merely pro-

ceedings for a public sale by an officer, in a specified way, as agent for the mortgagee."

In *re Christy*, 3 How. 292, 11 L. Ed. 603, *Norton v. Boyd*, 3 How. 426, 11 L. Ed. 664, and *Houston v. City Bank of New Orleans*, 6 How. 504, 12 L. Ed. 526, are also cited in support of the action of the district court. These cases all arose under the bankrupt act of 1841, which conferred more extensive powers on the bankrupt court than does the act of 1898. Yet these decisions do not go to the extent of taking from the possession of a state court property which has been in its custody for years before the adjudication in bankruptcy, and of enjoining its officer in the execution of its decree for a sale of the property under its control.

One further question requires examination. It is insisted in the petition of the trustee filed in the court below that the decree of the state court, the execution of which was enjoined, was procured by fraud and collusion; that Charles D. Benbow was not the bona fide holder of the judgments assigned to him by certain judgment creditors of the bankrupt, but that he held the same for the benefit of the bankrupt himself. The proceedings in the state court, the record shows, were regular in every respect. If the assignment of the judgments in the state court were not for the benefit of Charles D. Benbow, but he in reality held them in trust for the benefit of the bankrupt, because the judgments had been paid for by the bankrupt, the trustee could have set this matter up in the state court. The bankrupt act provides that he may, by order of the bankrupt court, enter his appearance, and defend any pending suit against the bankrupt. As said by the supreme court in *Eyster v. Gaff*, supra:

"If there was any reason for interposing, the assignee could have had himself substituted for the bankrupt, or made a defendant on petition."

The importance of this case will justify us in making a further quotation from the same decision. It is as applicable to the present as to the former bankrupt act:

"In the absence of any appearance by the assignee, the validity of the decree can only be impeached on the principle that the adjudication of bankruptcy devested the other court of all jurisdiction whatever in the foreclosure suit. The opinion seems to have been quite prevalent in many quarters at one time that the moment a man is declared bankrupt, the district court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any court except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person who contested with the assignee any matter growing out of disputed rights of property or of contracts into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view."

For the reasons stated, we hold that, the state court having acquired jurisdiction of the subject-matter and taken possession of the property more than four months before the adjudication in bankruptcy, it must be allowed to remain in control of the same, and to dispose of it under its own decrees. The order awarded by the district court restraining the commissioner of the state court from executing the decree of sale entered by that court must be dissolved.

The order directing a sale of said property by the trustee of Benbow, the bankrupt, must be revoked, and the petition of the trustee dismissed, without prejudice to his right to proceed in the state court as he may be advised.

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UNITED STATES v. GABRIEL.

(Circuit Court, S. D. New York. January 18, 1900.)

No. 2,793.

CUSTOMS DUTIES—CLASSIFICATION—GROUND TALC.

Ground talc is dutiable under section 6 of the tariff act of 1897, as a nonenumerated article partly manufactured, and not under paragraph 97.

This is an application by the collector of customs at New York for a review of the decision of the board of general appraisers.

The merchandise was classified and assessed for duty at 35 per cent. ad valorem, as an article composed wholly or in chief value of earthy and mineral substance, under paragraph 97 of the act of congress of July 24, 1897. The importers claim it should be assessed at 20 per cent. ad valorem, as an article manufactured in whole or in part not provided for in said act, under the provision of section 6 thereof. The board of general appraisers decided the material was dutiable at 20 per cent., for the reasons that this ground talc is not a French chalk; that it is not an article composed of a mineral substance, not decorated in any manner; that it is a ground mineral; that it is a non-enumerated, partly manufactured article.

Curie & Smith, for importers.

D. Frank Lloyd, Asst. U. S. Atty.

WHEELER, District Judge. This ground talc is a mineral substance, but not such as can be decorated, and does not appear to fall under paragraph 97 of the act of 1897, as claimed. *Dingelstedt v. U. S.*, 33 C. C. A. 395, 91 Fed. 112. Decision affirmed.

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AMERICAN SUGAR-REFINING CO. v. UNITED STATES (two cases).

(Circuit Court of Appeals, Second Circuit. January 24, 1900.)

Nos. 34, 35.

CUSTOMS DUTIES—APPRAISAL—SUGARS—INCREASED VALUE FROM DRAINAGE DURING SHIPMENT.

In the appraisal for duty, under the tariff act of 1894, of Brazilian sugar bought and shipped when green, and which necessarily loses weight and increases in value per pound, by drainage during the voyage, such increase in value may properly be taken into account. The provision of section 19 of the customs administrative act of 1890, that, where merchandise is subject to an ad valorem duty, the duty shall be assessed upon its value in the principal markets of the country from whence imported, "and in the condition in which such merchandise is there bought and sold for exportation," is not intended to limit the appraiser to a condition which existed at the time of the purchase, but was immediately to become altered until a new condition and value were reached, but, as shown by the context, is intended to apply to the condition of preparedness for shipment of the merchandise when bought; it being further provided that to its value in the condition bought shall be added the cost of coverings, and all other costs, charges, and expenses incident to placing it in condition for shipment.

Appeals from the Circuit Court of the United States for the Southern District of New York.

John E. Parsons, for appellant.

Henry C. Platt, for the United States.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. These two appeals from the circuit court for the Southern district of New York involve the same question. In suit 2676 the American Sugar-Refining Company imported from Brazil, in March, 1897, certain sugars, by the John Swan, the Richmond, and the Bellaure, which were assessed for duty at 40 per cent. under the tariff act of August 28, 1894. In January, 1895, the same importer imported, also from Brazil, by the Cuvier, other sugar, which was assessed at the same rate of duty. Brazilian sugars, when bought in Brazil immediately after the manufacture, are wet, and lose weight upon the voyage to the port of entry, mainly by drainage, from 10 to 16 per cent., but they gain in value, because the dryer the sugar the higher its test, and there is a corresponding increase in value. This drainage is peculiar to Brazilian sugars, though it exists to some extent in sugars from Puerto Rico. "It has therefore become customary to insert in the contract of sale a guaranty that the loss in weight shall be a certain percentage, estimated by experts as the probable drainage of the particular cargo. If the loss is less than the stipulated percentage, the seller receives an additional payment in proportion; if it is greater, he makes a corresponding allowance from the purchase price." This is called the basis of settlement, and upon that ascertained amount of loss by drainage the appraisement was made in these cases. For example, in the case of the Bellaure the appraiser reported to the collector as follows: "The value of sugar per unit of quantity advanced from 7s. 2d. cwt. 86°, the market value when shipped, to 7s. 11½d. cwt. 86°, in the condition landed, owing to its increased value, due to drainage on the voyage of importation." The importers protested that, under the proper construction of the statute, the rate and amount of duty chargeable upon the merchandise could be only on its market value when shipped, and that duty upon "its increased value, due to drainage on the voyage of importation," was illegally exacted. The collector's construction of the statute was affirmed by the board of appraisers and by the circuit court.

The question in the case is whether this increase of value, on account of drainage during the voyage, is not illegal, because in violation of section 19 of the customs administrative act of June 10, 1890, which is as follows:

"Sec. 19. That whenever imported merchandise is subject to an ad valorem rate of duty, or to a duty based upon or regulated in any manner by the value thereof, the duty shall be assessed upon the actual market value or wholesale price of such merchandise as bought and sold in usual wholesale quantities, at the time of exportation to the United States, in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale including the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind, and all other costs, charges and expenses incident to placing the merchandise in condition, packed ready

for shipment to the United States, and if there be used for covering or holding imported merchandise, whether dutiable or free, any unusual article or form designed for use otherwise than in a bona fide transportation of such merchandise to the United States, additional duty shall be levied and collected upon such material or article at the rate to which the same would be subject if separately imported. That the words 'value' or 'actual market value' whenever used in this act or in any law relating to the appraisement of imported merchandise shall be construed to mean the actual market value or wholesale market price as defined in this section."

Prior to the passage of this act, the statutory provision on this subject had been the following (Rev. St. § 2906):

"When an ad valorem rate of duty is imposed on any imported merchandise, \* \* \* the collector within whose district the same shall be imported or entered, shall cause the actual market value or wholesale price thereof, at the period of the exportation to the United States, in the principal markets of the country from which the same has been imported, to be appraised; and such appraised value shall be considered the value upon which duty shall be assessed."

The appellant insists that in the new section, in addition to the old requirement that the duty shall be assessed upon the actual market value or wholesale price in Brazil, the direction was carefully inserted that the value shall be upon the merchandise "in the condition in which the merchandise is there bought for exportation to the United States," and that this clause directly instructs the appraisers to assess the value upon the sugar in the condition of moisture in which it is bought.

It was well settled by early decisions that, if the quantity or weight stated in the invoice has been diminished by leakage or similar loss, the duty should be chargeable upon the quantity actually imported into this country (*Marriott v. Brune*, 9 How. 619, 13 L. Ed. 282; *U. S. v. Southmayd*, 9 How. 637, 13 L. Ed. 290); and the appellant asserts that, whether the diminished quantity of sugar received at the port of entry is dry or wet, its value must be ascertained by the wholesale market price of the sugar in the condition in which it was bought for exportation, and, if green sugar was bought, its enhanced value by drainage cannot be considered, and that there is no statutory authority for endeavoring to ascertain what the dried sugar would have cost in Brazil, if it had been bought in a dried state. The question is of the legality of the appraisal,—not of its accuracy, or its equity, but simply whether it is permitted by the statute,—and that depends upon the meaning of the words, "in the condition in which the merchandise is bought for exportation." The construction of the statute which would compel an ascertainment of value as the sugar was bought in Brazil when wet, though justified by the language of the statute if literally construed, is not sound. The intention of the statute was that the value of the imported merchandise shall be ascertained in accordance with the wholesale price of such merchandise in the principal markets from whence imported, in the condition in which such merchandise is there sold for exportation, whether packed or unpacked, specially prepared for a voyage or unprepared, and that the expenses incident to placing the merchandise in condition for shipment are to be taken into account. The statute was not looking to the peculiar circumstances incident to any article which necessarily

changed its value during a few weeks, wherever it was stored, and did not demand that the market price of sugar, if bought green, shall be the only standard for assessment, though it forthwith begins to lose in weight and to increase in value per pound. It is true that the word "condition" is broad enough to include any state or situation, but, as used in section 19, it was not intended to limit the appraiser to a condition which existed at the time of the purchase, but was immediately to become altered, and to change, until a new condition and value was reached. When the word is construed, the intent of the lawmaker, in the section as a whole, is to be regarded, which was to assess duty upon the value in the state or condition of the preparedness of the merchandise for shipment when sold, and to include the expenses of subsequent preparation, and thus to prescribe, with more particularity and accuracy than had been done in section 2906 of the Revised Statutes, the particulars which must enter into the assessment of value. The Brazilian sugar will, after its manufacture, surely lose weight by lapse of time, and it is sometimes stored in Brazil until it becomes dry. It is not material whether it becomes dry by subsequent storage and drainage in Brazil, or whether it is immediately shipped, and becomes dry upon the voyage. The loss in weight and the increase in value are necessary incidents to the sugar of Brazil, and it is dry sugar when it reaches New York. In this state of facts, it is incumbent upon the appraiser to ascertain the value of similar dry sugar in the markets of Brazil, and not to be limited to its invoice price or market value when wet. The decision of the circuit court is affirmed.

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## PICKHARDT et al. v. UNITED STATES.

(Circuit Court, S. D. New York. January 16, 1900.)

No. 2,899.

## CUSTOM DUTIES—DYES.

The dyes known as "alizarin brown" and "coerulein" are not shown to be "derived from anthracin," so as to be free from duty, under Act Cong. 1897, par. 469, by the facts that the presence of anthracin in the colors has been determined by chemical tests, that no chemical examination of the article will satisfactorily disclose the raw materials from which the dye is made, and that the only other sources of information accessible to the government are the statement of the maker or importer, if he chooses to make one, or of the specification in the patent, if there be one, since not conclusive that the word "derived" should be used in its technical or chemical sense of having anthracin as a base, or responding to the chemical tests for anthracin, as distinguished from its ordinary sense.

Appeal by the importers from a decision of the board of general appraisers which affirmed the classification for duty by the collector of the merchandise in question.

W. Wickham Smith, for importers.  
Charles D. Baker, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The merchandise in question comprises various dyestuffs or colors. The only ones to be here

considered are alizarin brown and the dye known as "coerulein." They were assessed for duty under the provisions of paragraph 15 of the act of 1897 as "coal-tar dyes or colors, not specially provided for in this act, thirty per centum ad valorem"; and were claimed as free under the provisions of paragraph 469 of said act, which is as follows: "Alizarin, natural or artificial, and dyes derived from alizarin or from anthracin."

Counsel for the importers concedes that these articles are not artificial alizarin, which, under the decisions of the courts and of the board of general appraisers, is dioxyanthraquinone, and which is the only article included under the term "artificial alizarin," and which is a product of anthracin. Counsel for the importers contends that these colors are dyes derived from anthracin, and that the word "derived" is here to be used in the chemical sense of having anthracin as a base or responding to the chemical tests for anthracin. Upon this he makes the following further contentions, namely: That the presence of anthracin in these colors has been determined by chemical tests; that no chemical examination of the article will satisfactorily disclose the raw materials from which the dye is made; and that the only other sources of information accessible to the government are the statements of the maker or importer, if he chooses to make one, or of the specifications in the patent, if there be one.

I am satisfied, from a careful examination of the evidence and of the exhaustive opinion of the board of general appraisers, that these contentions are not sufficiently proved. The importers have failed to show that the dyes in question were derived from alizarin or from anthracin as a source. They have failed to show that congress intended that the term "derived" should be used in this connection in the technical or chemical sense, as distinguished from its ordinary sense. The decision of the board of general appraisers is affirmed.

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PINNEY, CASSE & LACKEY CO. v. UNITED STATES.

(Circuit Court, S. D. New York. December 28, 1899.)

No. 2,780.

CUSTOMS DUTIES—CLASSIFICATION—SCOTCH HOLLANDS.

Cotton goods used for window shades, known as "Scotch Hollands" or "King's Hollands," stiffened with 20 per cent. of starch, are dutiable under paragraphs 306, 307, and 308 of the tariff act of 1897, being the countable cotton clauses, and not under paragraph 311, as "cotton cloth, filled."

Appeal by the importers from a decision of the board of general appraisers, which affirmed the classification by the collector of the importations in question.

W. Wickham Smith, for importers.

D. Frank Lloyd, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The goods in question are commonly known as "Scotch Hollands" or "King's Hollands," and are used for window shades. Such goods prior to the passage of the



tariff act of 1897 had been classified as "cotton cloths," under the countable cotton clauses. The goods in question were classified for duty, under paragraph 311 of the act of 1897, as "cotton cloth, filled or coated," at 3 cents per square yard, and 20 per cent. ad valorem. The importers protested, claiming that they should have been classified under paragraphs 306, 307, and 308, being the countable cotton clauses of said act. These goods are stiffened with about 20 per cent. of starch. They have also been subjected to a process of beetling, which consists in pounding the cloth in order to give a moire or polished finish thereto, and the effect of which is to flatten the threads, or to bring them closer together. It is conceded that the goods are not coated. The sole question is whether they are cotton cloth, filled. A majority of the board of general appraisers overruled the protest of the importers, but the only member of the board who saw and heard all the witnesses delivered a dissenting opinion in favor of the importers. It is conceded that the provision for filled goods is the more specific one. The testimony as to the meaning of the words "fill," "filling," and "filled" is very conflicting. In England the term "filled" is applied to fabrics which have been weighted artificially by the introduction of glue or of clay, or other inorganic materials, in order to give them a factitious solidity. Some of the witnesses testify that said term has the same meaning in this country. Others testify that the question whether goods are filled or not depends either on the purposes to which the goods are to be devoted, or the percentage of starch, or the character of the material used, while others say that no one of these definitions can be applied, and that the question whether goods are filled or not can only be determined by inspection of the material. In view of these conflicting uses, it is evident that the term "filled" has no sufficiently fixed, uniform, universal meaning in trade or commerce to establish a trade designation. It is admitted that these goods contain no extraneous material except starch. The strength of the government's contention is that starch alone is sufficient to constitute a filling, when used in such quantities as to practically close the pores. But the contradictions and inconsistencies in the testimony of the witnesses for the government concerning the meaning of the term, the standard of determination, the material used, the percentage of starch necessary to constitute such a filling, and as to variations in percentage according to the relative coarseness or fineness of the cotton, and their admission that the term is an elastic one, leave the government's side of this contention so uncertain that it would be impossible to so determine the meaning of the term as to formulate a definite construction, or to establish a standard by which it could be tested. No definition has been suggested which would furnish a reasonable and practical construction, capable of ordinary application in the business of the custom house. One of the witnesses for the importers, McNab, introduced on the hearing one piece of hollands which had been beetled, but not starched. It showed that this beetling process alone had made the interstices between the threads as close as in the goods in question. One of the witnesses for the government introduced an order for goods to be "well filled

up," and testified that in accordance with said order he filled said goods. Upon cross-examination he was asked to produce, and did produce, a sample of said goods, when it appeared that they were neither filled, within the definition of "being occupied to their full capacity," or of "practically closing up the interstices." The goods in question are not filled, in fact, within the foregoing ordinary meanings of that term, or within the definition "to put, pack, or pour into until no more can go in," for it is not contended that these goods have been filled to their full capacity with starch, nor so far filled as to entirely close the interstices; or in the technical sense, as shown by the books treating of this subject, in which it is generally stated or assumed that, in order to constitute a filling, there must be some inorganic material or material other than starch. The testimony of the witnesses for the government conflicts as to whether the method pursued for starching is the same as that used for filling. The uncontradicted testimony shows that all finished goods are starched with a greater or less percentage of starch, and that the amount used is modified according to the purposes for which the article is to be adapted. In view of all the foregoing considerations, it must be held that the goods in question are not filled, and therefore the decision of the board of general appraisers is reversed.

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HENSEL et al. v. UNITED STATES.

(Circuit Court, S. D. New York. December 28, 1899.)

No. 2,312.

CUSTOMS DUTIES—CLASSIFICATION—PICTURE FRAMES.

Paragraph 575 of the tariff act of 1894, admitting free of duty paintings which are works of art, does not include as a part of such paintings ornamental frames in which they are imported, nor are such frames exempt as usual coverings, but are dutiable, under paragraph 181, as manufactures of wood.

Appeal by the importers from a decision of the board of general appraisers, which affirmed the action of the collector in assessing duty upon the importations in question.

Howard T. Walden, for importers.

Henry C. Platt, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The merchandise in question comprises certain gilt and bronze picture frames, assessed for duty at 25 per cent. ad valorem, under paragraph 181 of the act of August 27, 1894, as "manufactures of wood," and claimed to be exempt from duty, under paragraph 575 of said act, as parts of paintings, or as usual coverings. It is clear that these frames are designed for purposes other than to cover and protect the paintings, and that they are designed to give additional attractiveness to the pictures. The only apparent support for the contention of the importers is in the language of the circuit court of appeals in *U. S. v. Hensel* (C. C. A.) 98 Fed. 418, as follows:

"It appears that the treasury department has allowed frames containing pictures, which for some reason had been given free entry by congress, to come in free with the pictures, but in the case of dutiable oil paintings the practice of assessing a separate and independent duty upon the frame has been followed by the treasury department continuously since 1866, and, so far as appears, has never been successfully attacked; nor, indeed, has it ever been presented to any court."

Thereupon the circuit court of appeals, reversing the decision of the circuit court, held that certain frames on paintings subject to duty should be separately assessed, on the ground that where there has been "a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons." Counsel for the government shows by the citation of a great number of treasury decisions since 1875 that duty has been repeatedly assessed on frames as manufactures of wood, where the paintings, for certain reasons, have been admitted free. In the Hensel Case, which was before the circuit court of appeals, the only question involved was that of the duty upon frames where the paintings themselves were subject to duty. Therefore the evidence as to the action of the treasury department on frames containing free pictures was not presented to the court by counsel for the government. I think the general provisions of the act of 1894 for free entry of paintings which are works of art should not be so construed as to include ornamental frames such as those here in question. The decision of the board of general appraisers is affirmed.

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UNITED STATES v. LOEB et al.

(Circuit Court, S. D. New York. January 19, 1900.)

No. 2,699.

**CUSTOMS DUTIES—APPEAL FROM REAPPRAISAL—JURISDICTION.**

Under the provision of section 13 of the customs administrative act of 1890 that the action of a single general appraiser in making a reappraisement "shall be final and conclusive as to the dutiable value of such merchandise, \* \* \* unless the collector shall deem the appraisement of the merchandise too low," the duty of determining whether or not such appraisement is too low is devolved upon the collector, and in the performance of such duty he acts judicially, and his discretion cannot be controlled by his superior officers; hence, when he does not, in fact, deem the appraisement too low, an appeal taken by him by direction of the secretary of the treasury confers no jurisdiction on the board of three general appraisers to review such appraisement, and he is a competent witness to rebut the presumption of jurisdiction arising from the fact of appeal by showing that it was not taken in the exercise of his own judgment.

This was an appeal by the United States from a decision of the board of general appraisers, which sustained certain protests involving the legality of a reappraisement by the board of review of certain imported merchandise.

The decision of the board of classification, written by General Appraiser Somerville, is as follows:

The goods involved in these protests consist of so-called "Swiss embroideries," a small number of handkerchiefs being also included in the importation, all of which were the subject of certain appraisements hereinafter more fully explained. The appraised value of the articles, as ascertained by the local appraiser at the port of New York, was in advance of the invoice value of the goods. The importers called for a reappraisement pursuant to the provisions of section 13 of the customs administrative act of June 10, 1890, which, in each instance, was held accordingly before a single general appraiser, who reappraised the goods, and reduced the advances made by the local appraiser to the extent shown by the record. The collector of customs, being of opinion, as he officially reported, that the appraisements made by the single general appraiser were not too low, declined to comply with the suggestion of the local appraiser that he should transmit the invoices and papers appertaining thereto to a board of three general appraisers for review, under the provisions of said section 13. He did, however, subsequently adopt this suggestion, when requested to do so by the treasury department, under circumstances hereinafter stated, which are claimed by the protestants to have operated upon his official action as a moral and legal duress, it being made to appear that the collector had made no change in his original opinion that the appraisements made by the single general appraiser were not too low. The board of three general appraisers assumed jurisdiction of the cases against the objection of the protestants, who interposed a written demurrer thereto; and the board proceeded to examine and decide the cases under the authority of said section 13. The collector liquidated the entries upon the basis of values ascertained by this board of review, and the importers filed their protests within the time prescribed by law, urging objections to the said liquidation, which are discussed seriatim in this opinion.

1. The first contention of the importers is that the board of three general appraisers never acquired jurisdiction to review the appraisements held by the single general appraiser, for the want of legal compliance with the requirements of said section 13, inasmuch as the collector transmitted the invoice and accompanying papers to the board of three general appraisers under coercion of the treasury department, and in face of the fact that he (the collector) did not deem the appraisal of the merchandise as already made too low. In our judgment, the question of jurisdiction is one which can properly be raised by protest. The rule is well settled by numberless decisions of the courts that, while the valuation of imported merchandise, as appraised by the proper officers, is conclusive upon the parties, "nevertheless the appraisal is subject to be impeached when the appraiser or collector has proceeded on a wrong principle, contrary to law, or has transcended the powers conferred by statute." *U. S. v. Passavant*, 169 U. S. 16, 21, 18 Sup. Ct. 219, 42 L. Ed. 644, and authorities there cited. Any statutory tribunal which assumes jurisdiction not expressly given by law unquestionably transcends the powers conferred on it by statute. The authority of a board of three general appraisers, sitting as a board of classification, duly organized under section 14 of the act of June 10, 1890, to pass upon questions raised by protests of this character, has been held to be precisely coextensive with a like authority conferred upon the courts by section 15. *U. S. v. Klingenberg*, 153 U. S. 93, 102, 14 Sup. Ct. 790, 38 L. Ed. 647; *Passavant's Case*, 169 U. S. 16, 18 Sup. Ct. 219, 42 L. Ed. 644; *In re Taylor*, G. A. 4072; *U. S. v. J. Allston Newhall & Co.* (C. C.) 91 Fed. 525. In *U. S. v. Murphy*, decided by the United States circuit court for the Southern district of New York, per Townsend, J., in December, 1898 (suit 2,704),<sup>1</sup> it was held that a reappraisement of merchandise made by a single general appraiser under the provisions of said section 13 could be successfully challenged by protest, on the ground that the general appraiser who made the reappraisement did not examine any of the goods, nor have before him samples of the same at the time of the reappraisement. When the case was before the board of classification upon protest, that board held that the alleged irregularity was one which could be proved by parol evidence, and was fatal to the jurisdiction of the general appraiser, and, consequently, that his reappraisement was null and void.

<sup>1</sup> No opinion filed.

This view of the law was sustained by the court, and the decision was duly acquiesced in by the treasury department. S. S. 20,538 and 18,959. There is nothing in the suggestion of the government counsel that the so-called "reappraisement board" (or board of review) had a legal right to finally determine its own jurisdiction. If such a claim could be successfully made in this case, it could be sustained with equal propriety in every other case which has gone before the courts for review where a like jurisdiction has been assumed. No tribunal whose decisions are subject to review can lawfully be the final arbiter of its own jurisdiction.

2. The important inquiry in this case, and one not entirely free from difficulty, is whether, under the state of facts disclosed at the hearing and by the record, the board of three general appraisers, organized and acting under the authority conferred by said section 13, acquired jurisdiction to "examine and decide" the case thus submitted. The provisions of said section, so far as they are pertinent to the issues raised by the protest, read as follows: "Sec. 13. The decision \* \* \* of the general appraiser in cases of reappraisement shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein, unless the importer, owner, consignee, or agent of the merchandise shall be dissatisfied with such decision, and shall, within two days thereafter give notice to the collector in writing of such dissatisfaction, or unless the collector shall deem the appraisement of the merchandise too low, in either case the collector shall transmit the invoice and all the papers appertaining thereto to the board of three general appraisers, which shall be on duty at the port of New York, or to a board of three general appraisers who may be designated by the secretary of the treasury for such duty at that port or at any other port, which board shall examine and decide the case thus submitted, and their decision, or that of a majority of them shall be final and conclusive as to the dutiable value of such merchandise against all parties interested therein, and the collector or the person acting as such shall ascertain, fix, and liquidate the rate and amount of duties to be paid on such merchandise, and the dutiable costs and charges thereon, according to law." This board of review, sometimes popularly designated the "board of reappraisement," is manifestly a statutory tribunal, with limited powers and jurisdiction. Appraisers, invested with an analogous jurisdiction under the previous statutes, have sometimes been designated as "quasi judges" or "legislative referees." *Greely v. Thompson*, 10 How. 225, 240, 13 L. Ed. 397; *Rankin v. Hoyt*, 4 How. 327, 11 L. Ed. 996. So, in like manner, the collector of customs is a special statutory officer or tribunal, invested with power to exercise certain specified statutory functions, some of which are purely ministerial and executive, while others are of a quasi judicial character. *U. S. v. Leng* (D. C.) 18 Fed. 15. The rule in reference to all statutory officers and tribunals of this character is well settled, and it is that, where they have jurisdiction over the subject-matter, their determination is conclusive, "except upon a review in such way as the law points out for the correction of errors"; but, as stated in *U. S. v. Thurber* (D. C.) 28 Fed. 56, per Brown, J.: "There is one fundamental exception to this rule: Not only must the officer have jurisdiction of the subject-matter, but he must also keep within the limits of power conferred by statute. Whenever a suit is brought, based upon such officer's action, it is always competent by way of defense to show that the officer has departed entirely from the statute, or acted so contrary to it that his acts are deemed beyond his jurisdiction, and in excess of power; and in such a case what he does in excess of power is illegal and void, and may be shown in defense. Void acts are thus wholly different in their consequences from merely erroneous acts. Mere errors or mistakes in the performance of a duty do not make the officer's acts void. They stand good and valid until reviewed and corrected as provided by law,"—citing *U. S. v. Doherty* (D. C.) 27 Fed. 730, 733, and cases cited. From the letter of the statute (section 13) it is apparent that the board of review could acquire jurisdiction to "examine and decide" these cases only in one of two ways: First, in the event of the importer or other owner of the merchandise giving notice of his dissatisfaction with the decision of the single general appraiser in the time and manner prescribed by said section 13; or, secondly, by the action of the collector in announcing in some suitable way

the fact that he "deemed the appraisement of the merchandise too low." And in both contingencies the collector is required to transmit the invoice and papers to the board of three general appraisers. The importers have expressed no such dissatisfaction, so that the jurisdiction of the board must turn upon the action of the collector.

The law makes the decision of the single general appraiser final and conclusive, unless the collector shall "deem the appraisement of the merchandise too low," acting upon which conclusion he is to transmit the invoice and accompanying papers to the board of three general appraisers. The words "shall deem," as used here, we construe to mean "shall think, judge, or hold an opinion, decide, or believe on consideration," which accords with the definition given by the lexicographers. The formation of this opinion or belief must necessarily involve the exercise of judgment and discretion by the collector, based on proper investigation, and entertained according to the rules of reason and justice. Without a compliance on the part of the collector with this requirement, the board of review would acquire no jurisdiction to decide the case, and any decision made by it would be null and void. It is, in other words, a condition precedent to the exercise of jurisdiction. The rule obtains that, "where the act or thing required by the statute is a condition precedent to the jurisdiction of the tribunal, compliance cannot be dispensed with"; and, furthermore, even if such compliance be impossible, the jurisdiction falls. *End. Interp. St. p. 630, § 443.* Nor can any consent of parties give jurisdiction, so that any statutory provision which goes to the jurisdiction does not admit of waiver. *Cooley, Const. Lim. 493-506.* It has accordingly been held that, where an act provided that justices, at the hearing of a bastardy proceeding, should "hear the evidence" of the mother, and such other evidence as she may adduce, the evidence of the mother was so essential to the jurisdiction of the tribunal that no order could lawfully be made without it, although the woman died before the hearing. *Reg. v. Armitage, L. R. 7 Q. B. 773.* The record here fails to show that the collector deemed the appraisement of the merchandise, as made by the single general appraiser, too low; and the testimony taken at the hearing shows beyond question that he did not deem it too low. It is in evidence that when the local appraiser at the port of New York suggested to the collector that he order a reappraisement of the goods by a board of three general appraisers the collector declined to adopt the suggestion. He expressed himself in a letter to the secretary of the treasury, under date of August 16, 1898, giving his reasons fully for the conclusions he had reached after due investigation. He officially reported to the secretary, after stating his reasons, as follows: "I am satisfied that the appraisements made by the general appraiser are not too low, although considerably less than those of the local appraiser; and I have no good reason that would justify the opinion on my part that the reappraisements as made are too low. Hence I am constrained to deny the request of the appraiser that I order a reappraisement on the 120-odd invoices by the board of three United States general appraisers, unless otherwise instructed by the department." The assistant secretary of the treasury then in charge of the customs division, in reply to this letter of the collector, under date of August 17, 1898, urged upon him the expediency of an appeal from the decision of the single general appraiser. After stating certain reasons, he concludes as follows: "The department has, therefore, to request that you make due application for a reappraisement by the board." It appears from the testimony that this letter was written after consultation with the solicitor of the treasury, and obtaining from him an opinion, verbally given, that "the secretary had the authority to request the collector to make an appeal in such case." The collector seems to have construed this request to be an order or instruction, from the fact that he made the following indorsement upon the papers: "In view of the department's order of August 7, 1898, I hereby order a reappraisement by the board of three general appraisers of the merchandise covered by this reappraisement." Subsequently, on October 7, 1898, the collector, after a personal conference with the assistant secretary of the treasury, made and signed the following indorsement upon the papers: "I hereby appeal from the decision of the general appraiser in this case, under the provisions and in accordance with section 13 of the act of June 10, 1890,

and transmit the invoice to the board of general appraisers for a reappraisalment of the merchandise covered thereby." This form of indorsement was prepared by the assistant secretary. The collector, on being interrogated as to whether or not the treasury department had "insisted" upon a reappraisalment being called for in these cases, or whether he had called for the reappraisements and had placed these two indorsements on the papers of his own volition, replied: "The assistant secretary did not say the department 'insisted,' but he said they 'desired' a reappraisalment." It is not made to appear, however, that the collector had at any time expressed, either in writing or verbally, the opinion that he "deemed the appraisements too low." The latter indorsement does not necessarily convey any such impression, and the first seems to have been made on the theory that the department had instructed him to take the appeal. On the contrary, the collector at the hearing was emphatic in reiterating the truth of the statement which he had officially reported to the secretary on August 16, 1898, and asserted that he had not changed his mind from the opinion expressed in that letter.

We do not feel authorized, from the testimony and the record, to reach any other conclusion than that the collector did not "deem the appraisalment of the merchandise too low," and that he reported no such conclusion to the board of review. The ambiguous phraseology of his second letter seems to have been adopted to avoid the recantation of the opinion on this subject which he had previously expressed to the secretary of the treasury, and as an act of obedience to what he regarded as an instruction from his superior officer, issued in the courteous form of a request. In this view of the case, the action of the collector could not be legally regarded as his voluntary act, but rather that of the secretary, who made the request. It was insisted at the argument, however, that the collector is a subordinate ministerial officer, subject to the control of the secretary of the treasury, who was authorized to give the instruction in question, and the collector was, consequently, bound to obey it. The statute under consideration, as we have said, makes the jurisdiction of the board of three general appraisers (or board of review) to depend upon the action of the collector, and not of the secretary, "unless," it says, "the collector shall deem the appraisalment of the merchandise too low." There is no doubt of the fact that the secretary has the right to instruct collectors as to all administrative matters, where the collectors act in a ministerial or administrative capacity. But the rule is different as to duties which are judicial or quasi judicial in character, the performance of which is made by statute to depend upon the exercise of discretion or judgment on the part of the collector alone. It may be laid down as a proposition generally sustained by the authorities, as well as by reason, that: "Where a statutory power or jurisdiction is granted, which otherwise does not exist, whether to a court or an officer, and in all cases where, by the exercise of such a power, one may be divested of his property, the grant is strictly construed. The mode of proceeding prescribed must be strictly pursued. The provisions regulating the procedure are mandatory as to the essence of the thing required to be done." *Suth. St. Const.* p. 587, § 454; *Potter, Dwar. St.* 224. So, in the case of *Allen v. Blunt*, 3 Story, 742, 1 Fed. Cas. 448, cited in the brief of appellants' counsel, the principle is stated as follows: "In short, it may be laid down as a general rule that, where a particular authority is confided to a public officer, to be exercised by him in his discretion, upon an examination of the facts, of which he is made the appropriate judge, his decision upon these facts is, in the absence of any controlling provision, absolutely conclusive as to the existence of those facts." On this point it has been forcibly observed that "every statute that limits a thing to be done in a particular form, although it be done in the affirmative, includes in itself a negative, viz. that it shall not be done otherwise." *Atkins v. Kinnan*, 20 Wend. 241, 248, citing *Plowd. Comm.* 113. In the light of these principles, it is clear that no one but the collector can decide that he (the collector) deems the appraisalment of any merchandise too low, unless there be some special statutory provision which would authorize the discretion or judgment of the collector to be controlled or dominated by the treasury department, or some other superior power. This authority is sought to be derived, in the first place, from the power conferred on the secretary of the treasury by section 249 of the

Revised Statutes, which empowers that officer to "direct the superintendence of the collection of the duties on imports and tonnage, as he shall judge best." Such a construction of that statute is put at rest by the decision of the supreme court in *Butterworth v. Hoe*, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. Ed. 656. It was there held, after elaborate discussion, that an entirely analogous power of supervision and direction, given to the secretary of the interior over the commissioner of patents, who is for many purposes deemed a subordinate officer, conferred no authority upon the secretary to control the judgment and discretion of the commissioner as to any matter the right to decide which is vested in him by law. In other words, the executive supervision and direction of the department was held to apply to administrative and executive duties only, and not to matters in which the subordinate is directed by statute to act judicially or quasi judicially.

It is further argued on the part of the government that the authority of the treasury department to instruct collectors in this particular manner, if, in fact, there was such instruction, is derivable from either section 2949 or section 2652 of the Revised Statutes. These two statutes are condensations of sections 23 and 24, respectively, of the tariff act of August 30, 1842 (5 Stat. p. 548, at page 566). The former section authorizes the secretary of the treasury from time to time to "establish such rules and regulations, not inconsistent with the laws of the United States, to secure a just, faithful, and impartial appraisal of all merchandise imported into the United States," etc. Section 2652 provides that "it shall be the duty of all officers of the customs to execute and carry into effect all instructions of the secretary of the treasury relative to the execution of the revenue laws, and in case any difficulty shall arise as to the true construction or meaning of any part of the revenue laws, the decision of the secretary of the treasury shall be conclusive and binding upon all officers of the customs." There is no regulation which the secretary has promulgated, under the authority of said section 2949, so far as we can ascertain, which would be at all applicable to this case. The law requires that all such rules and regulations, with the reasons therefor, shall be reported by the secretary to the next session of congress; and we find no regulation which is pertinent to this subject. An instruction given to a single officer, and not promulgated in the form of a general rule applicable to all officers under like circumstances, could scarcely be characterized as a regulation in any proper sense of the word. *Harvey Case*, 3 Ct. Cl. 38, 42. So, said section 2652 relates to the execution of the revenue laws and matters of an executive character. It was not intended to confer any authority upon the department to control or interfere with the decision of any matter or question which the laws of congress expressly relegated to the judgment of any subordinate officer. These two sections were long ago construed by the United States circuit court in *Tucker v. Kane*, Taney, 146, 24 Fed. Cas. 268, decided in the year 1850. It was there held that these statutes did not confer upon the secretary the right to review the judgment of merchant appraisers, nor to exercise any control over their decisions, nor set aside any such decisions because they were believed by him (the secretary) to be against the weight of evidence. To a like effect is the principle laid down in *Gray v. Lawrence*, 3 Blatchf. 117, 10 Fed. Cas. 1031. There are many adjudged cases bearing on the relative authority of the secretary of the treasury and the collector which serve to illustrate the foregoing principles. For example, the various collectors of customs have long been invested with the authority to determine what allowance of goods may be made for reasonable sea stores of certain vessels. This estimate being authorized to be made "within the discretion" of these officers, it was uniformly held by the secretary of the treasury that the decision of the collector as to these matters was neither subject to review nor control by the department. Customs Regulations 1892, art. 107, and treasury decisions there cited. So it has been held that such decisions, being based upon the discretion and judgment of the collector himself, are not subject to review by the courts nor by this board. *An Ullage Box of Sugar*, 24 Fed. Cas. 504; *In re Cunard Steamship Co.*, G. A. 4464. So, in a decision by the circuit court for the Northern district of California in *Re Wise*, 73 Fed. 183, a contention arose as to the proper construction of section 15 of the customs administrative act of June 10, 1890, which confers the right



of appealing from any decision of the board of general appraisers upon "the collector or the secretary of the treasury," when dissatisfied with such decision. The attorney general had given the treasury department an opinion that under the provisions of section 2652 of the Revised Statutes (to which reference has heretofore been made in this opinion) it was the duty of the collector to follow the instructions of the secretary in reference to the exercise of his authority to take such appeals. This opinion was placed upon the ground that a collector was a subordinate officer of the secretary of the treasury, and as such bound by his instructions relating to the revenue laws. 21 Op. Attys. Gen. 203. The circuit court held that, inasmuch as the statute itself conferred upon the collector the authority to take the appeal, and said nothing about obtaining authority from the secretary of the treasury, it was evident that no such authority was required. It would seem to follow logically that, if the secretary is debarred by law from controlling the judgment and discretion of a collector in the exercise of a statutory power which is given alternately to each of them, a fortiori, he could not legally control the decision of the collector as to the exercise of a power vested exclusively in him by statute, such as the power or authority to take an appeal in the case under consideration. A like principle is adduced from the various decisions of the courts bearing on the right conferred by statute upon the director of the mint to estimate quarterly the values of standard foreign coins in circulation among the various nations of the world. Such an authority involves the exercise of judgment and discretion, and has been held to reside alone in the director of the mint, where congress has placed it. It has accordingly been held by numerous court decisions that such findings of value by that officer are final and conclusive, and not subject to review, change, or control, either by the courts or by any other authority, except in the mode and at the time prescribed by law. *U. S. v. Klingenberg*, 153 U. S. 93, 14 Sup. Ct. 790, 38 L. Ed. 647; *Wood v. U. S.*, 18 C. C. A. 553, 72 Fed. 254; *United States v. J. Allston Newhall & Co.* (C. C.) 91 Fed. 525. In *De Forest v. Redfield*, 4 Blatchf. 478, 7 Fed. Cas. 364, such an authority was denied by the court to exist either in the president or the secretary of the treasury, under the general power conferred to make proper regulations for estimating duties on imported merchandise.

In construing the statute under consideration, it is a matter of importance that we should not overlook the fact that the collector of customs has long been invested by law with the authority to direct reappraisement, either by the principal appraiser or by three merchant appraisers, under the old system. *Rev. St. § 2929*; *Elmes*, *U. S. Laws Cust.* 231 et seq. And in case of disagreement between two appraisers the collector was authorized to decide between them, and determine the dutiable value of such imported goods. *Rev. St. § 2930*. He was thus constituted by law *pro hac vice* an appraiser. This was done, no doubt, for the reason that he would always enjoy ample opportunities for informing himself as to the market value of imported merchandise through constant access to the invoices of merchants and the statements of reputable importers. It cannot be supposed that the secretary of the treasury, with his multifarious and arduous duties, would have either the time or opportunities required to make such investigations, there being more than 150 ports of entry in this country, where collectors or surveyors are stationed, and upon whom the exercise of this function is constantly devolved. Our inference, therefore, is that it was not the intent of congress to vest the secretary of the treasury with either the authority to order a reappraisement of merchandise of the kind here under consideration, or to control the collector in the exercise of the discretion conferred on him by statute as to this particular matter. The power to make such an order in one case would necessarily and logically involve the correlative power of compelling the collector, by instructions, to desist from making like orders whenever this course might be deemed advisable by the department. No such authority was claimed at the hearing, nor, in our judgment, has it any just foundation in law.

It follows from the foregoing conclusions that the board of three general appraisers, acting as a board of review, acquired no jurisdiction to hold the appraisements in question, and, being without jurisdiction, their decision advancing the values ascertained by the single general appraiser would be null

and void. In such case duties must necessarily be levied upon the basis of the values ascertained by the single general appraiser, which the law makes final and conclusive in the absence of a valid order for reappraisal under the provisions of said section 13.

Other objections are raised to the validity of the so-called "reappraisements" under consideration, which are as follows: (1) That the reappraisal made by the board of review was irregular and illegal, because, instead of finding the market value per unit of measurement, they advanced the invoices by making additions in the form of a percentage. (2) That the merchandise was not lawfully appraised under either section 10 or section 11 of the customs administrative act. (3) That the board of three general appraisers advanced the value of a portion of the goods without inspecting the goods themselves, or having proper samples of them. In the view we have already taken of this case, it becomes unnecessary to pass upon these contentions, as to the soundness of which many forcible objections, however, can be urged. Inasmuch as this decision involves many other similar protests not now submitted for consideration, and a large amount of the public revenue is at stake, and the principle involved is one of great importance, it is quite probable that the final determination of these difficult questions must lie with the courts. For this reason the other protests will be suspended, the present cases having been agreed on by counsel as fairly presenting the issues involved. Conflicting claims of jurisdiction are naturally at war on their boundary lines, and often result beneficially in obtaining constructions of laws which would not otherwise be interpreted by the courts. It is only by submitting such questions to the final arbitrament of the courts that friction can be avoided between superior and subordinate tribunals, as well as between the different departments of the federal and state governments. The protests are sustained so far as they raise the question of jurisdiction, and the collector's decision is reversed, with instructions to reliquidate the entries on the basis of values as ascertained by the single general appraiser.

Henry C. Platt, Asst. U. S. Dist. Atty.  
W. Wickman Smith, for importers.

TOWNSEND, District Judge. In 1898, Messrs. Loeb & Schoenfeld imported certain embroideries, which were appraised by the local appraiser at a valuation considerably in advance of their invoice value. Under the provisions of section 13 of the customs administrative act of June 10, 1890, they applied for a reappraisal, and the general appraiser reduced the valuation. Thereafter, on August 20th, the collector transmitted the invoice and papers appertaining thereto to the board of three general appraisers, with an indorsement as follows:

"In view of the department's order of August 17, 1898, I hereby order a reappraisal by the board of three general appraisers of the merchandise covered by this reappraisal."

On October 7th he made a new indorsement as follows:

"I hereby appeal from the decision of the general appraiser in this case, and, under the provisions of and in accordance with section 13 of the act of June 10, 1890, transmit the invoices to the board of general appraisers for a reappraisal of the merchandise covered thereby."

This indorsement was pasted above the original one. To this reappraisal the importers objected, claiming that said board had no jurisdiction of the proceedings, because the collector did not deem the appraisal too low. Said board entertained jurisdiction, and examined and decided the cases, and the collector liquidated the entries in accordance with the valuation found by said board. The

importers thereupon protested under section 14 of said act, and the papers were duly transmitted to the board of three general appraisers acting as a board of classification. The question presented is whether said board of classification and this court have jurisdiction to review the action of the board of three general appraisers in reviewing the appraisement of the single general appraiser. The chief contention of the importers is based upon the following provision of section 13 of said customs administrative act:

"The decision of the appraiser \* \* \* shall be final and conclusive as to the dutiable value of such merchandise, \* \* \* unless the collector shall deem the appraisement of the merchandise too low," etc.

Counsel for the importers duly appeared before said reviewing board of three general appraisers, and asked that the testimony of the collector might be taken as to the question whether he in fact deemed said appraisal too low. The board replied that it was competent for the collector to change his opinion within a reasonable time, and declined to hear such testimony, stating that the record showed that the collector did deem said appraisement too low. At the hearing before the board of classification, however, said evidence and other evidence bearing upon the same question was received, from which it appeared that in the official correspondence between the collector of customs and the secretary of the treasury the collector wrote to the secretary of the treasury on August 16, 1898, as follows:

"I am satisfied that the appraisements made by the general appraiser are not too low, although considerably less than those of the local appraiser; and I have no good reason that would justify the opinion on my part that the reappraisements as made are too low. Hence I am constrained to deny the request of the appraiser that I order a reappraisement on the 120-odd invoices by the board of three United States general appraisers, unless otherwise instructed by the department."

The department replied as follows:

"The department has given due consideration to your letter of the 16th inst., in which you set forth the conclusions which you have reached in regard to the reappraisement cases covering Swiss embroideries. While due weight is given to the arguments you present against the expediency of an appeal from the decision of the general appraiser, the department believes that a proper adjudication of the questions involved requires the final verdict of the board of general appraisers. Much evidence has recently been obtained through the reports of Special Agent Whitehead, which has been transmitted to the board, and it is in a position to settle this vexatious matter equitably and finally. The department has, therefore, to request you that you make due application for reappraisement by the board."

The collector further testified before the board that the statement in said official letter that he did not consider the appraisement too low was true when he made it, and that he had not since changed his opinion.

The contention of the counsel for the government, inter alia, is that the secretary of the treasury has the authority to direct or request the collector to take an appeal from the appraisement of a general appraiser irrespective of the opinion of the collector; that the evidence that the collector did not deem the appraisement too low is incompetent and immaterial; that the board of general ap-

praisers on classification passed upon no question except that of jurisdiction; that the only question here is whether the board had or had not jurisdiction, there being no claim that the board of general appraisers on valuation did any illegal act, or made any error in their decision; and, further, that the action of the collector from which this appeal is taken is not a decision as to the rate and amount of duties under section 14 of said act, but is a mere computation, based upon the valuation made by the board of general appraisers. Counsel for the importers claim that it is a condition precedent to the right to review the appraisal of the single general appraiser that the collector shall deem the appraisement too low, that the secretary of the treasury has no power to direct the collector in regard to such appeals, and that said appeal was taken by the collector under the coercion of the secretary of the treasury. It is unnecessary to discuss all the contentions presented in the ingenious, forcible, and exhaustive argument of counsel for the government. If the evidence that the collector did not deem the appraisement too low is admissible, the decisive question is whether the secretary of the treasury had authority to direct the collector to take said appeal irrespective of his (the collector's) opinion. Counsel for the government, in support of his claim that said evidence was inadmissible, cited the following cases: *Cornett v. Williams*, 20 Wall. 226-249, 22 L. Ed. 254; *McNitt v. Turner*, 16 Wall. 366, 21 L. Ed. 341; *Bank v. Dandridge*, 12 Wheat. 70, 6 L. Ed. 552; *Ward's Lessee v. Barrows*, 2 Ohio St. 247. These cases only apply the settled maxim, "*Omnia præsumuntur rite et solemniter esse acta donec probetur in contrarium.*" When it is essential to the right of a public officer to act that a certain state of facts should exist, there is a presumption of the existence of such facts. But it is well settled that such presumptions may be rebutted by proof of lack of jurisdiction. Especially is this so in cases where the question arises as to the legal rights of importers. *Greely v. Thompson*, 10 How. 225, 13 L. Ed. 397; *U. S. v. Passavant*, 169 U. S. 16, 18 Sup. Ct. 219, 42 L. Ed. 644. The question here is not like that in *Muser v. Magone*, 155 U. S. 240, 15 Sup. Ct. 77, 39 L. Ed. 135, where the court stated that appraisers or other officers could not be interrogated as to their mental processes in making a decision on questions of value, provided they acted within their statutory powers, and without fraud. Nor is this a question between a superior and an inferior officer, in which the orders and regulations of the superior officer are binding upon his subordinate. In *Oelbermann v. Merritt*, 123 U. S. 356, 8 Sup. Ct. 157, 31 L. Ed. 164, the question arose whether a certain merchant appraiser was "familiar with the character and value of the goods" appraised, as provided by section 2930 of the Revised Statutes, and whether his incapacity could be proved by his own evidence. The court says:

"In regard to the question whether Mr. Bates was a competent witness to prove that he was not familiar with the character and value of silk velvets, we are of opinion that his evidence on that subject was admissible. As the question of his familiarity with the article and with its value necessarily depended upon the nature, and, to some degree, at least, upon the extent, of his experience in connection with the article, no one could know what that expe-

rience was so well as himself. If he is to be excluded as a witness on the subject, when offered by either side, the court and the jury and the parties would be deprived of the best testimony within reach. There is no ground of public policy which forbids that the merchant appraiser should be a witness to the extent above indicated. The brief of the solicitor general does not urge that the witness was not a competent witness to that extent."

The question, therefore, is whether the secretary of the treasury had the right to order the reappraisement. The word "deem," used in this connection, necessarily involves the exercise of discretion on the part of the collector. His calling and the nature of his business place him in a position where he is necessarily familiar with the value of imported merchandise, and with the facts bearing upon questions of appraisal. In such a determination he exercises his discretion judicially. "It is not consistent with the idea of judicial action that it should be subject to the direction of a superior in the sense in which that authority is conferred upon the head of an executive department in reference to his subordinates." *Butterworth v. Hoe*, 112 U. S. 50, 5 Sup. Ct. 25, 28 L. Ed. 656. The law as to ministerial functions, where nothing is left to the discretion of a person, and where he may be forced to perform a certain act, does not apply to the exercise of such judicial functions. *Association v. Zumstein*, 15 C. C. A. 153, 67 Fed. 1000. It may be true, as urged by counsel for the government, that there is a defect in the tariff laws, in that the secretary of the treasury has not been specifically empowered to order a reappraisement in such cases, as he is alternatively empowered to do under section 15, where he is dissatisfied with the decision of the board of general appraisers on classification; but this is not a matter to be remedied by judicial legislation. The decision of the board of classification sustaining the protests is affirmed.

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LA REPUBLIQUE FRANCAISE et al. v. SARATOGA VICHY SPRING CO.

(Circuit Court, N. D. New York. February 19, 1900.)

**1. TRADE-NAMES—INFRINGEMENT—"VICHY" MINERAL WATER.**

The name "Vichy," as applied to mineral water, is a geographical name used generally by the owners of springs near Vichy, France, to designate the locality of origin, and indicate the general characteristics, of their waters. It is not a trade-mark or trade-name, in a legal sense; and a suit by such owners against a defendant for using the name in connection with artificial waters, or waters of a different origin, can only be maintained on the ground of unfair competition.

**2. SAME—UNFAIR COMPETITION.**

Defendant for many years bottled and sold natural mineral water from a spring at Saratoga under the name of "Saratoga Vichy." No attempt was made to palm it off on purchasers as an imported water, but it was sold on its merits, and the labels were such as could not deceive a person of ordinary intelligence. *Held*, that the use of the name "Vichy" in connection with such water did not constitute unfair competition.<sup>1</sup>

This was a suit in equity for an injunction against infringement of rights in a trade-name. On final hearing.

<sup>1</sup> As to unfair competition in trade, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.

Rowland Cox, for complainants.

Edgar T. Brackett and Walter P. Butler, for defendant.

COXE, District Judge. It is thought that this cause is ruled by the decision in *La Republique Francaise v. Schultz* (C. C.) 94 Fed. 500, recently affirmed.<sup>1</sup> Of course the facts are not alike. They never are. The salient features are, however, almost identical. The principles upon which the decision in the Schultz Case rests are invoked in the case at bar and I see no way to avoid their application. The attempt to distinguish, though ingenious, is founded upon considerations which are too vague and unsubstantial for practical application. They do not go to the merits of the controversy. They make no breach in the principal line of defense. It would be inequitable to punish the defendant with an injunction and an accounting after exonerating the defendants in the former case. Indeed, the defense here is, in some respects, stronger than in the Schultz Case. The defendant's water has been known for 26 years as Saratoga Vichy and the record shows that there has never been an attempt to palm it off on innocent buyers as the imported article. The defendant has sold it upon its merits as a natural Saratoga water. The two are different in appearance, taste and ingredients. The defendant's is a sparkling water and for several years has been sold under a label on which the word "Saratoga" is as prominently displayed as the word "Vichy." It is true that there is a small neck label attached to the bottle on which the name "Vichy" is the more prominent, but in view of the many other distinguishing characteristics it seems inconceivable that any one of ordinary perception can be induced to buy the defendant's water supposing it to be the imported Vichy. An individual stupid enough to be deceived in such circumstances is beyond the aid of a court of equity. In his case a writ de lunatico is a more appropriate remedy than a writ of injunction. The bill is dismissed.

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### HOSTETTER CO. v. E. G. LYONS CO.

(Circuit Court, N. D. California. February 12, 1900.)

No. 12,822.

#### 1. TRADE-MARKS—INFRINGEMENT—PLEADING—PLEAS.

The objection to a bill for the infringement of a trade-mark, that it is insufficient to entitle complainant to relief, because it does not show that complainant has the exclusive right to the trade-name claimed to be infringed, cannot be raised by plea, but must be raised by demurrer, since a defect on the face of the bill.

#### 2. SAME—MULTIFARIOUSNESS.

In a suit for the infringement of a trade-mark, the plea set up as defenses that the bill was insufficient, because not showing that complainant had the exclusive right to the trade-name claimed to be infringed, and that complainant was not entitled to protection in using such name in connection with what it called "bitters," made and manufactured after formulae long known and understood, and not belonging exclusively to complainant. *Held*, that the plea was multifarious, because presenting two separate and distinct issues,—one of law and one of fact.

<sup>1</sup> 42 C. C. A. 238, 102 Fed. 153.

In Equity.

E. Edgar Galbreth and Albert H. Clarke, for complainant.  
Joseph M. Kinley, for respondent.

MORROW, Circuit Judge. This is an action brought for the infringement of a trade-mark by the complainant, a corporation organized under, and existing by virtue of, the laws of Pennsylvania, against the respondent, a corporation organized under the laws of this state, having its principal place of business at San Francisco, Cal. The bill charges that the respondent has sold and is now selling a compound made in imitation of a preparation put up and sold by complainant under the names, "Hostetter's Celebrated Stomach Bitters," "Hostetter's Bitters," "Hostetter," "Host.," and "H. Bitters"; that respondent's imitation is calculated to mislead and deceive the ordinary purchaser, and is sold by respondent either in bulk by the gallon, or in labeled bottles resembling complainant's bottles and labels, or in complainant's bottles, which, having been exhausted, are refilled by respondent with its compound. The bill further alleges that such infringement on the part of the respondent has been practiced by it for a period of five years, that complainant has but recently learned thereof, and that complainant has been injured thereby to the extent of \$10,000, and prays for an accounting of profits and damages, and that a perpetual injunction issue, restraining respondent from all the acts complained of. Respondent has filed an answer denying generally the averments of the bill, and has also filed a special plea accompanying the answer, subject to which the answer has been interposed, and without waiving any of the averments therein contained or the issues thereby raised. This special plea avers: (1) That the bill of complaint is inadequate and insufficient to entitle complainant to relief, in that it does not appear from the bill that the complainant has the exclusive right to use the trade-name "Hostetter's Bitters"; that such name is not a subject of trade-mark or exclusive use, except it be used other and different from the manner in which the complainant uses it with and concerning that class of goods it claims to have the exclusive right to sell. (2) And that complainant is not entitled to protection in using the said name in connection with what it calls "bitters," which are made and manufactured after formulæ long known and understood, and not belonging exclusively to complainant.

The office of a plea, in equity practice, is to present a single issue of fact as a defense, which operates as a bar to the complainant's right of recovery. A demurrer, on the other hand, raises a question of law, and is directed to the sufficiency of the complaint. It is manifest that these two defenses cannot be combined in one pleading, and this is the fatal objection to the present plea. It presents two separate and distinct defenses; the first being that the bill of complaint is inadequate and insufficient to entitle the complainant to relief, in that it does not appear from the bill that the complainant has the exclusive right to the trade-name of "Hostet-

ter's Bitters." If this objection is well founded, it discloses a defect in complainant's case as stated in the bill, but this objection is one that cannot be raised by a plea. A defect upon the face of a bill is to be met, not by a plea, but by a demurrer. In *Farley v. Kittson*, 120 U. S. 303, 314, 7 Sup. Ct. 534, 30 L. Ed. 684, the court said:

"But the proper office of a plea is not, like an answer, to meet all the allegations of a bill, nor like a demurrer admitting those allegations to deny the equity of the bill; but it is to prevent some distinct fact which of itself creates a bar to the suit, or to the part to which the plea applies, and thus to avoid the necessity of making the discovery asked for, and the expense of going into the evidence at large. *Mitt. Eq. Pl.* (4th Ed.) 14, 219, 298; *Story, Eq. Pl.* pars. 649, 652."

It is very certain that a question of law as to the sufficiency of the bill cannot be raised by a plea, and that the first defense set up by respondent cannot be maintained as a plea in bar.

The second defense, that the complainant is not entitled to protection in using the said name in connection with what it calls "bitters," which are made and manufactured after formulæ long known and understood, and not belonging exclusively to the complainant, presents an issue of fact as to the formulæ under which complainant's bitters are made and manufactured, and whether such formulæ have been long known and understood by the public. This defense requires evidence to support it.

The plea, presenting, therefore, two separate and distinct issues,—one of law and one of fact,—is objectionable for duplicity and multifariousness.

In the case of *State of Rhode Island v. State of Massachusetts*, 14 Pet. 259, 10 L. Ed. 423, it is said:

"But the plea put in by the defendant cannot be sustained, even if this were to be treated as a suit between individuals, and tried by the ordinary rules of chancery pleading. It is multifarious, and on that account ought to be overruled. It is a general rule that a plea ought not to contain more defenses than one. Various facts, therefore, can never be pleaded in one plea, unless they are all conducive to a single point, on which the defendant means to rest his defense. This principle is so well established that it is unnecessary to refer to many adjudged cases to support it."

In *McCloskey v. Barr* (C. C.) 38 Fed. 167, Circuit Judge Jackson said:

"It is not usual or in conformity with proper practice for a defendant, without previous special leave of the court, to file several separate pleas, or to protest several distinct and independent defenses in one plea to the suit, for the reason that the defense proper for a plea is such as reduces the cause, or some distinct part of it, to a single point or issue; the object of the plea being to save litigant the expense and trouble of going into the evidence, and a trial at large. In *Mitt. & T. Eq. Pl.* 381, it is said that 'it is generally concurred that a plea ought not to contain more defenses than one, and though a plea may be bad in part, and not in the whole, and may accordingly be allowed in part and overruled in part, yet there does not appear any case in which two defenses offered by a plea have been separated, and are allowed as a bar.' The reason for this rule is fully and clearly explained on pages 382 and 383 of the same work. The plea may consist of a variety of facts and circumstances, without being bad for duplicity or multifariousness, provided they furnish, as their result, one clear ground upon which the equity of the bill, or the



part thereof pleaded to, may be disposed of. 1 Daniell, Ch. Prac. 607; Story, Eq. Pl. par. 654; Didier v. Davison, 2 Sandf. Ch. 61."

See, also, Briggs v. Stroud (C. C.) 58 Fed. 717.

The plea will be overruled.

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EMERSON CO. OF WEST VIRGINIA v. NIMOCKS.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1900.)

No. 303.

1. PATENTS—VALIDITY OF APPLICATION.

An application for a patent for a lumber-drying kiln, introducing a new method for circulation of air in the kiln, which describes the kiln so that one could be readily constructed from the plans and specifications, is not void because it assigns a wrong rule of physics as the cause of the resulting air currents.

2. SAME—ANTICIPATION.

The Emerson patent, No. 535,982, for an improvement in lumber-drying kiln, *held* not anticipated.

3. SAME—INFRINGEMENT.

The Emerson patent, No. 535,982, for an improvement in lumber-drying kiln, *held* infringed as to claims 2, 5, and 6.

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina.

Arthur Steuart, for appellant.

F. H. Busbee and Ernest Wilkinson, for appellee.

Before GOFF, Circuit Judge, and MORRIS and WADDILL, District Judges.

MORRIS, District Judge. This is a suit in equity for infringement of a patent. It was brought upon two patents, Nos. 535,981 and 535,982, but the complainant now relies only upon claims 2, 3, 5, 6, and 9 of the second patent, No. 535,982. This patent, No. 535,982, was issued March 19, 1895, upon application filed June 20, 1894, to the inventor, Victor L. Emerson, assignor to Annette E. Emerson, for an improvement in drying kilns for lumber. The inventor, in his specifications, claims that his improvement consists in the fact that in the kiln constructed by him the heated air is not cooled or discharged from the kiln chamber until it becomes fully saturated with moisture. He states that the object of the invention is to construct a simple, durable, and inexpensive kiln, which will be effective in operation, economical of heat, and wherein sufficient moisture (derived from the material being dried) will be automatically retained during the initial stage in order to keep the exposed surfaces of the material from becoming too dry, and to maintain the surfaces in the best condition until the internal moisture has been extracted. He states that in operation the heated air is first retained, and caused to circulate in a natural way through the material until it reaches a high temperature, density, and humidity; its higher temperature increasing its capacity to absorb

moisture, its greater density insuring its more equal and thorough dissemination throughout the lumber, and its humidity preventing the hardening of the exterior surfaces of the lumber before the interior parts become dry. The inventor then, with great particularity and detail, describes the construction of his kiln by which he accomplishes these results. It is a room into which two lines of cars loaded with lumber can be run, and the entrances closed. External air is allowed to enter into an air chamber in the base, and through an opening goes up and is heated by passing over steam pipes arranged beneath the cars. The heated air then ascends through the green lumber, absorbing the moisture, and losing its heat, and as it cools it becomes heavier, and descends along the sides of the chamber, and follows certain air passages until it reaches the air chamber again, where mingling with any incoming supply of outside air it is reheated and ascends again through the lumber. This process continues until all the lumber is so thoroughly heated and dried that the ascending air does not lose much heat, and the whole chamber is filled with heated air, which rises to the top space of the chamber. From this higher space the inventor provides descending ducts or air passages down which the air falls as it cools, and these ducts are open at their lower ends to the external atmosphere, and thus allows this internal air to escape. The result is claimed to be that in the first stage of the operation the heated air not escaping, but, being reheated and circulating through the lumber, the moisture is not carried off rapidly as it is when the heated air is allowed to escape by direct ventilation through the roof, and therefore for that reason the lumber is not cracked by too rapid surface drying, and also heat is economized; and in the second stage, when the lumber has been thoroughly heated, and the moisture, to a great extent, evaporated, then the air rises to the top spaces of the chamber, and as it cools is allowed to escape slowly through descending ducts, thus creating more circulation, which expedites the drying at the time when it is not hurtful to have the material dry more rapidly.

The essentials of the construction of a kiln embodying the inventor's scheme is perhaps most fully expressed in his claim 6:

"A drying kiln having in combination a drying chamber containing double tracks, so arranged as to provide vertical air-circulating passages between the loaded cars upon the tracks in the drying chamber, means in the drying chamber for supplying heat, communications from the drying chamber extending down and below the means of supplying heat, and thence opening again into the drying chamber, and descending air outlet passages having their upper parts open to receive moist air from the drying chamber, and provided with exits to the external atmosphere, substantially as shown and described."

Taking the drawings and the specifications and this claim, it would seem that a person at all skilled in the construction of a drying kiln for lumber could construct the patented kiln, and one which would embody all the contrivances the inventor has deemed essential. It is argued by the defendant that the specifications are ungrammatically expressed, prolix, misleading, and are erroneous in their statement of the scientific principles which govern the movement of the currents of air. Nevertheless, I can see no reason why

a skilled person attempting to construct a kiln according to the specifications and the drawings of the patent should not be able to do it. It is urged against the patent that the specifications assert that the air descends in the inside passages because it has become heavy by taking up the moisture from the lumber, whereas in fact it descends because it has become cooler; and it is objected that the specifications assert that in the second stage the air is siphoned off by the outside ducts into the external air because it has become so saturated that it will not absorb any more moisture. Persons of ordinary education do not know why currents of air ascend or descend, except as they are told by scientific experts; and Emerson was no doubt wrong in the causes he assigned for the movements of the currents created in the chamber during the heating process. But if the currents are created and circulate and accomplish the drying, and are made use of beneficially at first by an internal circulation and then by a circulation which escapes to the outward air slowly through the inverted ducts in the manner and by the means which the inventor has described in his specifications, and shown in his drawings, and claimed as his improvement, it does not appear to us that it matters at all that the inventor was wrong in supposing that air saturated with moisture is heavier than dry air of the same temperature, provided it is the fact that the currents in the complainant's kiln for any scientific reason do flow as the inventor states they do, and the beneficial results are produced; and it makes no difference that he called the downward ducts siphons, and thought they acted on the principle of siphons, provided they effect the beneficial result intended by him, and in the manner he intended. The inventor states in his specifications that in ordinary kilns the highly-heated air escaped rapidly through the direct vertical outlets in the roof, and, there being a direct draft, there was a waste of heat, and a too rapid drying of the lumber; and this is consistent with common knowledge and supported by testimony. He claims that in his improved kiln the hot air, even after its preliminary circulation through the material, cannot escape by a direct outlet, but must descend through the side ducts, and only escapes slowly, and only when it has reached the openings much lower down. It makes no difference in the construction or operation of the kiln whether the fact is that the air descends and escapes slowly because it is heavy with moisture, as the inventor thought, or because it has become cooler than other air in the kiln, as the scientists instruct us. If the current moves and escapes just as the inventor provided it should, and by the means he has provided, and produces the useful result he intended, can it make any difference in the validity of the patent that he was mistaken in his explanation of the physical causes of the downward direction of the currents? The fact is clearly stated in the specifications that all the outlets from the drying chamber must be downward, and discharge into the external air below their interior connection with the chamber, so that only the air which is heavier, and tends downward, can escape; and he claims that the heat will in this way be economized, and the drying proceed in the manner most beneficial to the lumber. This is strictly true, and its resultant benefit is the

improvement claimed by the inventor. He describes the process, the mode of operation and the result, and the means for obtaining it. The scientific principle is not part of the process, is not patentable, and need not be set forth. *Eames v. Andrews*, 122 U. S. 40-55, 7 Sup. Ct. 1073, 30 L. Ed. 1064. The granting of the patent raises a presumption of utility which has not been overthrown.

Stress was laid in the opinion of the learned judge who heard the case below upon the fact that it had been found that the spaces LL in the drawing, being a widening of the kiln above the lumber and over the down ducts to the external air, are not necessary, and in practice are discarded. It is apparent that, while these spaces might to some extent facilitate the operation the inventor was seeking, they add considerably to the cost of construction, and in the cheaper form of kiln, shown in figure 2 of the drawings of the patent, they are omitted. They are not mentioned in any of the combinations described in the claims now sued upon. They therefore are not described as essential to the operation of the invention, and may not be worth the additional cost they entail; and it is apparent that they were not considered by the inventor indispensable, for he omits them in many of his claims and in one of his two drawings. There is no ground, therefore, to contend that the inventor introduced the spaces LL in order to mislead and deceive as to his real invention.

We have examined the prior patents cited as anticipations, and find but one which suggests the devices necessary for the first stage of interior circulation, and not one which suggests the descending outlet passages with exits to the external air. They are mostly devices for deflecting the heated air through the lumber, or means for taking up the condensed moisture, so that the partially cooled air of the kiln could be reheated and used again. The patent to Morton & Andrews—No. 426,463, dated April 29, 1890—has openings at the top of the kiln into a space between the outer and inner walls of the kiln, and, descending in that inclosed space, the air loses its moisture by condensation against the outside wall of the kiln which is of metal, and then, being partially cooled, is returned to the heating coils. This is, in substance, the first stage in complainant's method, except that complainant's kiln does not require an outside covering of metal, and the descending air is inside the inner wall of the kiln, and condenses its moisture on the ground below the heating coils. But there is nowhere suggested in Morton & Andrews' kiln the second stage of the operation of complainant's kiln, or the devices by which the process towards the end is accelerated by the increased circulation caused by a moderate outflow of the air of the kiln through the downwardly discharging ducts into the open air. With respect to the patent to H. S. Servoss,—No. 469,067, February 16, 1892,—we think it obvious that it is only a more elaborate device for providing metallic ducts or passageways for the air from the top of the roof and the sides of the kiln down into the space beneath the heating coils to produce the same result as in the kiln of Morton & Andrews, namely, to maintain an internal circulation with devices for condensing the moisture of the heated

air. It has no suggestion of the second stage of complainant's operation by which a slowly-moving current into the open air is established. So far as we can judge from the proofs in the case, this combination found in the complainant's patent was new, and the presumption that it is useful has not been overthrown.

It remains to consider whether the defendant has infringed. The defendant's kiln was constructed by the Moore-Cain Dry-Kiln Company under patents granted to Lafayette Moore. The first is No. 524,598, dated August 14, 1894. This patent describes a tight kiln, without openings to the external air except those which admit cold air to the heating coils. It provides for spaces around the lumber for the circulation of the heated air, so that, as it cools, it falls to the bottom of the chamber, and its moisture is absorbed by the earth or sand of the bottom. Its distinctive feature is the earth or sand bottom and the absence of any flues or openings for the escape of the heated air. The advantages claimed are the rapidity of the operation, the moist condition of the whole interior, and consequent lessening of the risk of fire, and the freedom from cracks in the lumber due to the continued moisture. It is expressly stated that the final drying does not take place in the kiln, but only when the lumber is taken out and exposed to the open air. The second patent to Lafayette Moore is No. 554,134, dated February 4, 1896, upon application filed January 12, 1895. Emerson's patent now in suit was issued March 19, 1895, upon application filed June 24, 1894, so that the Emerson patent is prior by nearly a year. The Lafayette Moore second patent is stated to be an improvement on his first patented kiln, and aims to increase its capabilities by placing inclosed side flues leading from near the top of the kiln down the sides to the bottom near the places where there are openings to the external air. The devices added to the kiln of the first patent were the descending ducts or air passages and the openings to the external air, and these were precisely the two devices which Emerson had already obtained a patent for, and which distinguished his kiln from the prior tightly-closed kilns from which the heated air was not allowed to escape. The difference between the Emerson patent and the second Moore patent is to be found, not in what was done, but in the reason which Moore in his specifications has given for doing it. Emerson had said in his specifications that he introduced the downwardly discharging ducts with external openings for the purpose of carrying off the moisture-laden air when it was no longer required, and to produce a moderately increased circulation for the final drying of the lumber while in the kiln. Moore says he introduced the descending air passages in order to conduct the air at the top of the kiln to the bottom, so that there coming in contact with the incoming air flowing in through the new external openings its moisture would be condensed, but its remaining heat be availed of, and he asserts that the movement of air through the new outside openings is all inward, and none of it goes outward. On the issue of fact as to whether, in the defendant's kiln, there is any outward movement of air from the apertures at the bottom of the descending air passages there is

conflict of testimony. The excuse for the conflict may, we think, be found in the testimony of one of the complainant's witnesses, who testifies that there were three apertures, each about two feet square, on each side of the Moore-Cain kilns, like the defendant's; that there were two currents to be observed,—one at the bottom of the aperture, flowing inward, and the other near the top, flowing out,—and that a handkerchief held fast at the top and free at its lower edge would be affected only by the lower current, and would indicate that the current was all inward. One of the defendant's witnesses testified that the reason these large apertures were cut into the sides of the defendant's kiln was because it had been found in the Moore-Cain kiln that the air which entered the ends was not uniformly distributed, so that the lumber in the middle did not dry as well as that at the ends, because it did not get a sufficient supply of air. This statement is difficult to understand, for this class of kilns are built without outlets except such accidental escapes of air as come from cheap or defective construction. There are four openings, two at each end, for the constant inflow of air to supply this accidental escape. Moore, in his specifications, states that his kiln is practically an air-tight structure, and that the heated air is to be used over again and again without appreciable loss of heat. The chamber is full of air at the commencement of the operation. These four inlets are provided. There are no outlets except accidental cracks, and it is difficult to conceive how three additional openings on each side, each two feet square, could be required to supply the accidental escape of heated air. It seems impossible that, if all that was needed in the Moore-Cain kiln was a freer and better distributed supply of air for internal circulation, some way could not be devised to supply it without making the openings at or near bottoms of the descending side air passages, thereby incurring the risks of this suit, and its great attendant costs and expenses; and it is strange that the Moore-Cain Company, which is defending this suit, should put forward the most technical defenses, and make the most strenuous efforts to exclude testimony, and to have the complainant's patent declared invalid, rather than employ some simple device for supplying the air without the risk of infringement. We cannot escape the conclusion that the descending air passages and the openings into the outside atmosphere at or near their lower ends in defendant's kiln are used, and their use persisted in, because they do produce the same beneficial results produced by the descending air ducts and openings in the complainant's patent. We agree with the learned judge below that the incorporation of the complainant is sufficiently proved, that certain answers of the expert Reid were to be excluded, and we have not regarded the testimony of the witness Ulman, taken after the refusal to allow the complainant further time in which to take testimony. Our conclusion is that claims 3 and 9 are somewhat obscure, and the question of infringement as respects them is not without doubt, but claims 2, 5, and 6 we hold are valid, and that the defendant has infringed them. The decree below is reversed as to the claims 2, 5, and 6 of patent 535,982, with directions to enter a decree find-

ing that the defendant has infringed those claims, and for an injunction and an account. The appellee is to pay the costs of this appeal.

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SCOVILLE MFG. CO. V. PATENT BUTTON CO. et al.

(Circuit Court, D. Connecticut. Februar/ 5, 1900.)

PATENTS—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

Where the question of infringement is a nice one, which cannot be satisfactorily determined on affidavits, and the defendant is financially responsible, a preliminary injunction will be denied.

This is a suit for infringement of a patent. On motion for preliminary injunction. Denied.

Mitchell, Bartlett & Brownell, for complainant.

George Cook, for defendants.

TOWNSEND, District Judge. Motion for preliminary injunction against infringement of patent No. 598,021, granted to Shipley & Hyde, January 25, 1898, for a tack-fastened button. The claims in suit are as follows:

"(1) A button, formed with a shank having secured in the bottom thereof a clinching anvil, the lower plate of the latter resting against the bottom of the button proper, and serving as a bearing for the upset end of a button fastener, substantially as described."

"(7) A button having a face and shank, and a dome-like anvil, having a reinforce or washer, and positively secured in the base of the shank, and thereby rigidly restrained from outward movement, the anvil serving to turn the point of the fastening, and the reinforce or washer receiving the turned point of the fastening, and thereby reinforcing the base of the shank, substantially as described."

Defendants are estopped to deny priority by reason of having been in interference. The defendant Platt was the first to conceive this button, but was defeated in the interference proceedings, because he had not used due diligence in reducing his conception to practice. Defendants manufacture their buttons under patents No. 568,546, to defendant Clark M. Platt; No. 607,452, to Franklin G. Neubert; and No. 635,706, to Franklin R. White.

The question of infringement is complicated by the inconsistencies in the contentions and statements of both sides, in the interference proceedings, as to the scope of said patents and the meaning of the terms therein used. The issue involved is one of functional construction. All the buttons in question comprise a shell or button body, and a dome-shaped circular piece inserted therein, the latter serving as an anvil to upset the point of a tack driven through the fabric and into the button.

The alleged invention is so narrow that it is difficult to state in what it consists. The court of appeals of the District of Columbia found as follows:

"The matter in issue is a button which is to be fastened to a garment by means of a tack driven through the garment into the button head, and its point upset or clinched by means termed a 'die' or 'anvil.' The feature that lends patentability to this particular button is the form of anvil, which is

made crown or dome shaped, with its base, which is provided with an opening for the insertion of the tack, resting upon the back piece or bottom of the button. This anvil performs two functions when the parts of the button are properly assembled, viz.: (1) To reinforce the bottom of the button; and (2) to upset the end of the tack or rivet. When upset, the end of the tack bears against the bottom of the die."

Such anvils or dies and such reinforcers were old. The defendants contend, in view of the history of said patent and of the prior art, that said claims must be limited to a button having a flat bottom, and a die or anvil having a flat bottom, and that these two shall be turned inwardly to the same extent, so as to so mutually reinforce each other that the strain will come on the bottom plate of the die instead of on the metal surrounding the opening in the bottom of the button. This was the contention of the representatives of complainant during the whole course of interference proceedings. Complainant's representatives then contended, also, that buttons such as those now alleged to infringe had no bottom, and therefore that there was nothing for the die or anvil to reinforce.

Counsel for defendants says: "The largest opening which can be made in the bottom of a button to be used with a tack is smaller than the smallest opening in the bottom of our eyelet buttons." It is true that in defendants' "eyelet buttons," so called, the hole is so large, or, rather, there is so little bottom, if any, that an upset tack would fall out. Therefore, while there is a flange or knurl which may be called a bottom, it is not functionally a bottom, in the sense of supporting a tack, and therefore the washer does not reinforce it. In defendants' button there is no "plate \* \* \* resting against the bottom of the button proper," but only a thickened edge curled up on itself. In said interference proceedings complainant acknowledged and contended that these were different constructions. In its later patent to Ashley it covered, by claim 6, an upturned edge, such as defendants use, as an invention distinct from that of the patent in suit.

Defendants claim that their buttons are manufactured in accordance with their patent to defendant Platt, No. 568,546. The construction of this patent is admitted by complainant to have been outside the interference, and therefore not to infringe. The only difference between defendants' construction and that of said patent to Platt is that their buttons have a somewhat increased flange or bottom varying in degree, without necessarily any functional difference, although, possibly, with a greater resistance as said flange is enlarged. But in any case it is questionable whether said bottom has any infringing function of reinforcement, or any function other than that of said Platt patent. The defendants are admittedly financially responsible. The nice question of infringement raised by the varying degrees of resistance surface cannot be satisfactorily settled on affidavits. The defendants manufacture under three patents, apparently in the same field with that of complainant's patent, but which are not at present sufficiently shown to be improvements thereon or infringements of the first and seventh claims thereof. The motion is denied.



**BOWERS v. PACIFIC COAST DREDGING & RECLAMATION CO. et al.**

(Circuit Court, N. D. California. January 15, 1900.)

No. 11,949.

**1. PATENTS—INFRINGEMENT—EVIDENCE.**

The granting of two patents for similar devices is not conclusive of a lack of identity between such devices, but one may be merely an improvement on the other, the patent for which does not give the patentee any right to use the completed device described therein, without the consent of the prior patentee.

**2. SAME—DREDGING MACHINES.**

The effect of the construction given by the courts to the Bowers patents, as covering pioneer inventions in the art of dredging, is to entitle the patentee to make broad generic claims for his inventions, without limitation as to the form of construction of the particular elements, and to render all subsequent machines infringements which employ substantially the same means to accomplish the same results.

**3. SAME.**

The Bowers patent, No. 318,859, for a dredging machine, claims 9, 11, 12, and 13, and No. 318,860, for the art of dredging, claims 3 and 5, are infringed by a dredging apparatus constructed in accordance with the Parker patent, No. 601,524, which employs an equivalent device, within the broad construction to which the Bowers patents are entitled, for swinging the dredge boat from side to side while in operation.

**4. SAME—ROTARY EXCAVATOR.**

The rotary excavator covered by the Bowers patent, No. 318,859, claims 10, 13, 53, 54, 59, and by No. 318,860, claim 5, is infringed by a rotary excavator having a side feed, an inward delivery through itself, and operated in a similar manner, although the dredged material is forced inward more by the current of water drawn into the suction pipe, and less by the action of the cutting blades, than in the one described in the patents.

**5. SAME—VIOLATION OF INJUNCTION—PUNISHMENT FOR CONTEMPT.**

When a defendant, after hearing, has been perpetually enjoined from infringing complainant's patent, it is his duty, before employing a device which may infringe, to obtain the opinion of the court thereon; and, if he fails to do so, the fact that he acts in good faith, or on the advice of counsel, is no protection against punishment for contempt, when it is adjudged that such device in fact infringes.

On order to show cause why respondents should not be punished for contempt in violating a writ of perpetual injunction issued under interlocutory decree.

J. H. Miller, for complainant.

R. Percy Wright (D. M. Delmas, of counsel), for respondents.

**MORROW**, Circuit Judge. This is a proceeding against the respondents for violating a perpetual injunction issued upon an interlocutory decree entered in this case December 12, 1898. It was there adjudged and decreed that the letters patent of the United States, No. 318,859, bearing date May 26, 1885, for a "dredging machine," granted by the government of the United States to Alphonzo B. Bowers, the complainant, were good and valid in law as to claims 9, 10, 11, 12, 13, 16, 22, 25, 53, 54, 59, and 87, and that the said Alphonzo B. Bowers was the original and first inventor of the invention described in said letters patent, and claimed and patented in and by the said above-specified claims, and each of them;

that the letters patent of the United States, No. 318,860, bearing date May 26, 1885, for the "art of dredging," granted by the government of the United States to Alphonzo B. Bowers, complainant, were good and valid in law as to claims 3 and 5 thereof; and that the said complainant, Alphonzo B. Bowers, was the original and first inventor of the inventions described in said letters patent, and claimed and patented in and by the said above-specified claims, and each of them. It was further decreed that the respondents, the Pacific Dredging & Reclamation Company and John Hackett, and each of them, be enjoined and restrained from making, using, or selling any dredging machinery, appliances, or apparatus containing the inventions claimed, covered, and patented in and by the claims mentioned in the decree, and also from infringing in any manner whatever upon any of the above-specified claims. On January 21, 1899, the complainant filed affidavits charging the respondents, the Pacific Coast Dredging & Reclamation Company and John Hackett, with contempt of court, in having violated the injunction issued against them, in the infringement of claims 9, 11, 12, 13, and 87 of patent No. 318,859, and claims 3 and 5 of patent No. 318,860. Thereupon an order to show cause was issued and served upon the respondents, and in March, 1899, the matter came on for hearing. The affidavits on the part of the complainant alleged that the respondents were engaged in dredging on the San Joaquin river, near the mouth of Stockton channel, and near the city of Stockton; that the work in which the respondents were engaged was the deepening of the river channel by excavating the material therefrom and depositing it on the shore. The apparatus used was a hydraulic dredger, photographs of which were taken, and attached to one of the affidavits. A model of this machine was produced in court upon the hearing. It consisted of a dredge boat, with an excavator, and a practically rigid line of discharge pipe, with joint or hinge connections, and suitable apparatus for operating the excavator, and for drawing the spoils from the excavation through the excavator, and for discharging the same at a distance through the discharge pipe. The complainant's dredger, alleged to have been infringed, consists, also, of a dredge boat, with an excavator, and a line of flexible discharge pipe flexibly connected with the dredge boat at or near a pivot or center of oscillation. In a general way, the two machines perform substantially the same function in the operation of dredging, and in transporting to and depositing the dredged material at a distant point. Indeed, it is evident from an inspection of the two devices that the builder of respondents' dredger, while departing from the mechanism of complainant's machine in some of its details, has nevertheless adopted its general idea of construction, and has secured at least some of the advantages of its method of operation. But the respondents justify the construction and operation of their machine on the authority of a patent numbered 601,524, issued by the United States to John R. Parker on the 29th day of March, 1898, for a dredging apparatus. This fact does not, however, conclusively establish the absence of identity. Two patents may be valid when the second invention is merely an improvement

upon the first, and, when the second includes the first, neither patentee can lawfully use the invention of the other without his consent. *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017; *Caster Co. v. Crossman*, 4 Cliff. 568, 22 Fed. Cas. 1133 (No. 13,321). It is true that every patent is *prima facie* evidence of the novelty of the invention described in the patent, but the invention patented is the invention set forth in the claim, and that only. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 278, 24 L. Ed. 344; *Railroad Co. v. Mellon*, 104 U. S. 112, 118, 26 L. Ed. 639; *Manufacturing Co. v. Greenleaf*, 117 U. S. 554, 559, 6 Sup. Ct. 846, 29 L. Ed. 952. The identity or lack of identity in two patented inventions for similar devices must therefore be determined by a comparison of the claims of the two patents. The claims of complainant's patent No. 318,859, alleged to have been infringed, are as follows:

"(9) A dredge boat, having a self-contained pivot, forming a center of oscillation, with devices for swinging and working said boat upon said pivot, in combination with a suction pipe and exhausting apparatus." "(11) A dredge boat, having a self-contained pivot or center of oscillation, with devices for swinging and working said boat upon said pivot, in combination with a pipe for discharging the spoils. (12) In a dredging apparatus having a side feed and self-contained pivot or center of oscillation, a discharge pipe, flexibly mounted at or near said pivot, to allow said apparatus to swing without material alteration of the position of said discharge pipe. (13) In a dredging machine having a device for excavating from side to side of the cut, a discharge pipe extending from a discharging apparatus to or near a center of oscillation, where it is provided with a hollow, flexible joint, or other suitable connection, and is prolonged thence to a place of discharge." "(87) In combination with a dredge boat having devices for swinging and working said boat with a side feed, a hauling line having connection direct from the anchorage to the excavator support, and near the point of resistance, and arranged to throw a large portion of the strain of the side feed on the outer end of the apparatus carrying the excavating device."

The claims of complainant's patent, No. 318,860, alleged to have been infringed, are as follows:

"(3) The improvement in the art of dredging, which consists in oscillating the boat on a contained center, thereby making an arc-shaped cut during the side movement of the boat, substantially as described." "(5) The described method of dredging, which consists in oscillating the dredge boat on a center, and by such oscillation forcing an excavator continuously sidewise, thus making an arc-shaped cut, and drawing the excavated material inboard by suction."

The first of these patents was before this court in the case of *Bowers v. Von Schmidt*, 63 Fed. 572. In that case the defendant was proceeded against for infringing claims numbered 10, 16, 25, 26, 33, 53, 54, 59, and 75 of this patent, and also for infringing certain claims of another patent, not involved in this action. The defendant in that case justified the use of his machine under several patents,—among others, a patent issued to him, numbered 185,600, dated December 19, 1876, for a "machine for dredging sand and mud from bars, rivers, harbors, and docks," and also under a patent issued to him, numbered 277,177, dated May 8, 1883, for an "excavating, curved, rotating plow for submarine work." The court held that complainant's patent No. 318,859 was valid, and covered inventions of a pioneer

character, and that the claims were entitled to a broad construction. It was further held that the defendant had infringed claims Nos. 10, 16, 25, 53, 54, and 59. The case was taken to the court of appeals, where complainant's patents were fully considered, and the judgment of the circuit court affirmed. 25 C. C. A. 323, 80 Fed. 121, 48 U. S. App. 120. In the present case the pioneer character of the Bowers invention was assailed at the trial by evidence of certain prior inventions relating to dredgers, which it was said had not been before this court or the court of appeals in the prior case, and which, it was claimed, anticipated Bowers' patent. Among others, there was introduced in evidence an English patent to Louis Schwartzkopff, of Berlin, dated August 9, 1856, for "apparatus for raising mud and soil from the bottoms of rivers." 91 Fed. 381. The defense based upon this prior invention, as showing the state of the art at the time Bowers applied for his patent, was pressed upon the attention of the court with great ability and zeal, and the opinion of the court was directed mainly to the consideration of that defense. After a careful examination of that device and its method of operation, it was determined that while the Schwartzkopff patent disclosed, in a general way, the idea of a dredging machine intended to operate as the Bowers machine does, it did not describe a machine which was effective to carry such an idea to a successful result. This conclusion necessarily left the claims of the Bowers patent entitled to the broad construction of pioneer invention, as held by the circuit court of appeals in the case of *Von Schmidt v. Bowers*, supra. What was the effect of this broad construction upon the claims of the Bowers patent? It was that Bowers being a pioneer inventor, and entitled to make broad generic claims for his inventions, without any limitation as to the form of construction of the particular elements, all subsequent machines which employ substantially the same means to accomplish the same results are infringements, notwithstanding the fact that the subsequent machines may contain improvements in separate mechanism which go to make up the machine. *McCormick v. Talcott*, 20 How. 402, 15 L. Ed. 930; *Railroad Co. v. Sayles*, 97 U. S. 554, 24 L. Ed. 1053; *Clough v. Barker*, 106 U. S. 166, 1 Sup. Ct. 188, 27 L. Ed. 134; *Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co.*, 113 U. S. 157, 5 Sup. Ct. 513, 28 L. Ed. 939. This was the scope of the injunction served upon the respondents. It commanded the respondents not to make, use, or sell any dredging machinery, appliances, or apparatus containing the inventions claimed, covered, and patented in and by the claims mentioned in the decree, and also from infringing in any manner whatever upon any of the specified claims. The question is, have the respondents violated the injunction with respect to any of the claims of complainant's patents in the making and using of a machine under the claims of the Parker patent? In the application for the Parker patent, the inventor declared in his specifications the particular improvement in dredging apparatus which he claimed to have made. He says:

"My invention relates to dredging apparatus, and more especially to that portion of the apparatus by which the material is transferred from the plows or diggers by which it is excavated to a distant point, where the dredged mate-

rial is to be deposited, and in a means for advancing the digging apparatus as fast as it is required for the purpose of excavating in fresh ground."

He further points out the particular features of prior inventions for which he proposes to substitute his improvements, and says:

"In some forms of dredging apparatus the discharge pipe consists of a series of sections which are flexibly joined together, and supported upon floats or pontoons, and the pipe is so curved as to be of a considerably greater length than the distance between the dredging apparatus and the point of deposit, so as to enable the dredge to be advanced from time to time by gradually straightening out the curved sections to allow of this advance."

The inventor here refers to the form of discharge pipe employed in complainant's dredging apparatus, and he proceeds to distinguish the form of his discharge pipe from that of the complainant, in the following description:

"In my invention I employ rigid sections of discharge pipe, having suitably tight and essentially rigid joints, whereby they are united together, the whole forming a discharge pipe which may be supported upon the bottom of the stream, estuary, or other water way, if it is necessary to cross such water way; or it may be supported upon the land, if the digging is sufficiently near for the purpose; or if the digging takes place at a distance, across a considerable body of water, the pipe may be supported upon floats or pontoons so anchored in the line of direction of the pipe that the latter will be supported in as nearly a straight line as can be effected with such changes of direction as may be required made by the use of elbows, curved sections, or equivalent joints inserted at intervals between the pipe lengths, and the pipe is thus held in as nearly a rigid line as the effect of the wind and waves upon its supports will allow. The essence of this construction is the fixing of the conveying pipe without flexible joints as rigidly as possible, and as nearly in straight lines from the point of the reception of the dredged material to the point of delivery as can be maintained, and the connection therewith of a telescopic section of any desired length, which is extensible in the line of the pipe, without flexibility, for the purpose of advancing the excavating apparatus from time to time."

He then proceeds to describe his improvements in detail, and concludes with his claims, which are 13 in number. The first claim is as follows:

"A dredger and telescopic section of discharge pipe, the latter firmly anchored in position, and rigidly joined to other sections of discharge pipe extending to the place of deposit for dredged materials, and a joint connecting the telescopic section with the dredger to allow the dredger to move from side to side when at work, and to move ahead as the work progresses, without disturbing said fixed section of discharge pipe."

The telescopic section of discharge pipe described in this claim is one of the essential elements of the combination, and is the device for advancing the digging apparatus as fast as it is required for the purpose of excavating in fresh ground. It is described as part of the combination in substantially the same language in all the claims, except the eighth and ninth. The second claim is as follows:

"In a dredging apparatus, a fixed conveying pipe having the receiving end supported and anchored, a telescoping section slidable longitudinally in said fixed portion, an excavator with suction and discharge pipes, said pipes being hinged at the rearward end to the first-named anchored section."

The fixed conveying pipe described in this claim is also one of the essential elements of the combination. It is described in claim 3 as

a pipe line composed of sections rigidly united together, and this description is repeated as part of the combination in substantially the same language in all the claims, except in the eighth and ninth. In the eighth and ninth claims the telescopic section and fixed conveying pipe are omitted, and a peculiar double-edged cutting dredger is described. These claims are as follows:

"(8) The combination with the suction pipe of a dredge having an opening in the lower side of the front end, of a cutter curved downwardly to form a loop with cutting edges upon both sides, whereby material may be excavated and delivered into the suction pipe by moving the latter transversely to either side. (9) The combination with the suction pipe of a dredge having an opening in the lower side of the front end, of a cutting blade curved downwardly to form a loop beneath the pipe opening, and having cutting edges upon each side, and plates projecting transversely upon each side of the rear of the cutter."

In the 13 claims of this patent these three elements, namely, (1) a telescopic section of discharge pipe, (2) a conveying pipe consisting of rigidly united sections, (3) a double-edged cutting dredger, constitute the improvements claimed by the inventor; and the first two are the essential elements required to enable the dredger to be fed forward from time to time as the work progresses, without moving the entire discharge pipe at each advance, and without the employment of the flexibly jointed sections contained in complainant's invention. Whether Parker was the inventor of these devices does not appear to be seriously questioned in these proceedings, and, for the purpose of the present inquiry, it may be assumed that these elements were improvements for which a patent might properly have been issued to the inventor. But it is clear that these three devices were not of themselves sufficient to be brought together as a combination, and operated as a dredging apparatus. It was necessary that they should be connected in some way, and the combination so united as a dredger as to be capable of performing the function for which it was designed. Is there, with respect to the claims of complainant's patent, an absence of identity in these particular connecting elements? Let us see. Turning to the complainant's invention, we find in claims 9 and 11 a dredge boat is described as having a self-contained pivot or center of oscillation, with devices for swinging and working the boat on this pivot, and in claim 87 a dredge boat is described as having devices for swinging and working the boat with a side feed. In claim 12 the same mechanism is described as a dredging apparatus having a side feed and self-contained pivot or center of oscillation. In claim 13 the mechanism is described as a dredging machine having a device for excavating from side to side of the cut, a discharge pipe extending from a discharging apparatus to or near a center of oscillation, where it is provided with a hollow, flexible joint, or other suitable connection. Here we have the mechanism which in complainant's patent connects the dredger with the discharge pipe and makes it an operative machine. It is necessarily an essential and important element in the invention. There had been dredge boats before Bowers' invention, but they had never been pivoted or anchored, with an excavator firmly attached, so that the dredge boat

and dredger formed a rigid radius, and, as the boat would swing from side to side, hold the excavator to its work in a true arc path. In *Bowers v. Von Schmidt*, in this court (63 Fed. 572, 584), Judge McKenna, speaking of the flexible joints, and the office of flexibly joining the discharge pipe to the dredge in complainant's machine, said:

"It enables the action of the dredging machine to be continuous as it swings on a side feed and excavates. This is the essence of the invention,—the new result which was not accomplished before,—and bears the test of all the definitions of combinations to which I have been cited."

In respondents' machine, how is this connection secured? In claim 1 of the Parker patent the telescopic section of the discharge pipe is connected with the discharge pipe on the dredger by a joint to allow the dredger to move from side to side when at work. The dredger referred to is substantially the same as the dredge boat described in complainant's patent. The discharge pipe on the dredger is marked, "Section B," and the joint is described in the specifications as being formed by a well-known swivel or rotary connection, about which joint the section B is turnable from side to side. In claim 3 a joint is used whereby the discharge pipe is connected with the telescopic section so as to allow the excavator to swing from side to side with relation thereto. In all the other claims, except in 8 and 9, a joint or hinge connection is described between the telescopic section and the dredging apparatus, which is clearly designed to allow the dredge boat, with an excavator forming a rigid radius, to swing from side to side when in operation, and thus hold the excavator to its work. In claim 3 the fixed point around which the dredge boat and excavator swing, as a rigid radius, is secured by anchoring the float carrying the telescopic section by means of a spud or pivot. In claim 4 a guide is fixed with relation to the front end of the telescopic section, and is anchored by means of a spud anchor adapted to fit said guide and maintain the slidable section in line with the main pipe. The fixed point or center of oscillation required in swinging the dredge boat and excavator, as a rigid radius, is secured by means of a spud anchor in the guide. In claim 6 this mechanism is described as a socket formed in relation to the front end of the telescopic section, and a vertical spud anchor passing through it, and fixing the end of the telescopic section with relation to the pipe line of which it forms a part, and a structure hinged and turnable about said spud as a pivot. In claim 10 the device is described in substantially the same terms as in claim 6. In claim 11 an anchor is not mentioned, but the center of oscillation is described as a turning joint to allow the excavator to swing from side to side. In the model of respondents' dredging apparatus exhibited in court, the method of operating the boat was clearly established in accordance with the claims of the Parker patent. The swinging of the dredge boat and excavator as a rigid radius is secured by anchoring the front end of the float carrying the telescopic section by means of a spud or anchor, and in the connection between the discharge pipe on the dredge boat and the discharge pipe on the firmly-anchored float is a rotary joint in the pipe, as

described in the specifications, which permits the dredge boat to swing from side to side.

Referring now to patent No. 318,860, dated May 26, 1885, granted to Bowers for the art of dredging, we find that the patent office determined that he was the inventor of an improvement in the art of dredging; and in claims 3 and 5 the improvement was declared to consist in oscillating the boat on a contained center, thereby making an arc-shaped cut during the side movement of the boat, substantially as described. The specifications and drawings of this patent are the same as those contained in patent No. 318,859; and whatever may be the objections to patent No. 318,860, on the ground that it describes the function of a mechanism, and not the mechanism itself, it remains a fact that the function described is performed by the mechanism of patent No. 318,859, issued to the complainant on the same day, and that both patents have been declared valid by the decree in this case. In patent No. 318,859, Bowers incorporated into his specification this declaration:

"I do not herein claim the method of oscillating the boat, nor of raising, conveying, and diluting the spoils; the same being claimed in a division of this application filed April 24, 1885."

This division of the application appears to have been in accordance with a rule which prevailed at that time in the patent office (Ex parte Blythe, Dec. Com. Pat. 1885, p. 82), but which was soon after repealed (Ex parte Young, Id. 108; Ex parte Herr, Dec. Com. Pat. 1887, p. 105). The division of Bowers' application resulted in the patent office granting to Bowers patent No. 318,860, for the art of dredging. Under the present practice, both of these patents would be consolidated in one grant, covering the entire invention; but the two patents issued under the practice then prevailing do not, by reason of such division, diminish any of Bowers' rights under the law, or deprive him of any of his claims. The court is therefore not at liberty in this proceeding to revise the decree in this case, and, in accordance with that decree, the means and the function as described in these two patents constitute the invention which the complainant is entitled to have protected as his property. Whether the mechanism of respondents' machine infringes the claims of complainant's patent, as alleged, depends, then, upon the substantial identity of the means employed, the functions performed, and the effects produced. It must be manifest, even to a casual observer, that, in function and effect, respondents' machine is, in substance, identical with that of the complainant in swinging the dredge boat from side to side, and in holding the excavator to its work in a true arc path, and in these two elements are found the efficiency of respondents' machine. They are the elements that distinguished complainant's dredger from all the dredgers that had been constructed prior to his invention, and gave him the title of a pioneer inventor. They are also the elements which give to the respondents' machine an advantage over all others except that of the complainant, and bring the new machine into active and direct competition with complainant's invention.

Whether the means employed in the respondents' mechanism to



perform the function and secure the effect produced are the same as that of the complainant is a more difficult question. Some doubt has been suggested concerning the scope of the claims of the Parker patent in this respect. The complainant contends that the claims of the respondents' patent do not cover the device for anchoring the float carrying the telescopic section, or the device of the rotary joint or hinge in the discharge pipe near the center of oscillation, which permits the dredge boat to swing from side to side. But, after carefully considering the language of the claims, and comparing them with the specifications in the patent, I have reached the conclusion that they were intended to cover these devices, as a part of the patentable combination. The foundation for such claims is distinctly provided in the specifications, where the object of the invention is set forth as follows:

"The object of my invention is to provide a means for connecting the rigid conveying pipe with the corresponding rigid connection between said pipe and the digging or excavating mechanism in such a manner that the latter may be advanced as fast as the necessities of the work require, without the employment of any flexible sections in the conveying pipe, and in the formation of a swivel joint between the two rigid pipe sections, which will allow that portion connecting with the digging apparatus to be swung in an arc of a circle with relation to said joint, so as to excavate to any desired width."

It therefore follows that the fact that a second patent was issued with such claims in it creates a presumption of lack of identity in these parts of the two machines. But, notwithstanding this presumption, can the claim of a lack of identity be sustained in this case? I think not. In the first place, it must be remembered that Bowers is a pioneer inventor with respect to these specific devices. It was so determined in *Bowers v. Von Schmidt*, 63 Fed. 572, and that decision was affirmed in the circuit court of appeals. 25 C. C. A. 323, 80 Fed. 121, 48 U. S. App. 120. It was declared by the circuit court of appeals that Bowers was justly entitled to be regarded as standing at the head of the art, with respect to these devices, and to a broad and liberal construction of his claims thereto. In Rob. Pat. § 746, the law on this subject is stated in the following broad terms:

"A pioneer patent, introducing to the public some art or instrument entirely new, must be interpreted as liberally as its language will permit, in order to protect the original conception in its widest form, notwithstanding any description or claim for specific details which the patent may contain."

In this view of the law of the case, how can the court limit the complainant to a dredge boat with a self-contained pivot forming the center of oscillation exactly as described or claimed? He is entitled to invoke the doctrine of equivalents, and be protected against any device which, performing the same functions and producing the same results, adopts the same idea of means. What was Bowers' idea of the means to perform the function of swinging the dredge boat from side to side while the work of dredging and discharging the dredged material through pipes was in continuous operation? It was a dredge boat having a self-contained pivot forming a center of oscillation, with the discharge pipe flexibly mounted at or near said pivot. What was Parker's idea of the

means to perform the same function and produce the same result? It was a pivot on the float at the rear of the dredge boat carrying the telescopic section of discharge pipe, forming a center of oscillation, with the discharge pipe flexibly mounted at or near said pivot. The means are identical, except that in one case the pivot forming the center of oscillation is on the dredge boat, and in the other it is on the floating section immediately in the rear of the dredge boat; the pivot itself performing the same function in both cases. The substance is there, although the form is different. Manifestly, the second device is the equivalent of the first.

It is next objected on the part of the respondents that the pivot described in the specifications of the Bowers patent is a turntable and two spuds, and that the respondents' dredger has no such pivot. The self-contained pivot in the Bowers patent is not described as a turntable with two spuds in any of the claims alleged to have been infringed in this proceeding. But, assuming that the pivot forming a center of oscillation is described and limited in the specifications, the question occurs, what sort of a pivot do the specifications point out and describe as performing this function? They describe a mechanism for performing two specified functions: (1) A turntable with two spuds, wherein the latter, advancing alternately, enable the dredger to feed forward; (2) this turntable, with one or two spuds, forming a single center of oscillation, as a pivot, whereby the dredger swings from side to side in the continuous operation of dredging. The pivot must necessarily be single, to become a center of oscillation. If there are two spuds, they are put down through a turntable, and the turntable locked, so as to make a single pivot or center of oscillation. The spud or pivot in respondents' dredger is therefore clearly the equivalent of the spud or pivot described in the Bowers patent for performing the same function. It is the same idea of means, and in law constitutes an infringement. If it be said that this is a broad and liberal interpretation of the claims of the Bowers patent, the answer is that, whether broad or narrow, liberal or illiberal, the law of this case, as determined by the circuit court of appeals, requires this court "to protect the original conception of the inventor in its widest form, notwithstanding any description or claim for specific details which the patent may contain."

As the complainant does not appear to press very earnestly the charge of infringement of claim 87 of the Bowers patent in the use by respondents of hauling lines attached to the excavator of their dredger, no opinion will be expressed upon that feature of the complaint.

The conclusion reached by the court upon a careful examination of the evidence presented upon this motion, and after a careful consideration of the able and interesting argument of counsel, is that respondents have been guilty of infringing claims 9, 11, 12, and 13 of complainant's patent No. 318,859, and claims 3 and 5 of complainant's patent No. 318,860, in the particulars mentioned; and while it would have been more agreeable to the court to have determined this question in some other proceeding, where its conclu-

sions could be reviewed by a higher court, it cannot avoid the responsibility of awarding judgment upon the case as presented.

The punishment to be inflicted in vindication of the court's authority, and for the purpose of securing obedience to its decree, is also an embarrassing responsibility, under the circumstances of this case. But the respondents are alone to blame for the position in which they have been placed. In view of the decisions of this court and the final judgment of the circuit court of appeals upon the claims of the Bowers patent, the validity of some of the claims of the Parker patent, under which respondents' dredger was built, was at least doubtful; and the respondents were at liberty to obtain the opinion of this court upon that subject in advance, by a motion to modify the decree so as to permit the use of the new machine. They elected to take their chances, and they must abide by the result. The law applicable to this aspect of the case is stated by Rob. Pat. § 1214, in the following language:

"An injunction, whether granted on an ex parte or a contested hearing, or by consent, is binding on the defendant, and must be obeyed until rescinded by the court. The defendant has no right to construe it for himself,—ceasing to use what he imagines is forbidden, and continuing to employ the residue,—but must desist wholly from the practice of the invention, and, if he needs further instructions, must make application for them to the court. He cannot be permitted to experiment with other arts or instruments to see how nearly he can imitate the plaintiff's, yet still escape infringement; and, though he acts under the advice of counsel, his liability to punishment for disobedience to the injunction will not be diminished. His own good faith affords him no protection, and, while the court may consider it in affixing the penalty for his contempt, his violation of the injunction is complete if he intends to do, and actually does, the act which it prohibits, however fully he may have believed his conduct to have been consistent with submission to its terms."

A second proceeding having been instituted against the respondents for violating the perpetual injunction issued upon the interlocutory decree entered in this case, I will proceed to consider that charge. In the first case the respondents were using a dredger in the San Joaquin river, in this state; and while these proceedings were still pending the respondents began work on a dredging contract at South San Francisco, for the Union Iron Works. The only change made in the machine for the new work was in the excavator. A flat excavator, which was not charged to be an infringement of complainant's patent in the first case, was removed, and a rotary excavator substituted. This rotary excavator is now charged to be also an infringement of complainant's invention of a rotary excavator, and particularly an infringement of claims 10, 19, 49, 51, 52, 53, 54, 55, 59, 62, 75, and 87 of patent No. 318,859, and claim 5 of patent No. 318,860. After respondents had completed the contract at the Union Iron Works, they obtained a contract for dredging at Oakland, from Balfour, Guthrie & Co.; and they have proceeded to perform that contract with the dredging apparatus involved in the first charge, with the substituted rotary excavator. In this proceeding the complaint is renewed that the respondents have continued to infringe complainant's patent in the particular elements charged in the first complaint, and the questions relating thereto have all been reargued. What has already been said upon

that subject will apply to the charge as renewed. The only question remaining to be determined is, therefore, whether the rotary excavator used by the respondents is an infringement of the claims of complainant's patent for a rotary excavator. In claims 10, 13, 53, 54, and 59 of complainant's patent No. 318,859, the rotary excavator invented by Bowers is described as follows:

"(10) A dredge boat having a self-contained pivot forming a center of horizontal oscillation, with devices for swinging and working said boat upon said pivot, in combination with a suction pipe, exhausting apparatus, and rotary excavator." "(13) In a dredging machine having a device for excavating from side to side of the cut, a discharge pipe extending from a discharging apparatus to or near a center of oscillation, where it is provided with a hollow, flexible joint, or other suitable connection, and is prolonged thence to a place of discharge." "(53) The combination, with a nonrotative suction pipe, of a rotary excavator having an inward delivery through said excavator. (54) The combination, with a dredge boat and nonrotative suction pipe, of a rotary excavator having an inward delivery through said excavator." "(59) A rotary excavator with inward delivery, in combination with a nonrotating suction pipe mounted upon strong trunnions or equivalent joints, to permit the excavator and outer end of the suction pipe to be raised and lowered to suit the depth at which the work is progressing."

Claim 5 of patent No. 318,860 is as follows:

"(5) The described method of dredging, which consists in oscillating the dredge boat on a center, and by such oscillation forcing an excavator continuously sidewise; thus making an arc-shaped cut, and drawing the excavated material inboard by suction."

The drawing and specifications of the rotary excavator described in patent No. 318,859 are set out in the report of the case of Von Schmidt v. Bowers, 25 C. C. A. 323, 80 Fed. 123, 124, 135, 48 U. S. App. 124, 125, 127. They show a rotary excavator with inward delivery through itself, in combination with a suction pipe. They also show the arc-shaped cuts made by the excavator while the dredge swings from side to side on the pivot or center of oscillation, and devices for working the dredge with a side feed. The evidence shows that respondents' excavator is rotary in action, and that it has an inward delivery through itself in combination with a suction pipe; that it performs the same function and produces the same effect as complainant's device. The only question here, again, is whether the mechanism of respondents' excavator employs substantially the same means as the complainant's excavator to perform the same function and produce the same effect. The defense rests mainly upon the claim that respondents' excavator is constructed upon the same principle as the excavator described in letters patent of the United States, No. 185,600, granted to Alexey W. Von Schmidt December 19, 1876, which, it was admitted in Von Schmidt v. Bowers, *supra*, was not an infringement of anything patented to the complainant. That excavator consisted of a cutter of four propeller-shaped blades at the end of a rotating rod at the bottom of the suction pipe. This cutter was covered by a hood, and, while the apparatus was constructed to move from side to side, it is plain that it did not have a side feed, and could not be worked practically as a side cutter. It worked downwardly or outwardly in the direction of the feed of the propeller blades, obeying the law of propeller force as exemplified in the

thread of a screw. It is to be observed, further, that the circuit court of appeals, in *Von Schmidt v. Bowers*, had this very question before it, and, in commenting upon the dredging apparatus described in patent No. 185,600, said, "Its excavator, while rotary, consisted of radiating arms, the effect of which was the exact reverse of that of inward delivery." The respondents' excavator, like that of the complainant, is without a hood, and the cutter blades are so shaped and adjusted that the excavator cuts from side to side as it swings, making an arc-shaped cut. In this respect it is as nearly the means employed to perform the function and produce the effect accomplished by complainant's excavator as was the cutter described in letters patent No. 277,179, granted to Von Schmidt May 8, 1883, for "an excavating curved rotating plow for submarine work," and the cutter described in letters patent No. 306,368, granted to Von Schmidt on October 7, 1884, for "improvements in rotary plows for submarine work," declared by the circuit court of appeals to be infringements of complainant's invention, in *Von Schmidt v. Bowers*, *supra*.

It is further objected that the respondents' excavator has not the "inward delivery" that is claimed to be the characteristic of the Bowers excavator. The objection is based upon the difference in the shape and arrangement of the cutting blades. It is contended on the part of the respondent that the cutting blades of the Bowers excavator are so shaped and arranged that they force the dredged material into or towards the suction pipe, and that this inward delivery is the effect, or the principal effect, of the mechanism of the cutter itself, independent of the action of the current of water drawn into the suction pipe, and that the cutting blades of respondents' excavator or cutter, like the cutting blades in the excavator described in patent No. 185,600, have no forcing effect upon the dredged material to drive it inward towards the suction pipe, and that therefore respondents' excavator does not have the "inward delivery" possessed by the Bowers excavator. The answer to this objection is that "inward delivery" is not confined by the claims to the action of the cutter blades, and the opinion of Judge Ross, speaking for the circuit court of appeals, in *Von Schmidt v. Bowers*, does not so declare. This is what he says upon that subject: "The clear meaning of a claim to an excavator having inward delivery, or with inward delivery through itself, is an excavator so constructed as to produce an inward delivery." How produce inward delivery? By the shape of the cutters? The court does not say so. It says merely that the excavator must be so constructed as to produce inward delivery, or with inward delivery through itself. The excavator here referred to is clearly the entire apparatus, composed of cutters, frame, and suction pipe; and when these, acting together, produce "inward delivery" through the excavator, the mechanism is within the description contained in the claim, whether the force driving the dredged material inward is the equally combined action of the blades and the inflowing current of water, or less of one than the other. The idea of means is the cutting and severing of the material from its place, and the drawing of this material into the suction pipe, and this idea of means the patent office has declared to be an invention. How, then,

can the force of the suction pipe and cutter be divided, and by distribution eliminate the idea of means? In my judgment, the distinction contended for in the interpretation of this claim is more refined than real or substantial.

The affidavits of several expert witnesses have been introduced in evidence upon this motion, on the part of the respondents, in which it is alleged that the rotary excavator in respondents' dredger is the same in principle as that described in the Von Schmidt patent, No. 185,600. But these opinions cannot prevail against the views already expressed by the circuit court of appeals as to the mechanical principles involved in that excavator; and (accepting, as I must, those views as binding upon this court) I must hold that respondents' excavator is not constructed upon the principle of that machine, and that it is an infringement upon complainant's patent No. 318,859, and particularly claims 10, 13, 53, 54, and 59, and upon claim 5 of patent No. 318,860. In the opinion of the court, the respondents have had less excuse for using this excavator than they had in using the pivot or center of oscillation described in the Parker patent. No effort was made to obtain the opinion of the court as to whether this excavator was within the scope of the injunction or not, and not even the advice of counsel was sought upon the subject. Their attitude is inexcusable, and their conduct evidence of bad faith. They must obey the injunction until it has been dissolved or modified. The judgment of the court is that the respondents have been guilty of contempt of court, as charged in the first complaint; that they pay a fine of \$200, and pay the complainant the costs of this proceeding, to be taxed by the clerk, including \$100 as counsel fee; and that the respondent John Hackett be imprisoned until the fine and costs are paid, not to exceed 30 days. It is also the judgment of the court that the respondents have been guilty of contempt of court as charged in the second complaint; that they pay a fine of \$300, and pay the complainant the costs of this proceeding, to be taxed by the clerk, including \$100 as counsel fee; and that the respondent John Hackett be imprisoned until the fine and costs are paid, not to exceed 60 days.

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**NATIONAL HOLLOW BRAKE BEAM CO. et al. v. INTERCHANGEABLE  
BRAKE BEAM CO.**

(Circuit Court, E. D. Missouri, E. D. January 24, 1900.)

No. 4,047.

**1. PATENTS—ANTICIPATION—CAR BRAKES.**

The Westinghouse patent, No. 345,093, for a car brake, claim 6, the principal feature of which is the location of a slot for the reception of a brake lever in the strut between the compression member and the tension member of a trussed brake beam, was so fully anticipated in the prior art as to deprive it of patentable novelty.

**2. SAME—LIMITATION OF CLAIMS BY AMENDMENT—ESTOPPEL.**

Where a patentee has limited his claim by amendment after rejection by the patent office, he cannot be heard to contend that the claim allowed

has the breadth of the claim rejected, but must be held to have abandoned or surrendered to the public the broad original claim, except as modified.

8. SAME—CONSTRUCTION OF CLAIMS—IMPROVEMENTS ON OLD DEVICES.

A patent to one who has merely made an improvement on devices that perform the same function before and after the improvement should be limited, by a strict construction, to the very improvement described and claimed, or mere colorable evasions of it, so as to leave the unappropriated field open to other improvers.

4. SAME—CAR BRAKES.

The Hein patent, No. 361,009, for a brake beam for railway cars, claim 2, which covers "the combination in a brake beam of a hollow beam, a strut, and plugs or caps, 8, and a truss rod, 3, which extends through the caps, 8," if disclosing patentable novelty, is so limited by the prior art, and by amendment in the patent office, as to require a very narrow construction, confining it, as to the caps employed, to the particular construction of "caps, 8," as shown by the drawings. As so limited, *held* not infringed.

5. SAME—PATENTABILITY—FUNCTION OF A MACHINE.

The function of a machine or the result produced by its operation are not patentable.

6. SAME—CAR BRAKES.

The Hein patent, No. 430,194, for a brake beam, claims 1, 2, and 7, the essential feature of which is a camber given to the compression member of a trussed brake beam by screwing up the nuts on the ends of the tension member, so as to spring the beam from a straight line and retain it in that position, is void; the production and maintenance of such camber being merely a function or operative effect of the mechanism, which was itself old and well known in the art, and therefore not patentable. Such claims were also anticipated by the Westinghouse patent, No. 149,902, and the previous Hein patent, No. 361,009.

7. SAME.

Claims 3 and 4 of such patent, which relate chiefly to a notch in the end of a tubular brake beam to engage with a lug on the inside of the socket of the brake head, for the purpose of holding the latter in place, and preventing it from rotating on the beam, is void for want of patentable novelty.

8. SAME.

Claims 5, 6, and 8 of said patent, in so far as they cover brake heads having cup-shaped recesses for the insertion of the end of the brake beam, are limited by the proceedings in the patent office, and the amendments there made, to recesses or sockets with a closed end, to prevent the sliding of the brake head along the beam, and are not infringed by a brake head with an open socket, and held in place by other means.

9. SAME—ANTICIPATION.

A device which is an infringement, if later than a patent, constitutes an anticipation, if earlier.

10. SAME—PATENTABLE INVENTION.

The construction of lugs or projections on the inside of the flanges of a clamp, to hold them at the required distance apart, when drawn together by a bolt passing through them, so as to prevent them from binding upon a chain, which passes between them, does not involve patentable invention.

11. SAME—INVENTION—CLAMP FOR BRAKE BEAMS.

The Robischung patent, No. 430,755, for a clamp for brake beams, claim 2, is void for lack of patentable invention.

12. SAME—INFRINGEMENT.

The Robischung patent, No. 466,984, for a brake beam, claims 1 and 2, construed, and *held* not infringed.

13. SAME—INVENTION—EXTENSIVE USE.

Extensive use of a patented article is strong proof of utility, but not of invention, and is entitled to consideration, on that issue, only in doubtful cases.

This was a suit in equity for infringement of various patents relating to car brakes. On final hearing.

Paul Bakewell and F. W. Ritter, Jr., for complainants.  
Noble & Shields and Geo. S. Payson, for defendant.

ADAMS, District Judge. This is an action for infringement of the following letters patent of the United States: No. 345,093, granted to George Westinghouse, Jr., July 6, 1886; No. 361,009, granted to Phillip Hein, April 12, 1887; No. 430,755, granted to Henry B. Robischung, June 24, 1890; No. 480,194, granted to Phillip Hein, August 2, 1892; and No. 466,984, granted to Henry B. Robischung, January 12, 1892. There are several claims in each of these patents, but complainants, in the present suit, rely upon certain of the claims only, which will be specified as each of the patents is taken up for consideration.

The complainants' title to the patents, while put in issue by the pleadings, is not assailed in argument, and will therefore be assumed to be as stated in their bill. The defenses are, in substance, want of patentable invention, want of novelty or anticipation, and noninfringement.

There are so many claims involved in the determination of this controversy that it seems to me proper to take them up for a separate consideration, in the order above chronologically stated.

The first one is the patent of George Westinghouse, Jr., No. 345,093, dated July 6, 1886. The sixth claim of this patent, which alone is now relied upon by the complainants, is as follows:

"In a brake beam, the combination, substantially as set forth, of a tie bar, a double-inclined truss bar, and an interposed king post or strut, having a slot for the reception of a brake lever between the tie bar and the truss bar."

The particular novelty contended for in this claim is the location of a slot for the reception of a brake lever in the strut between the compression member and the tension member of a trussed brake beam.

The first defense to this claim is that its device lacks novelty. Several patents and one publication are pleaded as anticipations of this claim. They are as follows: The Wellington patent, No. 145,605, granted December 16, 1873; the Westinghouse patent, No. 149,902, granted April 21, 1874; the second Westinghouse patent, No. 243,416, granted June 28, 1881; and the publication or drawing found in the Car Builders' Dictionary, published in 1879, on page 488.

The first two of these patents show a slot in a strut not between the compression and tension members of the brake beam, but at the end of the strut outside of the tension member. The slot, and bolt running through it, as shown in these two patents, are obviously intended to serve the purpose, and perform the function, of a fulcrum for operating a brake lever, by means of which power is applied to the brake beam. It would seem that the location of this slot in the same post or strut between the compression and tension members, as shown in the sixth claim of the patent now under consid-



eration, instead of outside of one of them, would be but a question of common mechanical expediency; but, if this were doubtful, it seems to be made clear by reference to the second Westinghouse patent pleaded as an anticipation, No. 243,416. This last patent shows that the location of the slot in the strut between the members, instead of at the end of one of them, was then a familiar mechanical device. It is true that patent shows a provision for bolting the brake lever to the side of the strut, but the other two patents, namely, the Wellington and first Westinghouse patents, already considered, had, eight years before the granting of the second Westinghouse patent, taught the use of a slot in the strut. A mechanic engaged in the construction of brake beams, therefore, had before him, in 1886, the date of the application for the patent in suit, both features of the former art, namely, the use of the slot in the end of the strut as the place for locating the fulcrum bolt of the brake lever, and also the insertion of a bolt through the strut, between the compression and tension members, to serve as such fulcrum. It is claimed that this last-mentioned device is the mechanical equivalent of the device of the patent, because, according to it, the brake lever straddles the strut, instead of having the strut straddle the lever, as in the patent. But, whether this be correct or not, the prior art, as shown in these prior patents, was such, in my opinion, as to very persuasively, if not irresistibly, lead mechanical skill and ingenuity to the very device of the patent in suit. The patentee had a problem before him, and that was, how and where to apply the brake lever. He knew, by the instruction of the prior patents, that it had been applied in a slot at the end of the strut. He also knew that it had been applied on the outside of the strut, between the compression and tension members, by the use of a bolt, bolting the brake to the strut, and thereby affording it a fulcrum. He was thereby necessarily taught that a slot had been used in which to locate the fulcrum of the lever, and he had also been taught that this fulcrum had been located between the members. It does not seem to me to require any inventive skill to apply this information in the way and manner done in claim 6 of the patent in controversy, by locating a slot for the introduction of the brake lever between the members. Not only so, but the prior publication in the Car Builders' Dictionary of 1879 plainly discloses the slot in the strut, between the compression and tension members, practically as called for in the sixth claim of the patent in suit. The diagram found in this dictionary presents to the eye very clearly the employment of the slot exactly as the same is called for in claim 6 of the patent. I therefore conclude that the device now under consideration is so fully anticipated in the prior art as to devalue it of all patentable novelty.

The foregoing conclusion renders unnecessary any consideration of the voluminous evidence relating to prior use, relied upon by the defendant in this case.

The next patent, in order of time, is the Hein patent, No. 361,009, the second claim of which is alleged to be infringed by the defendant. This claim is as follows:

"The combination in a brake beam of a hollow beam, a strut, end plugs or caps, 8, and a truss rod, 3, which extends through the caps, 8, and is provided with nuts, substantially as and for the purposes specified."

When this patent was originally applied for, the patentee claimed broadly as follows: (1) A hollow metallic brake beam; (2) the combination with a hollow metallic brake beam of a truss rod and strut; (3) the combination with a hollow metallic brake beam of a truss rod and end caps. It must be observed from the foregoing that the claim, as originally made, was very broad, with respect to end caps; in fact, the combination, as first claimed, contemplated any kind of an end cap. The patent office, referring to Westinghouse patent, No. 142,600, of September 9, 1873, and Hedrick patent, No. 322,099, of July 14, 1885, refused to grant the patent, deciding that the invention was substantially anticipated by the references made. After argument by the attorney of the patentee, the same claims, with slight modifications, were again submitted for reconsideration. The patent office, after citing Westinghouse patent, No. 345,093, of July 6, 1886, and Eddy Patent, No. 176,522, as additional references, again refused the patent. Afterwards, the patentee amended his claims, canceling the first, second, and third claims above referred to, and substituted, in lieu thereof, claim 2 of the patent as now sued on, which, as already seen, calls for a combination in a brake beam of a hollow beam, a strut, and end plugs or caps, 8. As I construe this action of the department, it is the equivalent of saying that a combination of the hollow metallic brake beam with a truss rod and end caps, generally, was not, in the light of the art as it then existed, patentable. The patentee, instead of appealing from the decision of the examiner, acquiesced therein, and amended his claims so as to limit the same to a combination of a truss beam with the peculiar plugs or caps marked "8" in the drawings, and it is this combination to which the complainants are entitled, under the second claim of their patent, and nothing else.

It seems unnecessary to cite any authorities to the proposition that when the patentee limits his claim, after rejection by the patent office, he cannot be heard to contend that the claim allowed has the breadth of the claim rejected, or that he is entitled to such construction of his allowed claim as would be the equivalent of his rejected claim. He has voluntarily acquiesced in a limitation, and must be held to have abandoned or surrendered to the public the broad original claim, except as modified by the amended and allowed claim. *Roemer v. Peddie*, 132 U. S. 313, 10 Sup. Ct. 98, 33 L. Ed. 382, and cases cited; *Brill v. Car Co.*, 33 C. C. A. 213, 90 Fed. 666.

Again, this claim is for an improvement in brake beams for railway cars. Constructions involving all the elements of claim 2, except possibly the particular end plugs, 8, were old and well known at the time the application was filed. Such was the statement of the patent office at the time it rejected the original claims. The patent now under consideration is one of the many steps taken in the development of the modern brake beam. The inventive genius of many persons had been, and thereafter continued to be, employed

in this field of invention. End caps of certain kinds and descriptions had been before that time resorted to for the purpose of tightening or making fast the tension rod. Under such circumstances, each inventor ought, in my opinion, to be limited to his own particular improvement, and the doctrine of equivalents, if applied at all, should be strictly construed, so as to fairly give the patentee the full benefit of his own invention, without depriving other geniuses engaged in the same general line of invention of the rewards of their own discoveries. Judge Sanborn, in the case of *P. H. Murphy Mfg. Co. v. Excelsior Car-Roof Co.*, 22 C. C. A. 658, 76 Fed. 965, speaking on this general subject, says:

"The claims and specifications of every patent must be read and construed in the light of a knowledge of the state of the art when it was issued. A patent to the original inventor of a machine or construction, which first performs a useful function, protects him against all machines and constructions that perform the same function by equivalent mechanical devices. But a patent to one who has simply made a slight improvement on devices that perform the same function before and after the improvement is protected against those only which use the very improvement he describes and claims, or mere colorable evasions of it."

In the case of *Machine Co. v. Hanes* (C. C.) 70 Fed. 859, an expression is found which meets my approval, as follows:

"I am of opinion that well-settled principles of law, reason, and common justice require that mere improvers in combinations of old elements and ingredients should be limited by a strict construction of their descriptive claims and specifications, so as to leave the unappropriated field of art open to other improvers, that they may be encouraged to exercise their industry and inventive genius."

In the light of these considerations, the particular invention of claim 2 of the Hein patent must be considered. The end plug or cap there called for is of peculiar construction, rendered necessary by reason of the fact that the two ends of the tension rod pierce the extremities of the beam or compression member at an angle, and require a cap or plug of a beveled or triangular character, through which the ends of the rod may pass obliquely, and be made fast by nuts seated on the ends of the rod. This end plug or cap is provided with a circular recess and shoulder, so as to enter for a short distance into the end of the hollow beam, and fit closely there, much like the cork enters the neck of a bottle. This end cap or plug, too, is provided on its outer surface with a recess for the nut, so that the nut, when screwed up, is partially below its outer surface. It is this particular plug-like cap, made in one solid piece, with the truss rod extending through it, provided with a nut, as already described, which constitutes the end plug or cap, 8, of the claim. The defendant's device is also a cap necessarily constructed so as to accommodate the entrance of the rod through the end of the hollow beam obliquely, into and through the cap, there to be made fast by a nut seated upon the outer surface of the washer. The purpose or function to be accomplished by the two devices is obviously the same, but the defendant's cap lacks the circular recess and shoulder which allows its introduction into the end of the hollow beam. In addition to this, there is no recessed nut seat corresponding to that in the combination of the claim of the Hein pat-

ent, under consideration. The only nut seat of the defendant's construction is the ordinary inclined washer, which, I believe, was well known in the art long before the plug for the Hein patent was made. It thus appears that there is, at least, a substantial difference between the defendant's construction and the device of claim 2 of the Hein patent. This claim of the Hein patent calls for the particular end plug or cap which I have already described, and designates it as the one shown in the drawings of the patent by the figure "8." This, being a combination patent for an improvement on old devices that perform substantially the same function, must be restricted and confined to the specific combination described in claim 2, as indicated not only by the words employed, but by the figures of reference in the drawings, to which reference is particularly made, and each element specifically pointed out in either of these ways is an essential part of the combination. *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059, and cases there cited. In this last-mentioned case the court gives, as a reason for the rule just announced, one which is entirely apposite to the case in hand, namely: "For, if not so restricted by the letters of reference, the effect would be to make the claim co-extensive with what was rejected in the patent office." It is stated in the case of *P. H. Murphy Mfg. Co. v. Excelsior Car-Roof Co.*, *supra*, that the unquestioned rule is "that the absence from a device or construction that is alleged to infringe of a single essential element of a patentable combination of old elements is fatal to the claim of infringement." Applying these well-established rules, I am constrained to hold that if the second claim of the Hein patent is valid,—as to which I need express no opinion,—the limitations imposed upon it by the proceedings in the patent office narrow the claim to the specific device called for, as already seen, and, so narrowed, the defendant's device does not infringe. See *Sargent v. Lock Co.*, 114 U. S. 63, 5 Sup. Ct. 1021, 29 L. Ed. 67.

Strenuous contention was made by counsel for the defendant that the prior art, as developed by the evidence in this case, so shows the particular combination of claim 2 of the Hein patent as to rob it of all patentable novelty; but it is unnecessary to pass upon this contention, under the view taken on the issue of infringement. It may, however, be confidently said that the prior art, added to the result of the proceedings in the patent office, already referred to, subject claim 2 of the Hein patent to a very narrow and limited construction, and, so treated, the defendant must be held not to infringe.

The second Hein patent, No. 480,194, dated August 2, 1892, will next be considered. This patent has eight claims, all of which are alleged to be infringed by the defendant. Of these, the most important are those relating to the production and maintenance of camber in a trussed brake beam. This invention—that is, camber—is said to reside in the first, second, and seventh claims of the patent. These are as follows:

"(1) A metallic brake beam, consisting of a compression member, a tension member, and an interposed strut, the compression member having a camber,

and the beam structure containing means of adjustment, whereby the camber of the compression member is produced, and the resiliency of the beam made available.

"(2) A metallic brake beam, consisting of a hollow compression member, a tension member, and an interposed strut, the compression member having a camber, and the beam structure containing means of adjustment, whereby the camber of the compression member is produced, and the resiliency of the beam made available."

"(7) In a trussed brake beam, the combination of a tension member, having threaded ends and nuts therefor, a strut, and a cambered compression member, which maintains the tension of the parts, and prevents the rotation of the nuts, substantially as specified."

A careful reading of these claims, with the specifications of the patent, discloses that the alleged invention consists of so combining, in a then well-known trussed brake beam, a compression member, a tension member, and a strut as thereby—that is, by means of adjusting these elements—to produce and maintain a camber of the compression member or beam proper of the brake. The camber here referred to is a bending or springing of the beam, and the means here referred to are screwing up the nuts on the ends of the tension member; or, as stated in the specifications, "when the parts are put together the nuts, if, are tightened up, so as to draw the brake beam from the straight line indicated by dotted lines to the shape shown in full lines. This gives the desired camber to the brake beam." The testimony of all the witnesses, as also the proceedings in the patent office, confirms the manifest meaning of the patent itself, namely, that the camber or resilient spring of the patent is produced by means found in the beam itself. The patent, therefore, is not for camber, abstractly considered, but for that particular camber produced and maintained by means of the tension rod co-acting with the other elements of the combination, in the way and manner already referred to, by tightening up the nuts, as shown in the specification, and as testified to by Mr. Leigh, complainants' expert, in defining the adjustable camber of the patent. He says it is "a bending or arching of the compression member, and produced by means of the threaded ends of the tension rod and the nuts." A noticeable feature of the patent is that it nowhere describes the object to be obtained or purpose to be served by the camber of the patent. This omission is of no significance in itself, as, without doubt, the patentee, if the patent is valid, may employ the camber for any purpose for which it may be properly utilized. But this omission may be of some value in interpreting the true meaning of the patent. Notwithstanding the silence of the patent on this point, it appears from the evidence that the function of the camber is to create a continuing, constant, elastic resiliency and firmness in the beam, so that, by its tendency to spring back to its normal condition in a straight line, the nuts at the ends of the tension member are always kept tight, and their loosening, occasioned by the dangling of the brake beam while not in action, is prevented. In other words, the constant acting resiliency of the beam, created by the camber, serves to preserve the beam, and keep it from loosening up and deterioration, while not in action, and keeps it always ready for sudden emergencies and effectual service. Another

er result of this camber in the beam is said to be that it offers a ready expediency for coning the face of the brake shoe to the tread of the wheel. It is said that the tendency of the shoe, when the beam is in action, is to crowd into the throat of the wheel, and thereby greatly lessen the frictional area of the shoe and wheel tread, and that by the bend or camber of the beam, as called for by the patent, the face of the shoe is brought to operate at a right angle against the oblique surface of the tread of the wheel as usually constructed, and that thereby more effectual work is done in braking than would be done if the shoe operated against the tread of the wheel obliquely. These results, however excellent in their character, manifestly and obviously flow from the arching or cambering of the beam,—so obviously, in fact, that even the patentee did not deem it necessary to describe them; so obviously, indeed, that any person familiar with mechanical action or the laws of force would readily see and appreciate them. It is axiomatic that the axis of the shoe, when brought by the bending process into parallelism with the oblique surface of the tread of the wheel, renders it physically certain that the shoe, applied at a right angle to the axis, will bear evenly and uniformly on the oblique surface. It is also very plain that the constant reacting effect or resiliency of a spring or arched bow tends, by the pressure of the nuts on the thread, to tighten nuts, when they are employed to maintain the spring or arch.

Considering these things, it seems to me that the patentability of the invention under consideration is not at all affected by these obvious uses which the camber, when created, actually served. The question then is whether the production of camber, in and of itself, by the means described in the claims under consideration, irrespective of the obvious undescribed uses which it was afterwards made to serve, is patentable. The defendants say: First, this camber is nothing but a result or function of a machine, and for this reason, alone, is not patentable; second, that the prior art shows the particular camber of the patent, and therefore that it is not novel.

Referring to the first of these defenses, it can be confidently assumed from the evidence that the machine or parts combined in the three claims under consideration, namely, the compression member, the tension member, and the strut, co-operating with the nuts, as described in the specification and as claimed in the seventh claim, are each, separately and as there combined, old and well recognized in the prior art. It cannot be disputed that these elements and this combination had been employed long before in the art of brake-beam construction and other analogous branches of industry, and that they had been so employed for the special purpose of constructing a trussed brake beam, and maintaining its integrity as such and its efficiency in action. It is not necessary to refer to any other patent for a full corroboration of this statement than the first Hein patent, No. 361,009, of date April 12, 1887, already considered. In the device of that patent are found all these elements co-acting for the purposes stated.

For the purpose of disposing of the question raised by this first defense, it may be conceded, whatever be the actual fact, that prior to the patent in suit the nuts had never been so tightened up as to produce the resilient arch or camber of the patent. With these assumed facts in view, and with the further fact abundantly established, by the specification of the patent and the evidence of both complainants' and defendant's witnesses, that the resiliency or camber in question is produced by the tightening of the nuts on the end of the tension rod, as found in this old combination, the question for solution is whether the camber or resiliency thus produced is so a result of the operation of a machine or so a function of a machine as in and of itself to be nonpatentable.

The leading case on the subject of patentability of a result of operation or function is *Corning v. Burden*, 15 How. 252, 16 L. Ed. 683. In that case, while discussing the difference between a process patent and a machine patent, the court lays down the rule that "a man cannot have a patent for the function or abstract effect of a machine, but only for the means which produce it."

In the case of *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650, the court, in construing the patent act, says:

"We find here no authority to grant a patent for a principle or a mode of operation or an idea or any other abstraction. A machine is a concrete thing, consisting of parts or of certain devices and combination of devices. The 'principle' of a machine is properly defined to be its mode of operation, or that peculiar condition of devices which distinguish it from other machines. A machine is not a principle or an idea. \* \* \* Because the law requires a patentee to explain the mode of operation of his peculiar machine, which distinguishes it from others, it does not authorize a patent for a mode of operation, as exhibited in a machine."

In *Fuller v. Yentzer*, 94 U. S. 288, 24 L. Ed. 103, the supreme court says:

"Patents for a machine will not be sustained if the claim is for a result, the established rule being that the invention, if any, within the meaning of the patent act, consists in the means or apparatus by which the result is obtained, and not merely in the mode of operation, independent of the mechanical devices employed."

In the case of *Locomotive Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899, the court, after considering many cases involving the question what is and what is not patentable, stating generally that the operation or function of a machine is not patentable, concludes its opinion by saying:

"Medart [the patentee] may or may not have been entitled to a patent for the machinery employed in the manufacture of the belt pulleys in question, but he certainly was not entitled to a patent for the function of such machine, nor to the completed pulley, which differed from the prior ones only in its superior workmanship."

In the case of *Westinghouse v. Power-Brake Co.*, 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136, after reviewing the cases already cited and many others, the supreme court states as its conclusion as follows:

"These cases assume, although they do not expressly decide, that a process, to be patentable, must involve a chemical or other similar elemental action, and it may be still regarded as an open question whether the patentability of processes extends beyond this class of inventions. Where the process is simply

the function or operative effect of a machine, the above cases are conclusive against its patentability."

The question now is whether the production of the camber of the patent is a function or operative effect of a machine, within the rule so laid down by the supreme court. I have given the testimony of the witnesses on this vital point my most careful and exhaustive consideration, and am unable to reach any other conclusion than that the camber of the patent is nothing else than the effect of the operation or the working of the machine made up of the elements of the claims. The defendant's expert testimony is to this effect, and Mr. Cloud, one of the complainants' experts, admits that his understanding is that the "camber," in the sense the complainant uses the term, is a result or condition. And how can it be otherwise? The machine is operated solely by tightening up the nuts, and, in the language of the patent, "this gives the desired camber to the brake beam." This camber, then, is nothing else than the operative effect of the machine, and is not patentable.

But it is contended that claim 7 calls for the maintenance of the camber as well as its production. But the maintenance, in my opinion, is the result of operating the machine by screwing up the nuts, the same as its production is such result. The same force which produces the camber, when continued, maintains it. This force is the resilient tendency of the beam, which holds the nut in place by maintaining a constant pressure against the threads on the ends of the tension rod.

The foregoing conclusion effectually disposes of the camber claims of the second Hein patent, but, as much evidence has been taken and elaborate arguments made on the defense of want of novelty, I deem it proper to briefly express the views of the court on this feature of the case. The prior art, undoubtedly, shows all the physical elements of the camber claim. The patent itself recognizes the prior existence and employment of camber in the art of brake-beam construction. The patentee says:

"I have been aware that a brake-beam structure consisting of a beam, a truss rod, and interposed strut, the beam having a bend or camber produced by the act of the metal in the act of forming the camber, and prior to the welding of the parts forming the truss, is not broadly novel."

This admission is sufficient to meet any broad claim to any and all camber. The history of this patent, as shown by the file wrapper, shows how this admission was brought about. In his first and subsequently amended claims the patentee sought to cover (1) a beam with any camber; (2) a trussed beam with any camber; (3) a hollow trussed beam with any camber; (4) a beam with a camber produced by tension, generally. All of these claims were rejected, because old, and the rejection was acquiesced in by the patentee. The camber claims, when and as finally allowed by the patent office, were for a particular limited kind of camber, namely, that produced and maintained by means within the beam. Even as so limited, the allowance of the camber claims was seriously contested and refused, by both the examiner and the board of examiners in chief. The commissioner of patents, on an appeal to him, reversed the board of examiners in



chief, for reasons which he did not state, and which do not appear in the history of the patent. The original examiner and the board of examiners in chief based their refusal to allow these claims, as finally allowed, principally on two former patents, which are now cited and relied upon by defendants as anticipations of the device of the camber claims. These patents are the Westinghouse patent, No. 149,902, and the first Hein patent, No. 361,009, already considered. The Westinghouse patent, so relied upon, was for an improvement in railway brake beams, and claimed distinctly all the physical elements of the patent in suit, namely: "(1) A brake beam consisting of the bar, B, boxes, D, tension rods, a, and post, b, combined substantially as described." The device of this claim, as shown in the drawings, is plainly a trussed brake beam, like that of the patent in suit, except that bar, B, which is the compression member, is made of wood, instead of iron, and the tension rods are two, instead of one, as in the patent. The post, b, is the strut of the patent in suit, to all essential purposes. The description of the patent shows the use of nuts to tighten up the tension rods (the same function as is performed by them in the patent in suit), and says: "This tightening may be carried so far as to give the bar, B, a slight crown or arch, as shown in Fig. 1." By reference to Fig. 1 of the drawings, there appears to be an arched beam. True, there is no description of the function to be served by crowning or arching the beam in this patent (neither is there in the patent in suit), doubtless, as already explained, because its benefits arising from the resiliency of the arch, in the way of stiffening and tightening the structure, were palpable. It seems to me that the camber of the patent in suit is undoubtedly described in this Westinghouse patent, and that, too, in substantially the same language as is employed in the patent in suit. It is said in the Westinghouse patent, substantially, that tightening up the tension rods holds the bar, B (corresponding to the compression member of the device in question), securely in the proper place, and this tightening, namely, of the tension rods, "may be carried so far as to give the bar, B, a slight crown or arch, as shown in Fig. 1." The description of the patent in suit says, substantially, that on the ends of the tension rods are placed nuts, ff', and, when the parts are put together, the nuts, ff', are tightened up, and the camber results. The tightening of the nuts, of course, is a way of tightening the tension rods on whose ends they appear, and by such tightening the rods are shortened or tightened. Exactly what is said in the Westinghouse patent will result in the "crown" or "arch," which are synonyms for "camber." For the purpose of showing whether the camber of the patent appears in the Westinghouse patent, it is immaterial how or by what mechanism the tension rods are tightened. The only thing now to be ascertained is whether the Westinghouse patent shows the camber produced by the tightening of the tension rods, however this tightening may be brought about, provided only that it be brought about by means inherent within the structure itself.

But it is said this Westinghouse camber is useless, unappreciable, and impracticable, because the beam is made of wood, and is not susceptible of much arching, or of permanent continuance in

the arched or cambered condition. I do not deem it necessary to enter into any extended consideration of the evidence on this point. It is somewhat conflicting, but it clearly shows that the Westinghouse wooden beam may be cambered—in fact, it was actually cambered to a very appreciable degree in my presence at the hearing of this case—by the process of tightening up the nuts which controlled and tightened the tension rods. It is also a practicable beam, and is used today by one or more large railroad systems in the operation and running of their trains. I have no doubt the hollow iron beam is a better beam, but its superiority is not per se invention; it is only the result of workmanship, or, possibly, of choice of material.

In my opinion, the Westinghouse patent so taught and described the camber of the patent in suit that any skilled mechanic, following its teachings, could have produced it. This, in my opinion, is so, irrespective of the first Hein patent of April 12, 1887; but, when the instruction of the Westinghouse patent is considered in the light of the first Hein patent, it scarcely admits of a doubt that the camber of the patent in suit is not only vaguely suggested (as admitted by counsel for complainants), but clearly and distinctly taught, and that, too, with all the means requisite for its production and maintenance.

The first Hein patent, as already seen, calls for the same hollow metallic beam, the same strut, the same tension rod, and the same nuts (so far as their operation on the tension rods acts) as are called for in the patent in suit. The first Hein patent, therefore, contains all the elements of the three claims now under consideration, and thus, potentially, the production of the camber in question. Accordingly, it is clear that the first Hein patent is a full anticipation of the patent in suit, if I am correct in holding, as already indicated, that the function or operative effect of a machine is not patentable. If I am incorrect in this holding, it certainly appears, and Hein must conclusively be presumed to have known, that in his own first patent there were all of the physical elements of the patent in suit, and all the energies operant therein requisite and necessary for the production and maintenance of the camber in question. Assume, now, all these elements to be properly assembled, as shown in the first Hein patent, which has a more elastic metallic beam than that found in the Westinghouse patent, and therefore in itself suggestive of bending; assume, also, what the record conclusively shows, that camber, per se, was old at the date of the application for the patent in suit; and assume, further, which I think may be fairly done, that the uses of camber were so obvious as not to require description in the patent: and then add to these assumptions the instructions or teachings of the Westinghouse patent, with which Hein must also be presumed to have then been familiar, to the effect that, by tightening up the rods, camber could be produced,—and it seems to me that the facts so assumed constitute information ample, full, and precise enough to have enabled any person skilled in the art to which that information relates to readily produce and maintain the camber of the patent in suit with-

out the exercise of any inventive faculty whatsoever. Such being the views of the court, it is unnecessary to refer to the Preston patent, which, if applied for on the date it appears to have been, as shown in the printed patent in evidence, would be a material corroboration of the effect already given to the prior art. But, as complainants' counsel contend that there is no sufficient evidence as to when the patent was applied for, I do not take it into consideration. It is also unnecessary to refer to the many other patents pleaded as anticipations, or shown in evidence, as illustrating the prior art.

On the whole case, I am abundantly satisfied, in the light of the art as it existed at the time of the application of Hein for his second patent, that no patentable novelty is involved in the camber claims.

The third and fourth claims of the second Hein patent are now to be considered. They are as follows:

"(3) The combination with a trussed tubular brake beam, having a slot for the passage of the truss rod, and a notch for the reception of a lug on the brake head, of a brake head having a cupped recess for the reception of the end of the beam, and provided with a lug adapted to enter the recess in the end of the beam, as set forth.

"(4) The combination with a tubular beam, notched at its end, of a brake head having a cupped recess or socket, with a lug corresponding to the notch in the end of the tubular beam, as set forth."

While there are other claims in the combination, found especially in the third claim, it is apparent that both these claims relate mainly to the notch and lug feature of the brake beam in question, or to that arrangement of parts which prevents the rotation of the brake head upon the cylindrical beam to which it is attached. An inspection of the model of complainants' beam shows a shallow notch in the periphery of the hollow beam at both its ends. These ends, so notched, are inserted in a thimble or cup-shaped recess or socket, made integral with the brake head, and in this way it is intended to provide means for firmly attaching the brake head which carries the shoe to the beam. It being necessary that the brake head should be firmly attached to the beam, so as not to rotate upon it, a lug or projection is placed in the inside of the cup-shaped recess or socket at the end or bottom of the cup, so as to engage the notch in the periphery of the beam, when driven home. It is this notch and this lug, intended to perform this function, namely, to prevent the rotation of the brake upon the cylindrical beam, that constitute the special device of claims 3 and 4, now under consideration. This lug and engaging notch were probably old and well-known expedients for accomplishing the particular purpose claimed for them in the patent in suit, long before the application for this patent; at least, so it seems to me. But, if they were then comparatively new, it seems to me, from the evidence in the case, that they were clearly shown in the drawings of the first Hein patent, already considered. It is true they are located in those drawings somewhat differently than they appear in the device of the patent in suit, but that there are notches in the ends of the beam of that patent, intended to engage lugs in each of the caps of the

brake heads, and that the co-action of these elements was effectual to prevent the rotation of the brakes upon the beam, I have no doubt. These elements are distinctly shown in the drawings and in the model produced at the trial. They are pointed out and clearly defined by the expert witness for the defendant, and very equivocally, if at all, denied by the experts of the complainants. It is true the function to be performed by this notch and lug are not described in terms in the first Hein patent, but their utility seems to me to be so obvious that their appearance in the drawings necessarily and quickly discloses it.

The defendant's beam does not show the exact notch of the complainants' device, but rather the notch of the first Hein patent, in this: that it is not distinct and separate from the slot of the tension rod, but rather a continued opening, extended from the point where the tension rod obliquely enters the hollow beam to the end of the beam itself; the end of the slot serving the same purpose, however, as the distinct and separate shallow notch found in the periphery of the beam of the patent in suit. Neither is the defendant's lug located in the same relative position in the cup of the brake head as that of the complainants. It more nearly resembles the lug of the first Hein patent than that of the patent in suit. The complainants' device, and the device of the first Hein patent, do not show exactly the same construction of lugs and notches, but they each, in my opinion, show the equivalent construction, namely, the lug and the engaging notch or slot, and each employ these agencies to accomplish the same purpose, in substantially the same way. If, therefore, the defendant's construction is an infringement of complainants' patent, the first Hein patent is necessarily an anticipation of complainants' device. That which is an infringement, if later, constitutes an anticipation, if earlier. *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059.

The evidence and argument of counsel have taken a wide range on this point, and many other considerations are called to the attention of the court which might dispose of these third and fourth claims, but I deem it unnecessary, in view of what has already been said, to devote any more time to their consideration. They are, in my opinion, in so far as they relate to the engaging of the lug and notch to prevent rotation of the brake head upon the beam, void for want of patentable novelty. If any special claim of novelty is made for the provision of the third claim, which provides for the perforation of the beam for the passage of the truss rod into it, in lieu of having a continuous slot from the point where the truss rod enters the beam to the end of the beam, it is enough to say that the defendant's device does not infringe any such element of the claim. The other element of claims 3 and 4, namely, the cupped recess for the reception of the end of the beam, will be considered in connection with other claims of the patent.

The next and only remaining claims of this second Hein patent are the fifth, sixth, and eighth. They are as follows:

"(5) A trussed, hollow, or tubular brake beam, having a camber, and having one or more notches at its ends, in combination with brake heads having

cupped-shaped recesses, inclined bearings and one or more projections, and the truss rod, passing through and holding said heads in position.

"(6) A trussed, hollow, or tubular brake beam, having a camber, in combination with brake heads having cupped-shaped recesses, a truss rod passing through and holding said heads in position, and the inclined bearings for supporting the nuts on the ends on the truss rod."

"(8) In a trussed brake beam, the combination with a cambered compression member of brake heads having cupped-shaped recess for the reception of the cambered compression member, and a tension rod, substantially as and for the purposes specified."

Eliminating from these claims the elements found in other claims already disposed of, there remains in them substantially one feature only for further consideration, and that is the feature of the cupped-shaped recesses or sockets for the insertion of the ends of the compression member or beam into the brake head. These claims, also, in so far as they involve this cupped-shaped recess, had a troublesome experience in the patent office. The claims, as originally filed, were for either a cupped-shaped or hollow socket. As so claimed, they were rejected on references to which I need not now refer, and subsequently, by divers changes, the claims were modified and amended, so as to appear as now found in the claims under consideration. As so modified and amended, they were again rejected by the examiners on references to prior patents, and afterwards allowed on appeal. The final allowance of the claims was made after argument by the patentee's attorney showing, among other things (what is quite apparent from the claims themselves, as finally allowed, and the descriptions and drawings of the patent), that a cupped-shaped recess, as here claimed and allowed, implies a bottom or closed end. In an argument made September 30, 1889, the attorney for the patentee declared the particular advantage or function of a construction embodying the cupped-shaped recess of the claims in question to be that, "by reason of the ends of the recesses of the brake heads being closed, these heads, of course, cannot slip or be drawn along the beam." In an argument made by the attorney on April 10, 1888, he states that the citation of the first Hein patent is avoided by the closed ends of the cup, which the attorney says Hein's first patent did not show.

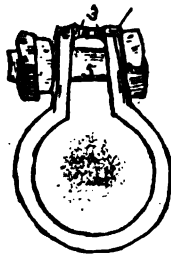
Without pursuing the argument or proceedings in the patent office further, it may be confidently said, as a result of the evidence in this case, that the hollow brake head or recesses generally, as first claimed, were abandoned on references made by the patent office, and that a voluntary limitation was accepted by the patentee, namely, a cupped-shaped recess alone, which implies, as is admitted, a bottom or closed end, and that the special function or new use to be served by the device of the claims is to prevent the brake heads from slipping or being drawn inwardly along the beam. The defendant's device which is alleged to infringe these claims is one in which the recess for the brake head is not cupped shaped,—that is, it does not have the closed end, but is simply a hollow perforation, just big enough to permit the entry of the cylindrical end of the beam, with no obstacle like the closed end to prevent its sliding through the recess; and it is urged that the defendant employs a device consisting of a cap and washer at the outer open end of the recess, through which the

end of the tension rod extends exactly as it does through the bottom of the cupped-shaped recess of the claims in question, and that by this device the same function is discharged as that which results from the cupped-shaped recess of the claims; in other words, that the defendant's device consists merely of two parts instead of one, as in the claims of the patent under consideration, and is therefore the mechanical equivalent of the device of such claims. It is urged by the complainants' counsel, and many authorities are cited to the proposition, that infringement is not avoided by simply making in two pieces what was formerly made in one piece only. This proposition cannot be denied, provided the device with the two pieces performs the same function and produces the same result as the prior one-piece device. But is it true that the defendant's device performs the same function as the device of the claims in question? I think not. I find nothing in the defendant's device, apart from the operation of the other elements of the tension rod and nuts (which are not now involved), which would prevent the sliding of the brake head inwardly along the beam. Unless tightened up by the tension rod, the brake head proper can slide along the shaft without any physical interruption by the cap and washer. They simply separate—that is, the cap and washer separate—from the end of the tubular beam, while in the device of the claims it is physically impossible for the brake head to slide inwardly along the shaft of the beam, even without the effective operation of the tension rod and nut. The resistance of the bottom of the cupped-shaped recess or socket at once prevents such motion.

But whether this difference of function or result exists in fact or not, it cannot, in my opinion, be now questioned by the complainants. They are estopped from so doing by the enforced amendment of their claims, accepted by the patentee, which limit them to a particular construction. *Brill v. Car Co.*, 33 C. C. A. 213, 90 Fed. 666, and cases cited. They are also estopped from so doing by representations made in the patent office to secure their patent. Their patentee secured the grant with much difficulty, after many citations, and after divers changes, modifications, and amendments, to avoid such citations, and then only upon the representation, voluntarily and repeatedly made, that his device, the socket or recess of the brake beam, was made in one piece, and so made with closed ends, like the bottom of a cup, in order that it might not slip along the shaft inwardly. Under such circumstances, the construction of the patentee's brake head in one piece, in order thereby to perform the particular functions claimed, is a self-imposed limitation, which complainants are not at liberty to question or disregard. *Westinghouse v. Power-Brake Co.*, 170 U. S. 537-558, 18 Sup. Ct. 707, 42 L. Ed. 1136. In fact, it appears to me conclusively from the proof in this case that, if the complainants' invention is not so limited, it was anticipated by several of the references made by the patent office, as disclosed by the file wrapper.

It results that, conceding to the complainants the full benefit of their invention, as found in claims 5, 6, and 8, and conceding the validity of the claims, notwithstanding the strenuous attack upon their patentability made by the defendant's counsel, the defendant is not shown to have infringed either one of them.

The next patent for consideration is No. 430,755, granted to H. B. Robischung, of date June 24, 1890. Its second claim only is alleged to be infringed by the defendant. It is as follows: "A clamp or yoke having flanges provided at or near their extremities with inwardly projecting lugs, which limit the closing of the flanges, substantially as and for the purposes specified." This claim relates to a yoke clasped around a brake beam, with extended flanges, through which a bolt is inserted upon which to hang the safety chain. In actual use, the operating nut at the end of the bolt is screwed up, and has a tendency to cause the flanges to bind or rigidly hold the safety chain, and to cause the chain itself, when so rigidly held and subject to the jolts and jars of service, to loosen up the bolt. The object to be accomplished was to so regulate and control the tightening of the bolt as to always permit the chain to hang freely over it, unbound by the flanges of the clip. To accomplish this object, lugs are provided, one on each of the inner sides of the flanges, at their ends below the bolt, so that, in the process of tightening up the bolt, the lugs, being first brought into contact, interpose effective limits to prevent the flanges from impinging upon or binding the chain. This is all plainly disclosed by an inspection of Fig. 5 of the drawings of the patent, as follows:



The figure "3" here represents the lugs, and the figure "5" represents the bolt passing through the flanges.

There is no pretense that the yoke, flanges, or bolt of this claim are new, or that the purpose served by them is new. The invention of the claim consists simply in the intervention of these lugs at the end of the clip, to limit the effect of tightening the bolt, and thus always keeping the flanges sufficiently apart to prevent their squeezing the chain hung over the bolt. The question is whether this expedient rises to the dignity of "invention," as the term is employed in the patent law. I do not believe that every little expedient resorted to, not in an abstruse art or pioneer invention, but in ordinary physics, for the purpose of more effectually applying the well-known laws of force, should be easily monopolized. Without any consideration of the prior art, it seems to me that the employment of the lugs of this patent for the purpose stated was a suggestion of common experience, and so obvious and appropriate to prevent the squeezing of the safety chain as to be naturally and rationally seized upon by a skilled mechanic at all familiar with the requirements of railroad service. If so, it did not involve invention. *Hollister v. Manufacturing Co.*, 113 U. S. 72, 5 Sup. Ct. 717, 28 L. Ed. 901. Given the necessity of holding the

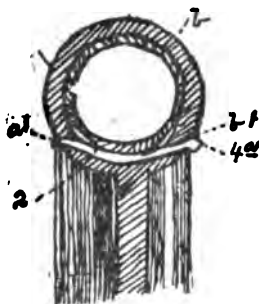
flanges apart, so as not to squeeze the chain, and at the same time keep the rod over which the chain hangs reasonably tight; can anything be more obvious than to interpose some solid substance, like lugs, to prevent too much impingement? I think not. But, when the prior art is considered, we are not left to the sole resort of obviousness. The lugs of this patent are shown in the cant-hook clip in evidence, and the mechanical equivalent of the lugs is, in my opinion, found in the Preston patent, No. 369,383, and the first Hein patent, No. 361,009. In these patents the flanges of the clip are prevented from approaching too closely together by the interposition of the tension rod, located so as to pass between the flanges of the clip. In my opinion, claim 2 of this patent is void for want of patentable invention and novelty.

The next and last patent requiring consideration in this case is No. 466,984, granted to H. B. Robischung, of date January 12, 1892. The first and second claims only are alleged to be infringed. They are as follows:

"(1) In a cambered trussed brake beam, the combination, with the compression member and the strut or post, of an interposed key or wedge, substantially as and for the purposes specified.

"(2) In a cambered trussed brake beam, the combination, with the compression member, of a strut or post having a collar for the compression member, said collar provided with key slots and a key or wedge, substantially as and for the purposes specified."

The first claim, it is noticed, relates exclusively to the key or wedge. The second claim relates to the same key or wedge, and also a slot in the collar of the strut for the insertion of the key. The invention of these claims may therefore be considered together. It consists in providing a slot for the insertion of a wedge in the collar of the strut which clasps the beam, for the purpose of taking up the slack between the collar of the strut and the beam, and for the purpose of overcoming lost motion. The complainants' device involving these claims is readily seen in the following cut, Fig. 3 of the patent:



The circular or bent key, a', b', represent both the slot and the key called for by the two claims in question.

By reference to the above drawing, it is observed that the key of the claim is of a peculiar circular or bent shape, and follows a tortuous channel or slot made for it transversely across the beam. In other words, this device presents a peculiar and unusual con-



struction. The defendant's device shows a straight wedge, interposed longitudinally on the concave side of the beam, and between it and the convex end of the strut. This appears to me to be nothing but the common, old-fashioned process of tightening up the parts by a straight wedge or key driven in between the parts liable to be loosened. The prior art, as fully disclosed in the evidence, as well as common knowledge and common observation, as it seems to me, demonstrate that the key of the defendant's device, as well as the function intended to be discharged by it, are old. The claims in question, therefore, must, if their validity or patentability be sustained, be limited to the particular and peculiar construction shown in the drawings. It follows that, conceding novelty and patentability to the peculiar slot and key of complainants' device, the defendant does not infringe it. Under the rule hereinbefore referred to, that whatever would infringe if later would anticipate if earlier, any construction of the claims of the patent under consideration which would make the device of the defendant an infringement would render the claims invalid for want of novelty.

I have carefully considered the argument of complainants' counsel based on evidence of extensive sales of their brake beam. Whether such sales have been made as a result of construction under any of the patents involved in this case, or whether they have been the result of the "patent of completion," as the Robischung patent, No. 486,218, which is the subject of another suit, is called by them, or of other causes, I cannot say; but conceding to complainants' brake beam, as a whole, the merit of great success and popular favor, it does not follow that it is patentable as a new invention. Extensive use is strong proof of utility, but not of invention. In doubtful cases, extensive use and popular favor might, and properly should, turn the scales to the side of invention; but I am of opinion that the issue as to patentable invention in certain claims, found adversely to complainants, was not left in such doubt as to be properly affected by the extensive use of the completed product.

This concludes a consideration of all the claims of the several patents sued on in this case. The result is, as already shown in detail, that, in so far as any of the claims are valid, the same are not infringed by the defendant, and the bill must accordingly be dismissed.

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**CHICAGO RAILWAY EQUIPMENT CO. V. INTERCHANGEABLE BRAKE-BEAM CO.**

(Circuit Court, E. D. Missouri, E. D. January 24, 1900.)

No. 4,048.

**PATENTS—INFRINGEMENT—CAR BRAKES.**

The Robischung patent, No. 486,218, for improvements in brakes for railway cars, claim 5, covering a locking device designed to prevent any alteration of the camber of the brake beam, construed, and held valid, but not infringed.

This was a suit in equity for infringement of a patent. On final hearing.

Paul Bakewell and F. W. Ritter, Jr., for complainant.  
Noble & Shields and Geo. S. Payson, for defendant.

ADAMS, District Judge. This is an action for the infringement of the fifth claim of letters patent of the United States No. 486,218, granted to Henry B. Robischung, November 15, 1892. This claim is as follows:

"In a trussed cambered brake beam, the combination, with a cambered compression member, a tension member, a brake head, and a nut for maintaining the camber, of an interposed locking device, for preventing any alteration in the camber of the beam, substantially as and for the purposes specified."

The patentee, in his specification, states the object of his invention to be "to prevent any tampering with the camber of the beam after it has been finally adjusted, which unauthorized and injurious tampering with the camber of the beam frequently takes place in attempts to take up or obtain slack in hanging the beam; and this object I accomplished by interposing between the tension member and head a locking device, which must be removed or destroyed before the camber of the beam can be changed." The device of this claim is very simple. It consists of interposing, between the brake head and the nut which controls the tension rod, a thin disk or locking plate, provided with a lip to be turned up after the nut is screwed into position, to prevent, under the penalty of immediate detection, any unauthorized interference with the nut, so as to affect the camber of the beam. The history of this invention shows that, after the camber or degree of resilient force in the compression member had been fixed and the beam tested, its integrity and effectiveness required that the same should not be subject to any unauthorized interference or intermeddling. It was found that employes of railroads, in adjusting the brake lever to the requirements of the air-brake system, and for other purposes, were in the habit, occasionally, of making their work easy by loosening or tightening up the nuts of the tension rod, thus diminishing or increasing the camber of the beam, in order to make the requisite variation in the position of the brake lever. This practice proved highly detrimental to the effectiveness of the beam, and it became a matter of serious concern to the manufacturers to know whether the ineffectiveness of the beam, in given cases, was their fault or the fault of the railroad operatives. The purpose of the inventor of the device of claim 5 was to discover something which could serve as a detector, to afford the manufacturers an opportunity of ascertaining whether their beams had been tampered with after delivery, and, incidentally, by reason of the certainty of detection, to prevent any such tampering. The lip, in order to serve the purpose of the designer, was made of frangible material, so that, when once bent over, it would readily break and not bend back to the old position, and thus prevent the detection of a trespasser. This particular device is found in a combination of elements consisting of a cambered compression member, a tension member, a brake head, and a nut for

maintaining camber. These elements, as seen in the case of *National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co.* (just decided) 99 Fed. 758, are all old, and it is claimed by defendant's counsel that the additional element of the locking device is also old. They say it is nothing but the old time nut lock, which has been employed in mechanical construction for a quarter of a century or more. A "nut lock," as such, is defined to be "a device for fastening a bolt nut in place, and preventing its becoming loose by the jarring or tremulous motion of machinery." It seems to me that the device of the claim in question is intended to and does perform a function entirely different from that of a nut lock. Its popular name, "detector," well and tersely describes this function. It produces a new and beneficial result, and does so in a different way, and by means quite unlike those shown in the prior art. The ordinary nut lock serves its purpose best when made strong and durable. The device of claim 5 serves its purpose best when made brittle and readily destructible. It is, in my opinion, a meritorious invention, well adapted to meet the want created by the necessities attending its use. Does the defendant infringe? Counsel say it does not, because there is a groove on the end of the brake head of the complainant's device, and a raised rib on the disk of the locking device, intended to fit into the groove, to prevent rotation of the disk, which the defendant does not employ. While this groove and rib construction appears in complainant's device, it is not called for by the claims of the patent, and is referred to in the specification as only a preferential construction. In my opinion, this groove and rib are not essential to the invention, and, as a result, the defendant's failure to employ them does not affect the issue of infringement.

Counsel say that defendant does not infringe because its construction is an old nut lock, and nothing more, and is employed, not as a detector, but merely as a nut lock, to prevent the loosening of the nut by the jolting incident to service; and, to substantiate this, they call attention to the proof showing that there are two lips on the defendant's lock, instead of one, as on the complainant's, and that they are made, not of brittle or frangible material, but of pliable material, such as may be readily turned down, and afterwards bent back, without breaking or subsequently disclosing the fact that they had been disturbed. I believe the evidence clearly shows this to be the defendant's construction. The description of the patent, to which reference is made, in claim 5 states: "This object [namely, preventing tampering with the camber] I accomplished by interposing between the tension member and head a locking device, which must be removed or destroyed before the camber of the beam can be changed." It is such a destruction of the lip of the locking device as prevents its returning to its original position that alone serves the purpose of detecting interference with it. The testimony, as well as the specifications, all show that this sure and certain destructibility or breaking of the lip of the device by the act of bending it down constitutes the effective detective feature of the claim; in other words, if the device is made of such material as will permit its being bent back into position, so as not to disclose the fact of disturb-

ance, it affords within itself opportunity for defeating the very purpose of the invention.

It is said by complainant's counsel that defendant has no occasion to use a nut lock merely, for the reason that the camber or resiliency of the compression member does away with the necessity of such a nut lock, in this: that the constant pressure of the nut against the threads on the end of the tension rod performs all the useful functions of the nut lock. Without doubt, this is theoretically true; but I cannot conclude from this fact, as I am asked to do, that the defendant's device is necessarily intended to perform the function of a detector, when it lacks the particular feature of frangibility, which alone fits it for that service. In addition to this, it is not an unreasonable thing for any one to provide against the possibility of ineffectiveness of theoretical action by the safeguard of a simple, practical, and well-understood device. Because, therefore, it appears from the evidence that the defendant does not make its device of any frangible or easily broken material, but rather of pliable material, such as may be readily turned down and bent back without breaking, I conclude that the defendant does not infringe the device of claim 5 of this patent. The bill must be dismissed.

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#### THE MANITOBA.

(District Court, S. D. New York. January 17, 1900.)

##### PERSONAL INJURIES—FALL FROM "JACOB'S LADDER" INTO HOLD.

Where a bag sewer in the employ of a warehouse company at whose dock a steamship was discharging was directed by his employers to go into one of the holds of the vessel to mend coffee bags, and in going down voluntarily made use of a rope ladder, with wooden steps, which the vessel had furnished to contracting stevedores who had rigged it in the hatchway, and after descending it in safety was injured by falling from it in attempting to ascend it at the close of the day, it was held (1) that the ladder was safe and sound of its kind; (2) that the shipowners owed no duty to the libellant to furnish him with a different kind of a ladder; and (3) that the libellant could not recover damages from the shipowners.

(Syllabus by the Court.)

##### In Admiralty. Libel for personal injuries.

The libellant was a bag sewer in the employ of a wharf and warehouse company, owners of a covered wharf at which the British steamship *Manitoba* was discharging a cargo of coffee, and of warehouses adjoining the dock, in which the coffee or a part of it was to be stored. A foreman of the wharf company, without previous communication with the ship's officers or servants, ordered the libellant to descend into the No. 1 hold of the steamship and mend or resew some bags in the bottom of the hold. Two of the four holds of the vessel had permanent iron ladders leading down through the hatchways into the holds, but there was no such permanent ladder in the No. 1 hold. The ship's officers had furnished to contracting stevedores, for their use in discharging the cargo, a rope ladder with wooden steps, known as a "Jacob's Ladder," which had been suspended by the latter in the hatchway and was hanging there when libellant went to the hatch. The stevedores were not at work in this hold at the time. The libellant went down the ladder in safety, but testified that it swung so as to make his descent upon it difficult. After completing his work for the day he attempted to ascend the ladder, which was then unattached at

the bottom, and when part way up fell back into the hold sustaining painful and serious injuries. He claimed (1) that the ladder was defective and that one of the steps slipped on the rope or broke, and (2) that the respondents, owners of the vessel, were negligent in not having a permanent iron ladder in the hatchway. There was contrary evidence that the ladder was sound and safe of its kind, and that similar ladders had been long in use at this place without accident.

George Whitefield Betts, Jr., for libelant.  
Convers & Kirlin, for respondents.

BROWN, District Judge (after stating the facts). The weight of testimony shows that the "Jacob's Ladder" was new, sound, good of its kind, and that the step did not give way as libelant supposed. Such ladders are in frequent use on board ship and familiar. This was in use for two days by many persons and the stanchion behind it prevented swaying backwards; it was not unsafe for persons used to it. It was voluntarily taken by the stevedore's men; and voluntarily used by them and by the libelant; there was no concealed danger about it, and the ship owed no duty to the libelant to provide other means of descent to the hold—certainly not except on call for it. I think the accident was due to the libelant's foot missing the step in some way, or slipping; he was near the top, and near the box beam where the swing would be least.

Libel dismissed.

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#### THE THOMAS TURNBULL.

(District Court, E. D. Pennsylvania. February 14, 1900.)

No. 52.

#### NEGLECT—ACTION FOR INJURY—KNOWLEDGE OF DANGER.

As a steamship was approaching a dock, a rope ladder was let down over the side, to enable a seaman to land upon the pier and make the vessel fast, and in the hurry of the moment it was dropped in front of the opening of an exhaust pipe connected with a donkey engine. While the ship was being moored, or immediately after, libelant, a stevedore, started to climb on board to seek employment in loading the vessel, which was customary at that port, and when opposite the exhaust pipe the engine was started for some purpose, and libelant was burned by the escaping steam and water. The end of the pipe could have been seen from the pier, and libelant knew its nature and use. *Held*, that the vessel was guilty of no negligence of which libelant could complain, there being no claim that he was known to be coming on board when the engine was started, and that he must be held chargeable with knowledge of the danger, which he could have seen.

In Admiralty. This was an action for personal injuries against the steamship Thomas Turnbull.

Francis C. Adler and John F. Lewis, for libelant.  
Henry R. Edmunds and Convers & Kirlin, for respondent.

McPHERSON, District Judge. This is an action to recover damages for personal injuries to the libelant, alleged to have been caused by the respondent's negligence. The facts are as follows: In the

afternoon of June 15, 1896, the steamship Thomas Turnbull was approaching an elevator on the Delaware river, in this city, where she was to take on board a cargo of grain. As she neared the dock, a rope ladder was let down over her side in order to permit a seaman to land upon the pier and make fast the mooring lines. In the hurry of the moment, the ladder was dropped over the exhaust pipe connected with one of the donkey engines. While the ship was being moored, or shortly afterwards,—the testimony concerning the time of the accident is conflicting, and I do not think it necessary to determine the point exactly,—the libelant came upon the pier, and mounted the ladder, in order to board the vessel and offer himself for employment in the work of loading. He is a stevedore by occupation, and during the morning had been employed in loading grain upon another steamship on the opposite side of the dock. That work had been finished, and he had been paid. His employer there had been a boss stevedore named Thomas Grace, and, as Grace was also under contract to load the Turnbull, the libelant hoped, and had some reason to expect, that he would be employed upon the Turnbull also. The injury was done under the following circumstances: It is the custom in the district where the vessel was to receive her cargo for stevedores in search of work to go, not only to the wharves, but also on board the vessels, where they hope to find employment. Sometimes they are hired on the wharf, and sometimes on the vessel. Whether or not the respondent knew of this custom does not clearly appear, but I do not regard her knowledge as important in the present action. For the case in hand, it may be assumed that the libelant was doing nothing improper when he attempted to board the vessel, whether she was still being docked or had been completely made fast. Probably she had been made fast, for the boss stevedore was already on board with two men, and was beginning to rig the chutes through which the grain was to be run into the hatches. But the libelant did not examine the surroundings of the ladder, and therefore did not observe that it had been let down over the exhaust pipe, although this pipe projects from the side of the vessel an inch or two, and, while probably not obtrusive, is easy to be seen. As he went up the ladder, and reached a point opposite the pipe, the donkey engine was started to perform some work, and steam and hot water were projected through the pipe, striking his breast and thigh, and doing the injury complained of. The negligence charged is not placing the ladder in a safe and proper place, and working the engine while the libelant was going on board.

I see no negligence at the time the ladder was put down. There was no reason, then, to anticipate that any one was about to come on board, and the ladder was merely intended for the temporary use of the seaman who was making fast the mooring lines to the wharf. Under such circumstances, the vessel owed the libelant no duty to exercise special care about the particular point on the ship's side where the ladder should be thrown over. If it was afterwards left in the same place for the use of any one who might desire to come on board, the question of due care in thus maintaining it might arise. But whether it was so left, or whether the injury occurred while the tempo-

rary use was manifestly the only use in contemplation, I do not find it necessary to decide. In either event, I think the libelant used the ladder at his own risk. He could easily have seen, if he had chosen to look, that the ladder was over a pipe projecting from the side of the vessel, and his testimony shows that he knew what kind of a pipe it was. He must be charged with the knowledge that he could thus easily have gained; and certainly, if he had seen the pipe and had still persisted in going on, it could not be successfully contended that he had not taken the risk of injury. There is no testimony to show that the engine was used with the knowledge that the libelant was on the ladder. The charge is negligence, and not the willful infliction of injury.

The libel must be dismissed, but without costs.

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### THE PERU.

(District Court, E. D. Pennsylvania. February 15, 1900.)

#### SALVAGE—AMOUNT—TOWAGE SERVICES.

A sailing ship valued at \$60,000 was in imminent danger of being destroyed by fire, which had started in the sheds on a wharf near which the ship lay. She was on fire in several places, when a tug ran up under her bow, took a line from the ship, and towed her away immediately. There was no difficulty in towing the ship, and after the two vessels left the wharf the peril was over. The injury to the ship did not exceed \$150. The value of the tug was not more than \$3,500. If the tug had not been present, a fire boat would have performed the services. The tug was at no time in danger. *Held*, that \$2,500 should be awarded the tug as salvage.<sup>1</sup>

In Admiralty.

Horace L. Cheyney and John F. Lewis, for libelant.

Edward F. Pugh and Henry Flanders, for claimant.

McPHERSON, District Judge. On June 13, 1898, the German sailing ship Peru was lying at the bulkhead wharf of the Philadelphia Refinery, upon the east bank of the Schuylkill river. She was a three-masted steel vessel, of 2,096 tons register, three or four years old, in good repair, and properly equipped. Her masts were of steel, her standing rigging was of steel covered with tarred rope, and her running rigging was mainly of Manilla rope. Her deck was of steel, covered with pitchpine. Some of her spars were of wood, and some were of steel or of iron. Her value was about \$60,000. She was empty, except for some sand ballast, but was soon to be loaded with case oil for Japan. She was lying with her head up stream, towards the north, and her starboard side towards the wharf. About 50 feet south of her a barge belonging to the Atlantic Refining Company, containing acid in large iron tanks, was moored; and perhaps 100 or 150 feet further down lay two large iron vessels, the West Lothian, which was next to the wharf, and the County of Haddington, which was immediately outside the

<sup>1</sup> As to salvage awards, see note to *The Lamington*, 30 C. C. A. 280.

West Lothian, the yards of the two vessels being interlaced. A frame shed, about 200 feet in length and 10 feet in height, stretched along the wharf, and contained in the southern end a large quantity of case oil, and in the northern end paraffine wax, and perhaps some other petroleum products. The West Lothian had on board a valuable cargo of case oil, but the County of Haddington was in ballast. The tide was flood, and there was no wind, except a light westerly breeze. About 7 o'clock a fire broke out in the southern end of the shed, spread with considerable rapidity, and, owing to the inflammable nature of the materials at hand, burnt with fierceness. The tug Josephine Lincoln was on her way down the river, towing two empty canal boats, when she saw the smoke from the fire. She immediately put on full speed, dropped the canal boats at Gibson's Point, about half a mile distant from the refinery, upon the opposite bank of the river, and proceeded at once to the scene of the fire. As she came down the river, she was overtaken by the King, a large and well-equipped fire boat, belonging to the city of Philadelphia, which was on its way to render such aid as might be possible. The two boats approached the wharf side by side, and, as they neared the Peru, the captain of the King shouted to the Lincoln to go in and save the Peru, while he himself went on to the other end of the wharf. The Lincoln thereupon ran up under the bow of the Peru, took a line from the ship, and towed her away immediately. At this time the fire had so increased in volume and fierceness that the West Lothian—which was earliest exposed—was already seriously injured, although she and the County of Haddington had been promptly towed away by two powerful and well-appointed tugs belonging to the refinery, which were kept in constant readiness for special service of this kind. The barge was in flames, and became a total wreck. The shed was on fire from end to end, and the heat on board the Peru was so great that the men could scarcely stay on deck. An attempt had been made by the crew to haul the ship ahead, but they were unable to move her. She had taken fire in several places on the starboard quarter, and a boat had been lowered over the port side to enable the crew to leave in safety and to remove their personal effects. Some burning oil was upon the surface of the water, not far astern of the Peru, but the Lincoln was not threatened by this source of danger. There was no difficulty in moving the Peru, and after the two vessels left the wharf the peril was over. The ship's crew put out the fire on board, which had done little damage, and she was slowly towed to Gibson's Point, where the Lincoln attended upon her until half past 10 o'clock, when the tug was notified that her services were no longer needed. The injury to the Peru probably did not exceed \$150, but there can be no doubt that she was in a situation of extreme danger. Everything upon the wharf that could be burnt was consumed, as well as the combustible portions of the bulkhead itself. The Lincoln is a small iron tug of 10 tons capacity, 50 feet long and 11 feet wide, with an engine having a capacity of 110 pounds of steam. She is 24 years old, is manned by four men, and her value does not exceed \$3,500. Her captain received \$45



per month, the engineer \$50, and the fireman and cook each \$25.

These are the relevant facts from which to determine how much salvage should be awarded to the *Lincoln* for the valuable aid that she unquestionably rendered to the Peru. From the first, the service was conceded by the ship to be a salvage service, and before the suit was brought some effort was made by the parties to agree upon the proper sum. They did not reach an agreement, but after the ship was attached upon a claim of \$7,500 the respondent paid into court the sum of \$1,000, with costs accrued to the time of payment. This amount was refused by the libellant, and the question for decision now is, how much more, if anything, should be awarded to the libellant? In cases of salvage, it is often difficult to decide how much should be allowed. The elements to be considered are well known, such as the danger to either vessel, the value of the property at risk, the nature of the service, the nearness of other aid, and the success of the rescuer's effort; but what the final conclusion shall be is, after all, largely dependent upon the effect produced by the particular circumstances upon the mind of the judge. There are no rules to guide him, and the decisions differ so widely, both in their facts and their conclusions, that little help is to be had from this source. Many cases are referred to in *The Boyne* (D. C.) 98 Fed. 444, and in the note to *The Lamington*, 30 C. C. A. 280, 86 Fed. 675. Turning, then, to the case before the court, and bearing in mind the facts above set forth, I have no doubt that, if the Peru had not been towed away at the time when that service was performed, she would have been either destroyed or seriously damaged. But it is equally clear that the *Lincoln* was not indispensable. If she had not been there to render the service, the King would have performed it without delay. The *Lincoln* herself was at no time in danger, and the work she did was not of an extraordinary character. The tow was unusually deliberate. There was little strain upon either the vessel or the crew. If it had not been for the fire, the labor performed would have merely supported a claim for towage, and this would have been fully compensated by the payment of \$50. But I cannot help being influenced by the value of the property saved, and by the imminence and seriousness of the peril to which it was exposed. The tug is not valuable, and was in little danger, but she certainly saved the ship either from destruction, or from the loss of many thousands of dollars. I have not been consciously influenced by the testimony concerning the sums agreed upon by the parties as salvage for the *West Lothian* and the *County of Haddington*. I have no doubt that the testimony on this point was competent,—since the three ships were exposed to the same danger, under circumstances much alike,—but I have not felt it necessary to take the sums thus paid into account, the other testimony offering sufficient facts upon which to base a conclusion.

Taking these facts into consideration, therefore, I am of opinion that the tug should receive the sum of \$2,500 (including in this award the \$1,000, already paid into the registry of the court), and a decree may be drawn for that amount, with costs of suit.

## MORRIS et al. v. BARTLETT et al.

SAME v. WHITAKER et al.

(District Court, E. D. Pennsylvania. February 16, 1900.)

Nos. 40, 65.

## JUDGMENT—RES JUDICATA.

A judgment in a proceeding in rem in the admiralty court, that a contract for repairs on a vessel did not bind the vessel or her owners, but that it was agreed that payment should be had out of her earnings, is a bar to a personal action against the owners to recover for such repairs.

## In Admiralty.

Joseph Hill Brinton, for libelants.

Edward F. Pugh and Henry Flanders, for respondents.

McPHERSON, District Judge. These two suits rest upon the same cause of action, a claim for repairs to the schooner Jennie Middleton. One is a proceeding in personam against certain part owners of the vessel, and the other is a foreign attachment, in which the master and the managing owners have been summoned as garnishees; but both are founded upon the same averment, namely, that the repairs for which the libelants seek to recover were done upon the request of the master and of the managing owners, the remaining owners being personally bound by this act of their agents. The defense is that the point is res adjudicata, the same question having been raised and determined in a proceeding in rem against the vessel in the admiralty court for the district of New Jersey. The record in that case discloses the following facts: The libelants averred that the repairs were done at the request of the master, while the answer of the respondents declared that the contract to repair was made by the libelants with the managing owners, and that the express agreement was that the repairs were to be paid for out of the earnings of the schooner, and from no other source. On the issue thus formed, testimony was taken, and upon the final hearing Judge Kirkpatrick found as a fact that the agreement was as the respondents alleged. Part of his opinion is as follows:

"In March, 1898, the schooner Jennie Middleton was in the yard of the libelants at Camden, N. J., in need of repairs. The captain did not feel authorized to determine the extent of these repairs, and the shipwrights were referred by him to Messrs. Bartlett & Sheppard, of Philadelphia, who were the managing owners of the schooner, for orders respecting the same. Subsequently, Mr. Mathis, one of the libelants, and Mr. Bartlett, one of the managing owners, met at the office of Bartlett & Sheppard, and discussed the matter of the extent of the repairs to the schooner, when Mr. Bartlett directed Mr. Mathis to make only such repairs as he might deem necessary. Mr. Mathis then asked if Messrs. Bartlett & Sheppard would personally guaranty the bill for the repairs, to which they replied, 'No.' It is asserted by Mr. Bartlett, and Mr. G. W. Sheppard, Jr., who was present at the interview, that Bartlett said to Mathis that, if he (Mathis) took the job of repairing the schooner, he would be obliged to wait for his pay until the schooner had earned the money, and that to this Mathis agreed. Mathis denies that he did so agree, but I think his denial relates to any express agreement on his part; for I am satisfied that the understanding of the parties was that the repairs should be paid from the earnings of the schooner, as had been their custom

in previous dealings. It is not by any one alleged that at this meeting, when the repairs were ordered, anything was said by which it was agreed or suggested that the repairs should be a lien upon the boat. \* \* \* The record fails to disclose any evidence of express contract for lien, and the only circumstance from which it could be inferred is the refusal of the managing owners to pledge their personal credit for the repairs. I think such inference, however, unwarranted, in view of the evidence relating to the agreement of the libelants to accept payment for repairs to the schooner out of the earnings as they accrued."

A decree was accordingly entered dismissing the libel. I think this decree is decisive of the present controversy. The question is not whether an action in rem and an action in personam may not both be brought, either simultaneously or successively, to enforce a claim for repairs, but whether, after one form of action has been chosen and the controversy has been fully heard on the merits, an unsuccessful libelant may, by a change to another form of action, secure a second hearing of the cause. The subject-matter of the present suits is the same as the subject-matter of the suit in rem; the parties are the same, for the vessel and the stipulation represented the interests of all the owners, and the master appeared for the owners then as the managing owners appear now; and the only question in dispute is the question already decided by Judge Kirkpatrick, namely, was the contract binding upon the owners, or was it expressly confined to her earnings? The vessel could not be bound unless the owners were bound. This decision, having been made directly upon the merits, in a suit between the same parties, before a court of competent jurisdiction, concerning a matter that was distinctly in issue as a ground for recovery, is a final determination of the question in the present controversy between the libelants and the respondents.

A decree may be entered in each case dismissing the libel, with costs.

## MUNSON v. STRAITS OF DOVER S. S. CO.

(District Court, S. D. New York. February 3, 1900.)

### 1. ARBITRATION—AGREEMENT TO ARBITRATE—ACTION FOR BREACH.

An agreement in a charter party to arbitrate any dispute which may arise between the parties, being purely executory, and ineffectual, under the settled rules of law, to oust the jurisdiction of the courts or debar either party from resorting thereto, will not afford the basis for an action by one party to recover damages for its breach, where defendant refuses a demand to arbitrate thereunder in the first instance, and exercise his legal right to bring suit.

### 2. DAMAGES—BREACH OF AGREEMENT TO ARBITRATE.

Where no action was taken under an agreement for arbitration beyond a demand and refusal to arbitrate, only nominal damages are recoverable for the breach of such agreement; the expense incurred in lawyer's fees and disbursements in a suit, above the expense of an arbitration, being a matter too uncertain and too much within the option of the parties to be made the legal basis for damages.

### 3. JUDGMENT—EFFECT AS ADJUDICATION—REFUSAL TO AWARD COSTS.

The refusal of a court, when within its equitable discretion, to award costs or disbursements to a successful party, is an adjudication which precludes such party from maintaining an independent action for their recovery.

In Admiralty. On exceptions to libel.

Wheeler & Cortis and Charles S. Haight, for libellant,  
Convers & Kirlin, for respondent.

BROWN, District Judge. The above libel was filed to recover \$505.56, the damages alleged to have been sustained by the libellant in "lawyer's fees and disbursements" arising from the defendant's refusal to arbitrate a matter in dispute between the parties under a charter party. The agreement to arbitrate is contained in the following clause of the charter:

"That should any dispute arise between the owners and the charterers, the matter in dispute shall be referred to three persons at New York, one to be appointed by each of the parties hereto, and the third by the two so chosen; that their decision, or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the court."

The dispute arose on a claim of the defendant as owner of the steamship Straits of Dover against the present libellant, as charterer of the steamship, to extra compensation for a detention of the steamer beyond the charter period. The present libellant offered to arbitrate that dispute, which was refused by the present defendant, which thereupon filed its libel in this court against the present libellant in personam for the recovery of a considerable sum for the detention. The case turned upon the proper construction of some of the clauses of the charter, and resulted in the dismissal of the libel without costs. 95 Fed. 690. In the present libel it is alleged that in that action "the libellant incurred the expense in lawyer's fees and disbursements of \$555.56"; that "the expense of arbitrating the claim would not have exceeded the amount of \$50"; and the libellant therefore claims an "indebtedness to him of \$505.56."

The respondent has filed exceptions (1) that the libellant does not state facts sufficient to constitute a cause of action; (2) that the alleged damages are remote and not recoverable, and (3) are at most nominal.

The agreement in this charter to arbitrate, was purely executory and prospective. It related to no particular dispute, but covered alike the entire subject of any matter in dispute that might thereafter arise. If valid, it would debar either party from a resort to the legal tribunals and oust the courts of jurisdiction. Such agreements ever since Lord Coke's time, and even before, have been held to be no defense to an action in the courts. In *Kill v. Hollister* (1746) 1 Wils. 129, upon a similar defense it was said:

"If there had been a reference depending, or made and determined, it might have been a bar, but the agreement of the parties cannot oust this court; and as no reference has been, nor any is depending, the action is well brought, and the plaintiff must have judgment."

In *Thompson v. Charnock*, 8 Term R. 139, which was an action upon a charter party, Lord Kenyon upon demurrer to a plea setting up a similar agreement to arbitrate, said:

"It has been decided again and again that an agreement to refer all matters in difference to arbitration is not sufficient to oust the courts of law or equity of their jurisdiction."

In *Scott v. Avery*, 5 H. L. 811, an agreement that no action should be brought on certain policies of marine insurance until the amount of the loss had been fixed by arbitrators, was sustained on demurrer, as an exception to the general rule, which was recognized to be as above stated. Baron Martin observes as respects agreements to arbitrate the whole matter, that they are "binding and operative if the parties choose to act upon them, but revocable at their will" (page 829).

Crompton, J., observes (page 835):

"It is a legal incident to every contract that the parties should have a right to resort to a court of law for the settlement of their disputes; and a stipulation to the contrary is void, as being repugnant to the rest of the contract."

And the Lord Chancellor (page 847) says:

"There is no doubt that when a right of action has accrued parties cannot by contract say that there shall not be jurisdiction to enforce damages in respect of that right of action; \* \* \* parties cannot enter into a contract which gives rise to a right of action for the breach of it, and then withdraw such a case from the jurisdiction of the ordinary tribunals."

The general principle above stated has been universally followed in this country in very numerous cases, which will be found collated in 2 Am. & Eng. Enc. Law (2d Ed.) p. 570, etc. See *Insurance Co. v. Morse*, 20 Wall. 445, 450, 22 L. Ed. 365; *The Excelsior*, 123 U. S. 40, 51, 8 Sup. Ct. 33, 31 L. Ed. 75; *Seward v. City of Rochester*, 109 N. Y. 164, 16 N. E. 348; 2 Pars. Cont. (8th Ed.) p. 708.

An agreement, however, to submit to arbitration a question of price, value, quantity or damage merely, as it does not oust the courts of jurisdiction of the cause, has long been held to be valid. *Scott v. Avery*, supra; *Hamilton v. Insurance Co.*, 136 U. S. 242, 10 Sup. Ct. 945, 34 L. Ed. 419, and cases there cited; *Perkins v. Light Co.*, 21 Blatchf. 309, 16 Fed. 513; *Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250; *Sweet v. Morrison*, 116 N. Y. 19, 22 N. E. 276. These constitute a second group of arbitration cases wholly distinguishable from the first.

In many of the cases in which it is held that the agreement to refer prospective disputes is no bar to an action, it is also intimated that the party may have an action for damages for the breach of the agreement to refer; and it is upon this ground that the libellant bases the present action. But it is a singular circumstance that notwithstanding the frequent repetition of this intimation, no case is to be found in which, upon a mere refusal to arbitrate and where no action had been taken by either party under the agreement to refer beyond a mere request and refusal to arbitrate, any damages have ever been recovered, or any other than nominal damages have ever been indicated to be recoverable, because too loose, indefinite and incapable of verification.

There are indeed numerous cases, which may be said to form a third group, in which damages have been recovered for the re-

fusal to proceed after an actual submission to arbitration has been made and entered upon, and which is afterwards revoked by the defendant. In such cases it is manifest that there may be very appreciable and definite expenses, damages, or losses caused by the revocation, which are the direct and proximate result of the defendant's breach of the submission, in reliance on which the plaintiff has acted; and for such damages upon the ordinary principles of law, a recovery should be had. See cases collated 2 Am. & Eng. Enc. Law (2d Ed.) pp. 602, 603. All the cases cited by the libellant in which damages have been recovered, are either of this latter kind or else belong to the second group of cases above referred to, in which the limited agreement to arbitrate as to price, damage, etc., is held to be valid.

The present case does not belong to either of these two latter classes. It is purely an executory agreement to submit, as I have said, prospective disputes, if any such should arise in the future, and covering also the entire subject of dispute; so that the present agreement falls wholly within the first class of cases referred to. Upon such a purely executory agreement, where no action has been induced or taken by either party beyond an offer and a refusal to submit, the authorities seem to be that only nominal damages are recoverable. In Russ. Awards (8th Ed.) p. 62, it is said:

"As it is ordinarily drawn up, usually only nominal damages are recoverable for the breach of the agreement to refer; for the jury generally can have no means of calculating the amount."

And this is repeated in Morse, Arb. p. 96.

The case cited of Day v. Bank, 13 Vt. 97, has no application here, as in that case there was a submission under the agreement of arbitration, which the defendant refused to attend, after having thereby induced the plaintiff to discontinue a prior suit and to discharge a sheriff's seizure of property under it. In Tattersall v. Groote, 2 Bos. & P. 131, Lord Eldon sustained the demurrer to a complaint for damages in refusing to submit to an arbitration. He says (page 135):

"This is quite clear, that there is no instance of such an action as the present having ever been brought in a court of law; and it is equally clear that though courts of equity will decree the specific performance of reasonable covenants, where substantial damages cannot be obtained in a court of law, yet no man I apprehend ever heard of a suit in equity to compel the specific performance of a covenant to refer disputes to arbitration. \* \* \* In the discussion of Mitchell v. Harris, 2 Ves. Jr. 129, the counsel were asked by the lord chancellor if an action like the present had ever been known in a court of law, and it was admitted that no instance was to be found. It would be difficult to direct a jury upon what rule to proceed in assessing damages in such an action."

In Street v. Rigby, 6 Ves. 815, it was again stated by the lord chancellor that only nominal damages could be recovered for the breach of such an agreement, except upon a further agreement for liquidated damages for a refusal to submit. In Brunsdon v. Board (1884) 1 Cab. & L. 272, the defendant having paid into court one shilling as nominal damages for the breach of the covenant to refer to arbitration, it was held that the plaintiff could recover noth-

ing but nominal damages for that breach, the court finding that there were no merits in the plaintiff's demand. In *Livingston v. Ralli*, 5 El. & Bl. 132, indeed, a demurrer to a claim for damages for breach of an executory agreement to refer, was overruled. The nature of the damages there claimed is not stated; and in reference to that point Coleridge, J., observes (page 136):

"It is said that the damages in such a case can be only nominal; supposing it were so, that would not bar the action; but it seems to me very difficult to maintain that the damages in such a case may not be substantial."

There undoubtedly may be damages arising from the subsequent conduct of the parties based upon that agreement, as in *Day v. Bank*, *supra*; but nothing of that kind is here alleged. The case of *Donegal v. Verner*, 6 Ir. R. C. L. 504, cited as in accord with *Livingston v. Ralli*, was in fact only an agreement to refer to arbitrators the valuation of a rental; as in *Perkins v. Light Co.*, 21 Blatchf. 308, 16 Fed. 513, the agreement to refer related only to the value of certain inventions; and of the same nature was the agreement in *Thomas v. Fredricks*, 10 Adol. & E. (N. S.) 775, as to a valuer of damage by game. All of these cases belong to the second class of cases above named, and have no bearing upon the present case.

The fact that diligent examination fails to find any case in which substantial damages have ever been recovered for a mere refusal to perform an executory contract to refer to arbitration, militates strongly against the existence of any recognizable legal damage, except where some further steps have been taken by an actual submission, or by some other action based on the agreement to refer involving actual loss or damage through the refusal to proceed.

The libelant on the argument urged that the produce exchange, in its provisions for arbitration, offers a much cheaper forum for the settlement of disputes than is found in the courts. Even if this be so, this agreement to arbitrate was not an agreement to refer to the produce exchange. The libel states, indeed, that "the expense of arbitrating the claim would not have exceeded \$50"; and that in the necessary defense of the suit "he incurred the expense in lawyer's fees and disbursements of \$555.56." But a hearing before arbitrators or before the courts, and the expense of each, is largely such as the party chooses to make it. If presented in the same way before each, the proceeding in court should be cheaper, since that is free, or nearly so, while arbitrators must be paid. Counsel may as well be employed in the one case as in the other; and in either, the amount and kind of counsel employed, and the consequent expense, are largely optional and voluntary, and dependent also upon the thoroughness and effectiveness with which a party may desire to have his case presented. It is impossible to say, therefore, that the necessity of expense is greater in the one case than in the other; and expenses so fluctuating in their nature and so dependent upon a party's own option are not a proper item of legal damage.

In *Reggio v. Braggiotti*, 7 Cush. 166, Shaw, C. J., says:

"But the counsel fees cannot be allowed. These are expenses incurred by the party for his own satisfaction, and they vary so much with the character

and distinction of the counsel that it would be dangerous to permit him to impose such a charge upon an opponent; and the law measures the expenses incurred in the management of a suit by the taxable costs."

In the somewhat similar case of *Miller v. Hays*, 26 Ind. 380, it was held that such expenses for attorney and counsel fees were not recoverable upon an arbitration bond. The same rule is usually applied, except in actions upon agreements of indemnity, or actions in tort involving some wanton or malicious injury, where punitive damages may be given; in which cases the actual expenses to which the plaintiff has been put may be considered by the jury. See 8 Am. & Eng. Enc. Law (2d Ed.) 673-676; *Day v. Woodworth*, 13 How. 363, 372, 14 L. Ed. 181; *Oelrichs v. Spain*, 15 Wall. 211, 230, 21 L. Ed. 43. And in admiralty, counsel fees cannot be taxed. *The Baltimore*, 8 Wall. 377, 388-392, 19 L. Ed. 463.

Aside from the above considerations, an allowance of the costs and expenses in the prior suit, seems to be wholly inconsistent with the defendant's undoubted legal right to bring that action. Is it not a contradiction in terms to say that a man may lawfully bring suit, but yet shall be punished for bringing it by being made liable to a subsequent suit for the recovery of his opponent's costs and expenses therein beyond what the court may have allowed in the original action? If the original suit is lawfully brought, all questions of costs and expenses therein must be deemed settled and ended in the disposition of that cause; otherwise suits might proceed thereon ad infinitum.

In the present case, moreover, although the decision in the former action was in favor of the present plaintiff, costs under the equitable discretion of the court were not allowed; and the disallowance of costs at that time, was an adjudication between the same parties that the present plaintiff was not equitably entitled to costs; and if so, certainly no independent action like this will lie to recover them; in that regard the case of *Brunsdon v. Board*, 1 Cab. & El. 272, is in point.

While it may be possible that cases may arise in which there are damages that are the natural and proximate result of a refusal to refer to arbitration, I think that damages of the kind here sought to be recovered are not of that character; and considering the vast number of cases in which suits have been brought in disregard of a prior agreement to arbitrate, the absence of any reported case of any similar claim for lawyer's fees as damages for the refusal to refer, is strong evidence that such claims have never been regarded as proper legal damages for such refusal. Nominal damages not being sufficient to sustain a libel in admiralty (*Barnet v. Luther*, 1 Curt. 434, 436, 2 Fed. Cas. 879; *The Asiatic Prince* [D. C.] 97 Fed. 343, 345), the exceptions are sustained.



## ROSS v. MERCHANTS' &amp; MINERS' TRANSP. CO.

(District Court, D. Rhode Island. January 30, 1900.)

**ADMIRALTY—COLLISION—NEGLIGENCE.**

At a point in a river where the dredged channel was 400 feet wide, a string of scows was anchored, the anchor being some 50 feet outside the channel, to the west thereof, and the distance therefrom to the stern of the last scow being between 375 and 400 feet. The incoming tide swung them directly across the channel. There was no light on any of them, unless on the one nearest the anchor; and the preponderance of the evidence was that there was none on it, the officers of five steamers going down the river during the night, with proper lookouts, testifying that there was none. Four of these steamers, three of them drawing not over 8 feet of water, and the other 13 feet, avoided the tow by making a sharp deviation to the eastward, the latter having barely room to get by, and her stern narrowly clearing some rocks. Immediately on report of the scows by the lookout of the fifth steamer, which was heavily loaded and drew 17½ feet of water, her engines were reversed, her helm put to port, and she struck the scow nearest the anchor. *Held*, that no fault of such steamer contributed to the collision, even if the perilous alternative of going to the eastward might have been more fortunate.

**In Admiralty.**

Robert D. Benedict and Dexter B. Potter, for libellant.

Daniel H. Hayne and Archibald C. Matteson, for claimant.

BROWN, District Judge. This libel is for the sinking of scow No. 4 by the steamer Chatham on the night of September 3, 1897, at about 11 o'clock, in the Providence river, just above Pomham Light. The steamer was going down the river. The scow was one of a string of four empty scows at anchor. It is very clear that the libellant was negligent in the anchoring of these scows, and that on that night they were a dangerous and unnecessary obstruction to the navigation of the narrow and frequented channel. The anchor was placed very close to the western edge of the channel. Scow No. 4 was fastened to the anchor by a cable with one scow alongside. Scow No. 6 was fast to the stern of No. 4, and scow No. 12 was fast to the stern of No. 6. The total distance from the anchor to the stern of the last scow was not less than 375 feet, and probably not much over 400 feet. The libellant claims that the anchor was 75 or 100 feet to the west of the western edge of the channel. In a letter written by him about three months after the collision he stated that it was 50 feet to the west. The dredged channel at this point is about 400 feet wide, with a depth of at least 25 feet. There is abundant evidence that the string of scows lay directly across the usual course of steamers. They were left to swing freely with the tide, which was coming in, and would naturally throw them across the middle of the channel. In view of the direct evidence as to their actual location, it is evident that the wind, which was very light, and from the northeast, was not sufficient to prevent their swinging with the tide. They were from 1,000 to 1,300 feet above Pomham Light, just below which the channel makes a sharp turn. Four steamers went down the channel before the Chatham, and each was compelled to make a

sharp deviation from the usual course, in order to avoid the scows, going to the eastward. So little room was there to the east that the Pilgrim had barely room to get by, her stern narrowly clearing Pomham Rocks by some 25 feet. The Mt. Hope passed within 25 or 30 feet of the rear scow, and her master says that he was then right over the eastern edge of the channel. The testimony from the officers of the steamers Pilgrim, Mt. Hope, Baltimore, and Watchcheer is in itself sufficient to establish the negligence of the libelant in anchoring, and entirely corroborates the testimony from the Chatham that the scows were directly in the proper course. It is also clear that the libelant was at fault in the matter of lights. The evidence for the libelant on this point is inconsistent and unsatisfactory. The libel avers "that said scows were well and properly moored, and scow No. 4 had a proper light set and burning." In a letter written by the libelant December 12, 1897, he stated, "My scow anchorage had the proper light exposed," and that the Chatham "ran into the first scow, or the one having the light on it." Capt. Jaycox, of the tug attending the scows, aboard which were kept the lanterns for the scows, says distinctly that but one light was put on the scows, and that on No. 4. Other witnesses for the libelant testify to two lights,—one on each end of the tow. The preponderance of the evidence for the libelant is to the effect that but one light was placed on the scows. This, with the evidence for the defense, establishes the fact that the two rear scows were without lights, in direct violation of law. Upon the question whether the sunken scow, No. 4, carried a light there is greater conflict. I am of the opinion, however, that by a preponderance of evidence it appears that there was no light on any of the scows at the time of the collision. The evidence for the libelant is to the effect that a lantern, properly filled, was lighted, and placed on scow No. 4, at about 4 o'clock in the afternoon. From that time on no person was aboard the scows. In *The Westfield* (D. C.) 38 Fed. 366, it was said:

"Where competent officers are in their places, attentive to their duties, and navigating their vessel according to what can be seen, their testimony that no light was seen which ought to have been seen and must have been seen if properly burning, is entitled to superior credit if their evidence is not outweighed by other circumstances."

In the present case we have not only the evidence from the Chatham, but the confirmatory evidence from four other steamers, that there were no lights on the scows. This is testimony of the highest character, and is supported by the presumption that in this narrow and frequented channel the officers of these steamers performed their duties with the usual degree of diligence required at that part of the passage down the river.

The libelant contends that, wherever was the anchorage, and whatever the direction of the scows as they lay, and whether they were lighted or not, the Chatham should have avoided the scows. The argument is that, because the other steamers passed in safety, the Chatham should have done so, and that the only cause that can be suggested for her failure to avoid a collision is that she did not keep a diligent lookout. But there is most satisfactory evidence that a

proper lookout was maintained. The lookout was at his proper station, and was attentive to his duties. In the pilot house were the quartermaster at the wheel, the master, and the first officer; the latter using marine glasses. The steamer was on a proper course, running at a proper speed, and, though the libellant has carefully criticised her conduct in every particular, I am satisfied that she was in every respect performing her duty. Under the circumstances, the fact that a collision occurred does not afford even *prima facie* evidence of negligence. It cannot be inferred that the Chatham did not see the scows as soon as did the other vessels, simply because she did not try to avoid the scows by going to the eastward. Excepting the Pilgrim, the other steamers were smaller river boats, capable of being very easily and quickly handled. None of them drew over 8 feet of water. The Pilgrim drew but 13, while the Chatham was a screw steamer, heavily loaded, and drew 17 feet and 6 inches. That the Chatham did not choose to accept the risk of going on the rocks to the eastward is evidence neither of a failure to keep a good lookout nor of unskillful navigation. Immediately upon the report of the scows by the lookout, she reversed her engines, and put her helm to port. It is by no means certain that it was not the best thing for her to do, as she was not capable of as quick handling as the side-wheel steamers, and her chance of clearing the rocks to the east was a doubtful one. But, even if it were not, the libellant, by his inexcusable negligence, had placed the Chatham in such a situation that she must choose between perilous alternatives. The fact that an order other than that which was given might have been more fortunate would be insufficient to put the Chatham in fault. The *Maggie J. Smith*, 123 U. S. 349, 355, 8 Sup. Ct. 159, 31 L. Ed. 175; The *Blue Jacket*, 144 U. S. 371, 393, 12 Sup. Ct. 711, 36 L. Ed. 469. I find, therefore, that the collision was due wholly to the faults of the libellant. The libel will be dismissed, with costs to the libelee.

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#### THE HOMER.

(District Court, D. Washington, N. D. February 3, 1900.)

**1. COLLISION—DEFENSE OF INEVITABLE ACCIDENT.**

To exonerate a steamer from liability for an injury resulting from a collision with a vessel moored at a wharf on the ground of inevitable accident arising from a latent defect in her machinery, it must be shown that such defect could not have been discovered by a person of competent skill in the exercise of ordinary care, and, further, that such defect necessarily caused the accident.

**2. SAME—EVIDENCE CONSIDERED.**

Evidence considered, and held to establish that the collision of a steamship with a vessel moored to a wharf was due to the fault of the master of the steamship.

**3. SAME—SUIT FOR PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE.**

Libellant was at work on a vessel moored to a wharf, when she was struck by a steamship. The steamer sounded no warning, and libellant did not know of her approach until immediately before the collision, and, when called to, he turned to pick up his coat, which contained a check,

before starting to leave the vessel, and before he could reach the wharf the vessel was struck, and he was seriously injured. *Held*, that the fact of his momentary delay to rescue his coat was not a defense to an action against the offending vessel to recover for his injuries.

4. DAMAGES—PERSONAL INJURY—AMOUNT OF AWARD.

An award of \$12,000 made to a libelant who was a young man with an expectancy of more than 30 years, for an injury to his back in a collision, by which his lower limbs were paralyzed, he was caused great suffering, and would probably, as shown by the evidence, remain a helpless cripple through the remainder of his life.

Suit in rem to recover damages for a personal injury caused by the steam schooner *Homer* running into the brigantine *Blakely* while the libelant was working as a carpenter on the latter vessel, which was at the time moored to a dock in Seattle Harbor. Hearing on the merits. Decree for libelant.

Martin, Joslin & Griffin, for libelant.

Metcalfe & Jurey, for claimant.

HANFORD, District Judge. From the evidence in this case I find that the particulars of the mishap from which this suit arises are as follows: At about 7:45 a. m., April 26, 1899, the steam schooner *Homer* was making her way from the Moran Company's shipyard to the Schwabacher dock, in the harbor of Seattle, which dock extends from the eastern shore westwardly into the bay. It was the intention of her captain to lay the *Homer* across the outward end of the dock, where she was to take on board some spars or other timber. The distance from the shipyard to the Schwabacher dock is, approximately, one mile. The morning was clear. There was a stiff breeze from the south, and the tide was slack. The *Homer* has two engines and twin propellers. She had been inspected by the United States inspectors of steam vessels less than one week before the accident, and all changes in her equipment which they required had been made, and her signal bells and attachments had been tested by her captain and engineer only a few minutes before she started, and were found to be in apparent good working condition. In making the run to the dock, only the port engine was in operation, under a slow bell. The testimony does not show what pressure of steam was raised, but her speed was about four miles per hour, and her course was north, or nearly so. The brigantine *Blakely* was at the time moored on the south side of the Schwabacher dock, her bow pointing towards the shore, and her stern being far enough in towards the shore to be well out of the way of vessels coming to the end of the dock. On the north side of the dock a British vessel, named the *Hatton Hall*, was moored, with her bowsprit projecting out beyond the outer end of the dock. The libelant was working as a ship carpenter on board the *Blakely*, and immediately before the *Homer* struck her he was on deck on the starboard side of the main hatch, facing towards the dock and towards his work, which required him to stoop or bend his body, and he had no warning or intimation of the *Homer's* approach until the instant of the collision. During the time of the maneuvers of the *Homer* her captain's position was on her upper

deck, abaft the pilot house, and about  $7\frac{1}{2}$  feet distant from a ventilating funnel, through which he was able to communicate with the engine room. He was in reach of the handles connected with wires and attachments for sounding the gong in the engine room, which was the ordinary means for directing the engineer. In that position he could see ahead, watch the wheel in the pilot house, and hear distinctly the gong when it was sounded in the engine room. When the Homer had approached to a point which the captain estimated to be 50 feet to the east and 200 feet south of the end and south side of the Schwabacher dock, the captain pulled one of the handles, intending to sound the gong once as a signal to the engineer to stop the port engine. At that moment he for the first time noticed the bowsprit of the Hatton Hall projecting beyond the end of the dock, and the discovery seems to have diverted his attention, so that he probably did not notice that the gong did not sound in response to his pull. He then, quickly as the motion could be made, pulled the same handle twice, intending to sound the gong twice as a signal to the engineer to reverse the port engine, and, although he noticed in his own mind that the gong did not sound, he at once pulled the other handle twice as a signal to the engineer to start the starboard engine backward, and to that movement the gong responded, and the engineer obeyed the order, but, as the engineer had not received any direction to stop or reverse the port engine, it continued working ahead. The effect of the port engine going ahead with the starboard engine backing was to swing the bow of the vessel to starboard. As soon as the captain noticed the apparent confusion, he stepped to the ventilator and called to the engineer to back, and he heard his order repeated in the engine room, but he then noticed that the steamer had swung in so far that she could not clear the end of the dock, and, being in that situation, he ordered the man at the wheel in the pilot house to set his wheel hard a-port, which order was instantly obeyed; and, so far as the testimony shows, this was the only order given by the captain to the man at the wheel, and this was the only movement of the vessel's helm. As quickly as he could speak after giving the order hard a-port, the captain called to the engineer through the ventilator, "Back her like hell," and repeated the same cry one or more times, to which the response was given, "She is backing, sir;" and it was not until that order was given that the port engine was reversed. About the same instant, or within a few seconds afterwards, the Homer came upon the Blakely without having given a blast of her whistle, or any warning sound. She was swinging to starboard under the influence of her helm and the peculiar working of her propellers, so that she struck in a glancing and raking manner, and immediately afterwards commenced to back off. The testimony does not go into all the details of the injury done to the Blakely, but it does show that her forerigging was torn away, a yardarm and its braces were broken, and a 12-inch block suspended from the arm fell to the Blakely's deck. The position of the libellant at his work was such that he did not see the approach of the Homer until another person near him gave a warning cry just as

the Homer was about to strike. Several persons were near by, and they all made a rush to get over on the dock. The libelant started also, as quickly as a man taken by surprise might be expected to, and, as he started, he grabbed his coat, in the pocket of which he had a check for \$234. His testimony shows that he thought of the check, and his movement to save it may have delayed him one or two seconds in getting away. He did not succeed in his effort to get on the dock, and he was found, immediately after the collision, on the Blakely's deck, badly injured, and suffering extreme agony from an injury to his back. The 12-inch block which had been attached as a pendant to the broken yardarm was found lying on the deck near the libelant. There were no indentations or marks on the deck to indicate that it had struck there with any great force, and the libelant's back was bruised in a manner to indicate that he had received the force of the falling block. Ever since the occurrence, the libelant has been in a helpless and pitiable condition, and a great sufferer. He has no use of his lower limbs, and it is reasonably certain that he will remain a helpless cripple during the balance of his life, although the physicians who have attended him admit that they cannot say that it is impossible for him to recover.

The suit is defended on three grounds, which are as follows: (1) Inevitable accident. In this the claimant contends that the conduct of the Homer in going out of her course and colliding with another vessel which was stationary, and moored to a dock, was purely accidental, and could not have been prevented by the exercise of ordinary prudence and the care and skill on the part of her captain and crew which the circumstances required. (2) The claimant contends that the evidence is insufficient to show clearly that the injury to the libelant was caused by the collision. In this he relies upon the admissions of the libelant, and all the witnesses who have testified in his behalf, to the effect that none of them did actually see the block strike the libelant, and the testimony of the man who was at the wheel in the pilot house of the Homer, to the effect that the block did not fall to the deck of the Blakely, but first struck on top of the galley of the Homer, and then, as she backed away from the Blakely, it was drawn overboard, and afterwards hung over the starboard rail of the Blakely. (3) The claimant sets up as a complete defense that the libelant is wholly responsible for his own injury by reason of his deliberate and reckless disregard of his duty to get out of the way immediately, and it is contended that there was deliberate and reckless disregard of his own safety on the part of the libelant shown by his effort to save his coat and bank check. All of these contentions are, in my opinion, destitute of any merit whatever. Nevertheless, as able counsel have been led by zeal in the cause of their client to make these defenses earnestly and in good faith, I have given each of them serious attention, and will endeavor to give reasons for deciding adversely.

It is insisted that the Homer was swung from her proper course, and that her speed could not be checked in time to prevent the collision, by an accident, which accident was "inevitable," because a soft metal tube, called a "pintle," set in the upper deck, through

which the wire for sounding the gong in the engine room passes, had become bent, so as to prevent proper action of the wire when the captain pulled the handle, and that this was a latent defect in the equipment of the vessel,—that is to say, it had not been discovered by the captain,—and in consequence of this latent defect the gong did not sound when the captain attempted to give three bells to stop and reverse the port engine, and, in consequence of the gong not sounding, the engineer did not stop or reverse the port engine, and in consequence of this failure the port engine continued to drive ahead after the starboard engine had been started backing, and had the effect to swing the bow of the vessel to starboard, and to prevent her momentum from being checked in time to avoid the collision. This all rests upon the erroneous theory that any defect in the machinery or equipment of a vessel is a latent defect, and that the law will regard any mishap it causes as an inevitable accident, for which no liability for resulting injuries will attach to the ship or her master, if, upon a careful inspection within a reasonable time preceding the accident, by competent persons, the defect was not discovered, and was unknown. The law, however, does not excuse the use of defective machinery and appliances merely because the users fail to discover their defects. The question to be determined before condemning or excusing the responsible party is not whether the defects were discovered or known, but these: Could the defects have been discovered by a person of competent skill and judgment if he acted with a degree of care and vigilance amounting to ordinary care and prudence in view of all the circumstances? And, if the defect was undiscoverable by the exercise of ordinary care and prudence, did it necessarily cause the accident? In this case the bent pintle is a matter of trifling importance. The fact that the bell wire was not in working order could have been discovered by a competent person if he was alert and attended to his duty at the moment of an attempt to use the bell, for the action or nonaction of the wire in his grasp would indicate that it was not serving its purpose, and the same thing would be indicated instantly by the failure of the gong to respond, and the failure of the engineer to act. Furthermore, the bent pintle was not the sole cause nor the proximate cause of the accident. When the intended signals to stop and reverse the port engine failed, the vessel would have passed clear of the dock, and no harm would have been done, if she had continued on her course. There was no necessity for haste to back the starboard engine, and it was the captain's duty to control the movements of the vessel so as to keep her from striking the dock or the other vessels moored there. If the captain had not ordered the engineer to start the starboard engine backward before the port engine had been stopped and reversed, and if he had required the man at the wheel to use the helm so as to keep the vessel from swinging to starboard, she would not have gone out of her course, and the accident would not have happened. Here I find the captain in fault in two particulars: First, in signaling the engineer to back the starboard engine without first actually knowing that his intended orders to back and re-

verse the port engine had been executed by the engineer; second, in not giving attention to the helm, which is the means provided for controlling the course of a ship under way; and neither one of these errors can be excused by reason of an unknown injury to the pintle.

Referring to the second ground of defense, there is certainly more than a mere preponderance of the evidence supporting the libellant's contention that the block struck him in the back when it fell after being torn from its attachment to the broken yard-arm. The injury to the libellant is just such an injury as would be caused by a person struck in the back by such a missile. There is not a particle of evidence supporting the contention on the part of the claimant that a different timber or heavy object might have been displaced by some cause other than the collision, and that the injury might have been inflicted thereby. The block was found at the place where it would naturally lodge on the deck of the *Blakely*, immediately after the injury. This is fully proved by the testimony of several witnesses, and the court would not be justified in rejecting the testimony of a number of unimpeached, disinterested witnesses because the man at the wheel on the *Homer* has given testimony to the effect that he saw the block fall on the galley of the *Homer*, and go overboard, and that he afterwards saw it hanging over the side of the *Blakely*. I believe that his testimony refers to a different block, or else he is mistaken in supposing that he saw any block.

The third defense has nothing to rest upon except the fact that the libellant was not so nimble in getting out of the way, when surprised by imminent danger, as the other persons who were near him at the time. In the argument made by counsel for the claimant, the libellant was severely criticised for the concern which he manifested to rescue the bank check representing over \$200, which was in his coat. But the law does not grant immunity to those responsible for the negligent use of a dangerous power by which others are injured merely because the injured party has failed to save himself by the extreme swiftness or extraordinary skill of his own movements; nor will the law deny its protection to a man whose mind at the moment of extreme peril involuntarily becomes fixed upon his most valuable accumulations, and prompts him to try to save something which may be of the utmost importance to himself and family in case of failure to save himself from severe bodily injury, or regard the injured party as being in fault for a mere error committed in extremis. The libellant is a young man. At the time of the injury he had an expectancy of more than 30 years yet to live according to the tables of mortality based on the average duration of human life. For his loss of earning capacity, his expenses consequent upon his injury, his suffering, and the misery of having to live as a helpless cripple, he is justly entitled to recover substantial damages. I award him \$12,000, and costs.



## BAILEY et al. v. TILLINGHAST.

(Circuit Court of Appeals, Sixth Circuit. February 12, 1900.)

No. 614.

**1. NATIONAL BANKS—SUIT BY RECEIVER AGAINST STOCKHOLDERS—JURISDICTION OF EQUITY.**

The receiver of an insolvent national bank may maintain a suit in equity to enforce an assessment against stockholders, where such assessment is less than the full amount of their liability; and, where the question of law involved is common as to a number of the stockholders, and rests upon substantially the same facts, they may be joined as defendants.

**2. EQUITY JURISDICTION—PREVENTING MULTIPLICITY OF SUITS—JOINDER OF DEFENDANTS.**

To authorize a plaintiff to maintain a suit in equity against a number of persons, it is not essential that there should be a community of interest between them; but where a common question of law arising upon similar facts is involved between the plaintiff and each defendant, equity has jurisdiction on the ground of preventing a multiplicity of suits.

**3. NATIONAL BANKS—LIABILITY OF STOCKHOLDERS—DEFENSES.**

It is incompatible with the policy and purposes of the national banking laws to permit mere irregularities, or even fraudulent practices, in the organization or management of a bank created thereunder, to invalidate its action, and give ground for a stockholder to repudiate his obligations to the public.

**4. SAME—INCREASE OF CAPITAL—CONCLUSIVENESS OF COMPTROLLER'S CERTIFICATE.**

The comptroller's certificate, authorizing an increase of the capital stock of a national bank, is conclusive of the existence of all the facts necessary to authorize such increase in favor of the public and against the subscribers to such stock.

**5. SAME—VALIDITY OF INCREASE.**

By a resolution duly passed, the stockholders of a national bank authorized an increase of \$300,000 in the capital stock, and under such resolution defendants and others subscribed and paid for such stock to the amount of \$150,000, and received certificates therefor, upon which dividends were paid the same as on the original stock. The names of the subscribers were entered on the books of the bank as stockholders, but the increase was not certified to the comptroller until three years later, the stock being shown during that time in the published statements of the bank as "stock paid in, but not certified." At the end of that time a second resolution was passed, reducing the amount of the authorized increase to \$150,000, and directing the same to be certified to the comptroller, which was done, and the increase was approved by him. The bank was then known to be insolvent, and was immediately thereafter closed, and a receiver appointed. *Held*, that the action of the stockholders in reducing the amount of the increase was legal, and that of the comptroller in approving the increase under the circumstances was proper; that the subscribers became stockholders, and had no equitable ground upon which to repudiate their liability as such to the creditors of the bank.

**6. SAME.**

A subscriber to an issue of increased stock authorized by a national bank, who was given original stock instead, which fact appeared on the face of the certificate and by the books of the bank, who retains such stock, without objection, for three years, and until after the bank has become insolvent, will be presumed to have known and assented to such change, and is precluded from thereafter asking to be relieved from liability as a stockholder on that ground.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This is a suit in equity, brought by Philip Tillinghast, as receiver of the Columbia National Bank of Tacoma, in the state of Washington, an association organized under the national banking act, against 46 defendants, sued as stockholders, for the purpose of recovering an assessment of \$61 per share of the stock held by them, levied by the comptroller of the currency upon their personal liability on account thereof, imposed by section 5151 of the Revised Statutes of the United States. The material facts as developed by the pleadings and proofs are as follows:

The Columbia National Bank of Tacoma, Wash., was organized on the 2d day of September, 1891, with a capital stock of \$200,000, and thereupon engaged in the banking business at that place. On the 12th day of January, 1892, at the regular annual meeting of the shareholders, by a two-thirds vote, the said shareholders resolved to increase the capital stock of the association in the sum of \$300,000. The resolution passed for that purpose was as follows: "(1) Resolved, that under the provisions of the act of May 1, 1886, the capital stock of this association be increased in the sum of three hundred thousand dollars (\$300,000), making the total capital five hundred thousand dollars (\$500,000). Further resolved, that, as money paid in amounts to fifty thousand dollars (\$50,000), or more, the president or cashier be authorized to certify the same to the comptroller of the currency, and shall so continue to certify until the said three hundred thousand dollars (\$300,000) is paid in." Thereupon notice was given to each shareholder of the association, granting the privilege to each of them of subscribing for such number of shares of the proposed increase of the capital stock as such shareholder was entitled to, according to the number of shares owned by him before the stock was voted to be increased. The shareholders having failed to subscribe for such increase, the books of the association were opened for subscription, and, among others, the defendants subscribed for certain shares of the increased stock, and paid for their subscriptions. Certificates of stock for the amount subscribed by them, respectively, were issued, and received by them, and their names were entered as shareholders in the stock book and ledger of the association. The whole amount of stock so subscribed by the defendants and others, and paid for, amounted to the sum of \$150,000. The bank included this stock in its statements published, in accordance with the banking act, as "capital stock paid in not certified"; and dividends were paid by the association in the same manner and to the same extent as dividends upon the original capital stock of the said association, to the defendants among the rest. This \$150,000 of stock had all been taken and paid for by the last day of July, 1892, but was not certified to the comptroller as fast as \$50,000 thereof was subscribed and paid for; nor was any certificate of the increased stock certified to the comptroller until the 9th day of September, 1895, when two-thirds of the shareholders of the said association, acting with the approval of the comptroller of the currency, and at a meeting called for the purpose, voted to modify the said increase of stock of \$300,000 by just one-half, making it only \$150,000, and the total amount of capital stock, original and increased, \$350,000, instead of \$500,000. Soon after this the officers of the association certified to the comptroller the fact of said increase of \$150,000, and that it had been fully paid. On the 23d day of October, 1895, the comptroller certified in due form that the capital stock of the association had been increased in the sum of \$150,000, that that sum had been paid in, and that he approved of such increase. With this certificate the comptroller transmitted the following explanatory letter:

"Mr. W. G. Peters, Cashier, Columbia National Bank, Tacoma, Wash.—Sir: Inclosed herewith you will find my certificate, approving the increase of the capital stock of your association from \$200,000 to \$350,000, with letter to that effect. In connection with these papers, I desire to inform you of my reasons for approving this increase of capital stock. On investigation it appears that a meeting of the shareholders of the Columbia National Bank was held January 12, 1892, at which 1,429 of the 2,000 shares of stock were represented, 1,394 of which were voted in favor of increasing the capital stock. Subsequently, subscriptions to the increased stock were taken to the amount of \$150,000, and this amount has been certified by the officers of the bank as having been paid in as permanent capital, their certificates to this effect

being dated July 25, 1895. In the meantime it appears that the subscribers to the increased stock have received the same dividends as the other shareholders since the time their money was paid into the bank as capital stock, and that no effort appears to have been made by them to have the increase of capital stock certified to this office in order that the comptroller's certificate of approval might be obtained, and no complaints appear to have been made by them because of this delay, so long as the bank remained in fairly good condition. The published reports of condition of the bank have advertised the amount paid in for increased capital stock as 'uncertified capital,' holding out to the public that the certified capital of the bank, namely, \$200,000, had been increased by the amount so published, to which the new shareholders tacitly consented. It must necessarily follow that the patrons of the bank have considered this 'uncertified capital' as a part of the permanent capital of the bank, and have made their deposits with faith in this belief; hence, if the bank should at any time in the future become unable to continue business, it would not appear in any way equitable that the subscribers to the increased capital stock should be put upon the same footing with the innocent depositors, who have relied upon the credit of the bank as maintained by its published reports of condition. For these reasons I have determined that it is my duty to approve the increase of capital stock in the amount certified by the officers of the bank as having been paid.

"[Signed]

Very respectfully, James H. Eckels, Comptroller."

When, on September 9, 1895, the above-mentioned modification was resolved upon by the shareholders, the affairs of the bank had become critically involved, and in fact the institution was insolvent. On August 27, 1895, the defendant Bailey, in behalf of himself and the other defendants, addressed a letter to the comptroller, protesting against any increase in the sum of \$150,000, which had been subscribed, to which letter the comptroller replied as follows: "You are respectfully informed that on August 5th the representative of the bank referred to was advised that, in view of the fact that the whole amount applied for had not been paid in, my certificate authorizing increase of the capital stock of the bank would not be issued, as per shareholders' resolution of January, 1892." On the 9th day of August, 1895, the comptroller addressed a letter to the cashier of the bank, in which he stated that he would approve of an increase in the sum of \$150,000, upon certain conditions, which were that a meeting of the shareholders be called for the purpose of considering the question of increasing the capital stock, the notice to said shareholders stating specifically that the matter of increasing such stock in the sum of \$150,000 should be considered at such meeting, and upon further condition that a two-thirds vote of the shareholders should be given in favor of such increase, and the legal requirements in reference thereto were fully complied with. It was in pursuance of this letter that the stockholders' meeting of September 9, 1895, was held, at which the modification of the increase of capital stock was determined upon by the shareholders. On the 24th day of October—which was the day after the comptroller had approved the increase of the capital stock of the bank in the sum of \$150,000, he (the comptroller) directed a national bank examiner to close the doors of said bank, presumably on account of its insolvency, and a receiver was appointed.

Certain other incidental facts are referred to in the course of the opinion which follows, in connection with the questions therein discussed. All the defendants demurred to the bill upon the ground that no sufficient basis for equitable relief was therein shown against defendants, or any of them; and some of them, more specifically, upon the ground "that the relief sought is not of equitable cognizance, because it appears upon the face of the bill that complainant had a plain and adequate remedy at law." The defendants filed a cross bill, wherein, upon the ground of matters already stated, and certain other facts hereinafter referred to, they prayed that the comptroller's certificate authorizing the increase of capital stock by \$150,000, of September 9, 1895, should be decreed to be "wholly null and void, as made without jurisdiction or authority, and that complainant be enjoined from asserting any claim against the respondents under or by virtue thereof." The demurrers to the original bill were overruled, Judge Taft presiding. The defendants answered, and a replication was filed. Complainant in the original bill answered the

cross bill, and complainants therein filed a replication, and proofs were taken. Judge Clark, who presided in the circuit court on the final hearing, passed a decree for the complainant. His opinion is reported in 86 Fed. 46. The defendants have appealed.

F. G. Roelker, F. B. James, John C. Healy, Oscar F. Davisson, and John Ledyard Lincoln, for appellants.

Philip Tillinghast, pro se.

Before LURTON, Circuit Judge, and SEVERENS and THOMPSON, District Judges.

SEVERENS, District Judge, after having stated the case as above, delivered the opinion of the court.

The first question arising upon this record is whether the complainant has chosen the proper forum in which to enforce the individual liability of the defendants as stockholders to the creditors of the bank in excess of their liability to the corporation for the stock itself, and, in connection with this, the related question whether the defendants were properly joined, all in one suit. In behalf of the defendants it is earnestly insisted: First, that there was a complete and adequate remedy at law; and, second, that, if they could properly be sued in equity, inasmuch as they are liable, if at all, not jointly, but severally only, there is no warrant for suing them collectively. In support of the first of these contentions, namely, that the remedy at law was adequate, it is pointed out that as to each defendant the question of liability and the amount to be recovered (if that is open to contest) could be readily ascertained by the ordinary methods of trial in an action at law; that the demand is simply for a judgment for a sum of money; and, further, that there is no fact or circumstance of an equitable character involved. In the case of *Kennedy v. Gibson*, 8 Wall. 498, 19 L. Ed. 476, which arose not long after the national banking act went into operation, suit was brought by bill in equity against several stockholders of a national bank by a receiver to recover the maximum amount of their special liability. The bill showed facts indicating the necessity for enforcing it to that extent, but did not show that the comptroller had made any determination of that matter, or given any direction for enforcing this liability of the stockholders. The defendants demurred, and the demurrer was sustained. What the grounds of the demurrer were is not stated in the report, but the reporter tells us that the case was decided in the court below mainly upon the ground that the bill failed to aver that the comptroller had taken any action in the matter. The supreme court held that such a determination by the comptroller was a condition precedent to the right of the receiver to bring suit against stockholders to enforce their liability in excess of their stock; and it seems clearly inferable that the court also held that, when the suit was for the whole amount of the liability, it must be at law. Other matters were discussed and decided in the opinion of the court delivered by Mr. Justice Swayne, not relevant to the present inquiry. But in the course of the opinion, after laying down the proposition that, "when the whole amount is sought to be recovered, the proceeding must be at law," it is said: "Where less is required, the proceeding may be

in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court, if such action should prove to be necessary, until the full amount of the liability is exhausted." This, it is now said, was a dictum merely; and undoubtedly it was such in the sense that it was not necessary to the determination of the case. But it is to be observed that—apparently with the sanction of the court—Mr. Justice Swayne was outlining the proceedings appropriate to the enforcement of this special liability of stockholders. If so, this statement of the rule is of more weight than is ordinarily attached to a mere dictum. The case has been referred to many times since, and its rulings approved in general terms by the supreme court, and there has never been any dissent from the announcement of the particular rule now under consideration. *Casey v. Galli*, 94 U. S. 673, 42 L. Ed. 178, and U. S. v. *Knox*, 102 U. S. 422, 26 L. Ed. 216, were two of such cases decided shortly after, and in the latter case the court expressly says that it approves and reaffirms the "rule laid down" in *Kennedy v. Gibson* and *Casey v. Galli*. No particular rule is mentioned, and we think it probable that it was meant to affirm generally the law "laid down" in the previous opinions. Beyond doubt the ruling that, where the whole amount of the liability is sought to be recovered, the suit must be at law, was based upon the fact that in such a case the remedy at law is adequate, and, under the provision of section 723, Rev. St., the action must be brought there, and then the stockholder would be given the privilege of a trial by jury. The proposition that, where less is required, the proceeding might be in equity, is apparently made to rest upon the implication that, as the liability would not thereby be exhausted, and further proceedings might be necessary, it would accord with the principles and practice of courts of equity that, the question of liability being once determined by decree, no new suit would be necessary, but the remnant of liability could be enforced by supplementary proceedings, one or more, and thus would be promoted one of the objects of equity in avoiding a multiplicity of suits. It is said that in such case the proceeding "may" be in equity. The implication is that it might also be at law, and this seems to give further color for the interpretation which we think the other language employed fairly imports. Further reasons might be given for according a remedy in equity in such cases. The liability of the stockholder is in the nature of a trust fund. The proceeds retain that character in the hands of the receiver for the benefit of creditors. The collection of the assessment does not finally deprive the stockholder of the sum collected. It is provisional only. The comptroller is, by the consent of the stockholder, appointed for the purpose of determining whether contribution should be made, and, by approximation, in what amount. In most instances the first assessment can only be an approximation. But in the end, if the stockholder has been required to advance more than his proportion of the amount necessary to pay creditors in the ratio of the stock he holds to the whole of the capital stock, it is refunded to him.

Again, while the stockholder is not concerned with the collection made from other stockholders, yet he is concerned in the question

whether the others are in fact stockholders, for the measure of his own liability will depend upon that. By a determination that some stock which has been counted by the comptroller as the basis of his assessment is not valid stock, and so not assessable, his own share must eventually be increased. Indeed, in the present case some of the defendants on various grounds are seeking by cross bill, alleging frauds and circumventions practiced on them, to exonerate themselves from the character and liability of stockholders. The receiver, so far as this attempt is concerned, represents all the other stockholders who are interested in retaining them. The facts that the receiver as the representative of the creditors is seeking to recover a trust fund, and that there is a complication of interest in the questions and matters involved, furnish additional grounds for holding that a bill in equity is an appropriate method of procedure wherein to litigate the matters in controversy. But it is not necessary to rest the equitable jurisdiction over the case upon that ground, for we are clearly of opinion that the bill should be maintained for the purpose of avoiding a multiplicity of suits. In considering this phase of the general question, the other point we have just considered is not material; that is to say, whether such a proceeding as this is an appropriate one, considered independently of the peculiar doctrine applicable under that branch of equity which includes its function for preventing a multiplicity of suits. For this latter purpose it is immaterial whether the suits to be avoided or prevented are of a legal or an equitable character. The object is the same in either case, and the reason for the proceeding is the same.

There is a common question in the case between the receiver and the defendants, namely, the question whether the latter were released from their stock subscription by the fact that, whereas the resolution for increasing the stock in the sum of \$300,000 was that under which their subscription took place, yet subsequently, by proceedings to which they did not consent, the proposed increase was reduced to \$150,000. The protest interposed by Bailey in behalf of himself and the other stockholders to the certification by the comptroller of the modified increase of the capital stock of the bank assumes that they stood on the common ground already stated. And these circumstances, namely, the great number of the parties on one side or the other, the identity of the question of law, and the similarity of the facts in the several controversies between the respective parties, are the basis on which the jurisdiction rests. The object is to minimize litigation, not only in the interest of the public, but also for the convenience and advantage of the parties. If the receiver was compelled to bring separate suits, it would entail a vast expense upon the fund in trying over and over again the identical questions of law and fact with each stockholder, and with no substantial advantage to him, but injury, rather, in the increased cost in the immediate suit, and the larger burden upon the fund, created by the many suits against the others.

Nor is it necessary, as counsel seem to suppose, that there should be any privity of interest between the stockholders, other than that in the question involved and the kind of relief sought, the right of

their claims being common to them all, in order to bring the case within the jurisdiction. In several of the early cases of this class which established and confirmed this ground of equity no such requirement was made, and no such fact existed. *Mayor of York v. Pilkington*, 1 Atk. 282; *Lord Tenham v. Herbert*, 2 Atk. 483; *City of London v. Perkins*, 3 Brown, Parl. Cas. 602; *New River Co. v. Graves*, 2 Vern. 431. In the origin of its establishment the jurisdiction was most frequently illustrated upon "bills of peace," so called, but, as time has gone on, experience has proved the utility of this doctrine of equity, and its application has been broadened and extended to a great variety of subjects and conditions to which it is found profitably applicable. A near-by case is that of *Louisville, N. A. & C. Ry. Co. v. Ohio Val. Imp. & C. Co.* (C. C.) 57 Fed. 42, where it was held that a railroad company whose guaranty had been indorsed upon the bonds of another company, without authority, as it was claimed, might maintain a bill in equity against the holders thereof to cancel the guaranty on the ground of preventing a multiplicity of suits, although it might have a good defense at law to each of the bonds. Other authorities there cited, and which are pertinent also to the present inquiry, are *Railway Co. v. Schuyler*, 17 N. Y. 592; *Supervisors v. Deyoe*, 77 N. Y. 219; *Black v. Shreeve*, 7 N. J. Eq. 440; *Waterworks v. Yeomans*, 2 Ch. App. 11; and *Pom. Eq. Jur.* §§ 222, 911, et seq. The cases in which a like principle is recognized and applied are too numerous for citation. Many of them are collected in *Pomeroy's Equity Jurisprudence* in the notes to the sections referred to. It is true there are occasional cases where it seems to have been supposed that there must be some community of interest,—some tie between the individuals who make up the great number; but the great weight of authority is to the contrary, and there is a multitude of cases which either in terms deny the necessity of such a fact or ignore it by granting relief where the fact did not exist. And, indeed, it is difficult to find any reason why it should be thought necessary. It has no relevancy to the principle or purpose of the doctrine itself, which stands not merely as a makeweight when other equities are present, but as an independent and substantive ground of jurisdiction.

Upon the merits of the controversy it is contended, first, that at the meeting of stockholders on January 12, 1892, the resolution for an increase of stock in the sum of \$300,000 was not legally passed, for the reason that the requisite two-thirds of the stock, which had been in form issued was not valid by reason of certain alleged frauds and irregularities in the issuance thereof; such, for instance, as that 1,700 of the 2,000 shares were originally taken out by parties who never intended to pay for them, and were not expected to do so, and that it was finally arranged that other parties should take and pay for them, which was afterwards done. Objections of much the same character are urged against the validity of the vote to modify the increase to \$150,000, on the 9th day of September, 1895. All such grounds of defense may be considered and disposed of together. In the first place, it is altogether incompatible with the policy and purposes for which these banking associations are

created and allowed to do business that mere irregularities, or even fraudulent practices, in organization or management, should wholly invalidate the exercise of their vital functions, and give ground for a stockholder to repudiate his obligations to the public. There would be no security in doing business with such institutions. If such business was done at the peril of being undermined and invalidated by the development and maintenance of such defenses, it would destroy public confidence, and the business would come to an end. The stability of the bank's organization and the integrity of its maintenance and operations must be assumed in favor of the public as against the stockholder. If the conditions exist which the law prescribes for its existence and the transaction of business, that is enough, so far as the public is concerned. It is not meant to say that irregularities may not occur so gross as to authorize the stockholder to intervene, and apply to the proper tribunals for correction; but in that case the proceeding must be promptly taken, and not delayed until the rights of others have become involved in business entered upon with the presumption that the ground is clear, or that, if irregularities have occurred, they have been condoned. But, second, questions such as these are not left open to controversy. The comptroller's certificate upon which the bank is allowed to begin business, and his further certificate approving an increase or reduction of the capital stock, are conclusive evidence of all facts which he is required to ascertain before the issuance thereof. These facts cover all that is essential to authorize the bank to begin, and go forward with the character and functions it is allowed to assume. Among these facts are that the capital stock has been lawfully subscribed, and, in the case of an increase, that the increase has been regularly created, and that it has been paid in. The purposes of the act in providing for and making necessary the comptroller's certificate are that he shall make inquiry, and determine the existence of these essential facts; and make record evidence, upon which the public may rely, that the required conditions do in fact exist. The conclusiveness of the comptroller's certificate is not now open to dispute. It is settled by repeated decisions upon the most satisfactory grounds. *Casey v. Galli*, 94 U. S. 673, 42 L. Ed. 178; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *McCormick v. Bank*, 165 U. S. 538, 17 Sup. Ct. 433, 436, 41 L. Ed. 817; *Bank v. Mathews*, 29 C. C. A. 491, 85 Fed. 934; *Brown v. Tillinghast*, 35 C. C. A. 323, 93 Fed. 326. Equally conclusive is the comptroller's certificate in respect of the amount for which an assessment shall be made on account of the special liability of the stockholders. He is put in that position of authority by the act; and the stockholder, when he takes stock, agrees that he shall act and decide upon the necessity for calling in the requisite sum, and how much is necessary. It is not the case of a liability imposed subsequently to the stockholder's subscription. The privilege is given him and his associates, upon complying with and assenting to the provisions which are enacted for safeguarding his own and the public interest, to engage in the business. The comptroller is authorized to determine what sum shall be advanced, and



the stockholder is bound to comply. He will get it back if it is not used. It cannot be diverted to any other purpose than the satisfaction of his personal liability. But, while the comptroller's certificates are conclusive in regard to the status of the bank and the necessity for an assessment, they do not foreclose the question as to who are the owners of stock. It is still open to one sued as such to say that he never was a stockholder, for in that case he has not come into the compact, and has not submitted to the obligations imposed by the statute; but in this collateral way he can take no advantage from any alleged infirmity of the association arising from irregularities or the nonexistence of facts which the comptroller, in the exercise of the authority vested in him, has found and certified.

We come, then, to the question whether the defendants became stockholders by reason of the transactions between themselves and the association, the resolutions relating to the increase of stock, and the approval of the final action of the stockholders in that regard by the comptroller. We entertain no doubt that they did. They subscribed, paid for, and received certificates therefor. Their names were entered in the stock books of the association, and the stock was held out to the public as having been taken. They received dividends upon it, and, so far as appears, were accorded all the rights of stockholders. These relations continued for more than three years, and until a time when the prospects of the bank darkened, without dissent either from their relation as stockholders or the conduct of the bank. They then demanded that the comptroller should abstain from making the formal certificate which should make their standing regular. It is insisted in behalf of the defendants that the comptroller's action in thus bringing them in when the association had become insolvent, and the consequence of doing it being to cast an extraordinary burden upon them, was a fraud; and it is pointed out that the very next day after the comptroller gave his certificate of increase and brought the defendants in, he closed the doors of the bank. We can find no evidence of fraud in what was done by the comptroller. Upon general principles, and independent of the special requirements of the national banking act, we think no one would hesitate to say that a party who had taken up and continued for so long a time the relation of a *de facto* stockholder, enjoying the privileges and having the chances accruing from the relation, should be held estopped from denying his position; that it would be a fraud upon those who had become the creditors of the bank for him to disown the obligations which belonged to the character he had assumed. If the comptroller had the power to give their holding the stamp of regularity, there was certainly nothing inequitable in his exercising it in the manner he did. It is urged that he thus compelled the defendants to come into a different contract from that which they had made; but we think not. The provisions of the act entered into their subscription of stock. The subscribers took it in contemplation of all that might lawfully happen to the bank, or be done by it. By a two-thirds vote the association was empowered to increase or reduce its capital stock, and, after having voted an increase, it had power to lessen

such increase, and to certify to the comptroller the increase, as thus modified, for his certificate sanctioning it. In our opinion, the rulings of the supreme court in the Pacific Bank Cases (*Delano v. Butler*, 118 U. S. 634, 7 Sup. Ct. 39, 30 L. Ed. 260; *Aspinwall v. Butler*, 133 U. S. 595, 10 Sup. Ct. 417, 33 L. Ed. 779; *Thayer v. Butler*, 141 U. S. 234, 11 Sup. Ct. 987, 35 L. Ed. 711) are practically decisive upon this point. Counsel for the defendants, for the purpose of distinguishing those cases, refer to the fact that in the records on which they were decided it appeared that a by-law of the association authorized the directors to dispose of the unsubscribed stock of the increase, but we do not think that was taken as an essential ground of decision. The reasoning of the court leads to the conclusion reached independently of that circumstance. The power of the association at all times to increase or diminish its capital with the approval of the comptroller includes the power there delegated to the directors. The by-law merely regulated the exercise of the power. When, therefore, the comptroller certified the increase of \$150,000, precisely the same thing happened as if the original vote had fixed the increase at that sum. The comptroller found that the proceedings for the increase had been according to law, and that it had been subscribed and paid in; and these things the defendants cannot deny. The fact that the subscription and payment for the stock of increase preceded the final vote of the stockholders to make the increase is not important. Precisely that condition of things existed in the Pacific Bank Cases, and it is worthy of note that there, as here, the vote to accept the smaller amount of increase took place after the bank became insolvent, and on the eve of its final collapse.

It seems proper in this connection to note that in the case of *Bank v. Eaton*, 141 U. S. 227, 11 Sup. Ct. 984, 35 L. Ed. 702, the decision in the same case in 144 Mass. 260, 10 N. E. 844, upon which Judge Jackson so much relied in making some of his observations in *Winter v. Armstrong* (C. C.) 37 Fed. 508, was reversed. As, however, in *Winter v. Armstrong*, the proposed increase never received the approval of the comptroller, there is no occasion to criticise the conclusion reached by the learned judge in that case. We think, therefore, that there is nothing in the action of the comptroller which was either irregular or wrongful to the defendants. Complaint is made that the notice given to the stockholders of the meeting of September 9, 1895, was not long enough, and that the defendants were not notified at all. We have already considered the effect of such irregularities as the first of these, and, as to the second, it may be added that, as their standing as stockholders was not complete, they were not entitled to vote, and notice to them was not required. Besides, they were repudiating the claim to be stockholders, and claimed to be creditors of the bank for the amounts they had paid, and that they could not "be considered as stockholders until the whole amount of stock (meaning the \$300,000) had been subscribed and paid in." Referring to the comptroller's letter to Bailey of September 4, 1895, it is to be observed that it imported no more than that he would not approve of the increase of \$300,000, voted on January 12, 1892, for the reason it had not been paid in;

and in no wise impugns his subsequent action in approving an increase of \$150,000, which had been paid in, when the association accepted that increase, and requested his approval. Besides, the comptroller would not be precluded in his final authoritative action by an informal communication of this kind. He could not thus disable himself.

In behalf of the defendants William A. Groneweg and Louis Groneweg it is insisted that they should not be held as stockholders, because, as is said, they subscribed for stock of the increase, and were given original stock instead. The certificates issued to them did not denote that they were for the increased stock, as was the case with that issued to the others. It is probable that the difference was not regarded as material by them, though, if they were not satisfied, they would doubtless have been entitled to demand the kind of stock they had subscribed for. They gave proxies to vote on their stock, and this could only be done upon the assumption that it was original stock. The question is more difficult than that which the position of the other stockholders involves, but we are inclined to the opinion that, having regard to the presumption of knowledge on the part of stockholders of that which appears upon the face of the books of their corporation, and their long-continued acquiescence in their relation as stockholders without investigation, precludes them from now asking to be relieved. There are circumstances in which the association may become the owner and have the right to dispose of its original stock, and, in the absence of proof to the contrary, we must infer that the transfer to these defendants, the Gronewegs, gave them a good title to the stock. The stock then had value. Perhaps there was ground for them to have proceeded in equity, if they had done so seasonably, to rescind upon the ground of mistake, and tender back the stock; but it is doubtful whether they can at this late day claim such right. The evidence leaves the question whether the Gronewegs have not in fact known all along the character of their stock in doubt, but we do not determine how that was, for we are of the opinion that with reasonable diligence they should have known it, and that it may be fairly imputed to them that they did know it. See *Rand v. Bank*, 36 C. C. A. 292, 94 Fed. 349.

Several cases have arisen and been decided in other circuits involving similar subscriptions to this increase of stock in the Columbia National Bank, and similar results have been reached in all of them. The cases of *Bank v. Mathews*, 29 C. C. A. 491, 85 Fed. 934, and *Brown v. Tillinghast*, were decided by the circuit court of appeals in the Ninth circuit. It was there held that the clause in the resolution of the shareholders of January 12, 1892, that as often as \$50,000 of the proposed increase of \$300,000 should be subscribed for and paid in it should be certified to the comptroller, should be construed as contemplating that the increase should be made by installments of \$50,000, or multiples thereof, and that the approval of the comptroller should be obtained from time to time. We are not to be understood as dissenting from that view, although there is reason for thinking that the officials of the bank did not so under-

stand it, and it would have been a rather unusual method of proceeding. But it is difficult to make out what other purpose there could have been, unless it was that the bank might thereby gain a better standing with the public, or, possibly, that the new subscriptions would be more securely tied. Being of opinion that the decree of the court below should be sustained upon the general grounds we have indicated, we have preferred to rest our opinion upon them, rather than upon the construction of the clause of the resolution in question. Our conclusion is that the decree of the circuit court should be affirmed.

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**MERCANTILE TRUST & DEPOSIT CO. OF BALTIMORE v. COLLINS PARK & B. R. CO. et al.**

(Circuit Court, N. D. Georgia. February 7, 1900.)

No. 1,090.

**1. CONSTITUTIONAL LAW—STATE LAW IMPAIRING OBLIGATION OF CONTRACTS—CITY ORDINANCE.**

Under the provision of the constitution of Georgia (article 3, § 7, par. 20) prohibiting the legislature from authorizing the construction of a street railroad in a city or town without the consent of the corporate authorities, the action of such authorities upon an application for a street-railroad franchise is the action of the state; and an ordinance granting such a franchise is passed under authority delegated by the state, and is a law of the state, within the meaning of the contract clause of the constitution of the United States.

**2. JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.**

A suit to enjoin the enforcement of a city ordinance which has the force of a state law, within the meaning of the contract clause of the constitution, on the ground that it impairs the obligation of a prior contract made by the city, involves a federal question, which gives a federal court jurisdiction, without regard to the citizenship of the parties.<sup>1</sup>

This is a suit in equity to enjoin the enforcement of an ordinance of the city of Atlanta. On demurrers to bill.

King & Anderson, Goodwin & Hallman, and Payne & Tye, for complainant.

King & Spalding, Brandon & Arkwright, Rosser & Carter, and John L. Hopkins & Sons, for defendant Collins Park & B. R. Co.

James A. Anderson, City Atty., for defendant city of Atlanta.

NEWMAN, District Judge. The demurrers to the bill in this case raise the question of the jurisdiction of the court. The bill was filed by the Mercantile Trust & Deposit Company of Baltimore, a corporation of the state of Maryland, against the Collins Park & Belt Railroad Company, a corporation of the state of Georgia, exercising its corporate powers in the county of Fulton, and against the city

<sup>1</sup> As to jurisdiction of cases involving federal questions, see note to *Bailey v. Mosher*, 11 C. C. A. 308, and, supplementary thereto, note to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co.*, 35 C. C. A. 7.

of Atlanta, a municipal corporation of said county of Fulton. The purpose of the bill is to enjoin the enforcement of an ordinance which authorized the Collins Park & Belt Railroad Company to condemn for its use certain parts of the track of the Atlanta Railway & Power Company, a corporation also of Georgia, and of the county of Fulton. The complainant is trustee for a large amount of bonds issued by the Atlanta Railway & Power Company, and the holder of all of its stock, except 25 shares.

The first question is as to whether or not the railway and power company is an indispensable party to the litigation. It is contended that there is a distinction between this case and the case of *Old Colony Trust Co. v. Atlanta Ry. Co.* (decided in this court in 1899) 100 Fed. 798, in which it was held that the Atlanta Consolidated Street-Railway Company was an indispensable party, and, as the facts of the case placed it on the side of the complainant in the litigation, that that defeated the jurisdiction of the court on the ground of citizenship, because in this case substantially all the stock of the railway and power company is in the hands of the nonresident trust company. I am not satisfied that this would be sufficient to make a distinction between the two cases, and would be indisposed to retain jurisdiction on this ground, but it is unnecessary to discuss it further, if a federal question exists in the case, as claimed by the complainant; and the greater part of the argument has been directed to this latter question.

The bill alleges that the action complained of is a violation of the provision of the constitution of the United States which prohibits any state from passing a law impairing the obligation of contracts. In order to determine this question, it is necessary to decide whether the ordinance of the city of Atlanta authorizing the Collins Park Company to condemn certain portions of the track of the railway and power company is a law of the state, in the meaning of the provision of the constitution of the United States. It is not denied that ordinances of a city, acting in its legislative and governmental capacity, and proceeding as an instrumentality of the state, may be, and often have been, held to be laws of the state, in this connection; but it is claimed that under the facts here it is not true of the ordinance passed by the governing body of the city of Atlanta.

The city in 1891 granted to certain persons, as the representatives of several street-railroad lines in the city, then having a separate corporate existence, the right to consolidate the same and to electrically equip them. It is unnecessary at present to go into any extended discussion of these ordinances, for the purpose of reaching the precise question at issue. It is sufficient to say that in the report of a committee, which was subsequently adopted, the city, in granting the rights mentioned, reserved the right to allow any other street-railroad company to condemn as much as five blocks of the several lines which subsequently became the Consolidated Street Railway, whenever it should be necessary for the purpose of allowing other street-railroad companies to reach the center of the city. The grant now to the Collins Park Company is a right to condemn

more than five blocks of the railway and power company, which has become the successor of the Consolidated. One question, among others, which will be at issue when the merits of the case are reached, is whether the city reserved the right to condemn five blocks in all of the Consolidated tracks, or whether it reserved the right to condemn five blocks of each of the lines, the consolidation of which was authorized by the city at the same time that the reservation was made. The complainant contends, and will contend on the hearing of the case, for the former construction, and the defendants for the latter.

The constitution of the state of Georgia (article 3, § 7, par. 20) provides that "the general assembly shall not authorize the construction of any street passenger-railway within the limits of any incorporated town or city, without the consent of the corporate authorities." The same provision is contained in the general street-railway law of the state subsequently enacted. Consequently no street-railroad company can lay a track in any of the streets of a city in Georgia without the consent of the city authorities. In conformity with this provision of the constitution and laws, the city's consent was asked and given in 1891 to the Consolidated Company, with the reservation stated. Consent being asked in 1899 by the Collins Park Company for the use of the streets, the city's consent was given to the use of a number of streets, as well as its permission to condemn a portion of the track of the railway and power company by the same ordinance. Of course, the primary authority over all the highways of the state, as well as the streets of the cities and towns, is in the state, and this authority over the same would usually be exercised by the legislature. The constitution of Georgia wisely provides, however, that even the legislature shall not authorize a passenger street-railway company to occupy any of the streets of a city or town until it has the consent of the authorities controlling the affairs of the city or town in which such right may be desired. Is it not true, then, that this act of consent—of withholding or granting the use of the streets of the city for such purposes, and, indeed, the entire subject-matter of control of the streets in this way—is the act of the state, through the city authorities as its instrumentality? Does not the provision of the constitution requiring such consent before the legislative grant becomes effective make the action of the city in this respect a part of the legislative act? The legislature grants the use of the streets, subject to the city's consent, and is not the city's consent, therefore, a part of the grant? Let us examine some of the authorities on the subject, with a view to the determination of this question. It will be unnecessary to go very far back in examining the decisions of the courts for the purpose of elucidating this question. The recent decisions have been so full and ample on the subject that a few citations will show the conclusion that must inevitably be reached.

The first case on the subject to which attention need be called is the case of *Wright v. Nagle*, 101 U. S. 791, 25 L. Ed. 921. This case went to the supreme court from the state of Georgia, and one of the questions in the case was whether the action of the inferior court of Georgia in granting a franchise, acting under legislative

authority, was the action of the state. This was decided in the affirmative. On this subject the court says:

"We think, also, that the motion to dismiss must be overruled. It is true, the court below disposed of the case by deciding that the state statutes did not authorize the inferior court to grant Miller an exclusive right to maintain bridges within the designated limits, and that in so doing it gave a construction to a state statute. It is also true that ordinarily such a construction would be conclusive on us. One exception, however, exists to this rule, and that is when the state court has been called upon to interpret the contracts of states, though they have been made in the forms of law, or conformity with state legislation.' *Bank v. Skelly*, 1 Black, 436, 17 L. Ed. 173. It has been decided in Georgia that the right to receive tolls for the transportation of travelers and others across a river on a public highway is a franchise which belongs to the people collectively. *Young v. Harrison*, 6 Ga. 130. A grant of this franchise from the public in some form is therefore necessary to enable an individual to establish and maintain a toll bridge for public travel. The legislature of the state alone has authority to make such a grant. It may exercise this authority by direct legislation, or through agencies duly established, having power for that purpose. The grant, when made, binds the public, and is, directly or indirectly, the act of the state. The easement is a legislative grant, whether made directly by the legislature itself, or by any one of its properly constituted instrumentalities. *Justices of Inferior Court v. Plank Road*, 14 Ga. 486. The complainants claim they have such a grant through the agency of the inferior court, acting under the authority of the legislature. This is denied, because, as is insisted, the legislature has not given the court power to make an exclusive grant. That was the precise question decided below, and, under the exception to the rule just stated, is reviewable here."

The next case to which attention is called is a case which is very much relied on here by the defendants. *Hamilton Gaslight & Coke Co. v. Hamilton City*, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963. It is contended that, tested by this decision, the action of the city in this case is not a state law, in the meaning of the constitution of the United States. The language of the court on this subject is as follows:

"The plaintiff's first contention is that there is no statute of Ohio authorizing any city, in which there are already gas works in full and complete operation, to erect gas works, or to levy a tax for that purpose. If this were conceded, we should feel obliged—the plaintiff and defendant both being corporations of Ohio—to reverse the judgment and remand the cause, with directions to dismiss the suit for want of jurisdiction in the circuit court. The jurisdiction of that court can be sustained only upon the theory that the suit is one arising under the constitution of the United States. But the suit would not be of that character, if regarded as one in which the plaintiff merely sought protection against the violation of the alleged contract by an ordinance to which the state has not, in any form, given or attempted to give the force of law. A municipal ordinance, not passed under supposed legislative authority, cannot be regarded as a law of the state, within the meaning of the constitutional prohibition against state laws impairing the obligations of contracts. *Murray v. Charleston*, 98 U. S. 432, 440, 24 L. Ed. 760; *Williams v. Bruffy*, 96 U. S. 176, 183, 24 L. Ed. 716; *Water Co. v. Easton*, 121 U. S. 388, 392, 7 Sup. Ct. 916, 30 L. Ed. 1059; *New Orleans Waterworks Co. v. Louisiana Sugar-Refining Co.*, 125 U. S. 18, 31, 38, 8 Sup. Ct. 741, 31 L. Ed. 607. A suit to prevent the enforcement of such an ordinance would not, therefore, be one arising under the constitution of the United States. We sustain the jurisdiction of the circuit court because it appears that the defendant grounded its right to enact the ordinance in question, and to maintain and erect gas works of its own, upon that section of the Municipal Code of Ohio adopted in 1869 (now section 2486 of the Revised Statutes) providing that the city council of any city or village should have power, whenever it was deemed expedient and for the pub-

lic good, to erect gas works at the expense of the corporation, or to purchase gas works already erected therein, which section, the plaintiff contends, if construed as conferring the authority claimed, impaired the obligation of its contract previously made with the state and the city."

It is difficult to see how counsel find a different rule in this case from that announced in the former cases and in subsequent cases decided by the supreme court.

The next case to which attention is called is the case of *City Ry. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114. The following quotation from the opinion of the court in that case will show sufficiently for present purposes what was decided:

"(1) There can be no doubt that the circuit court had jurisdiction of the case, notwithstanding the fact that both parties are corporations and citizens of the state of Indiana. It should be borne in mind in this connection that jurisdiction depended upon the allegations of the bill, and not upon the facts as they substantially turned out to be. The gravamen of the bill is that under the act of the general assembly of 1861, and the ordinances of January 18, 1864, and April 7, 1880, the Citizens' Railroad Company had become vested with certain exclusive rights to operate a street railway in the city of Indianapolis, either in perpetuity or for the term of thirty years or thirty-seven years, which the city had attempted to impair by entering into a contract with the City Railway Company to pay and operate a railway upon the same streets. All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair. Conceding that the legislature of the state alone had the right to make such grant, 'it may,' as was observed in *Wright v. Nagle*, 101 U. S. 791, 794, 25 L. Ed. 921, 'exercise its authority by direct legislation, or through agencies duly established, having power for that purpose. The grant, when made, binds the public, and is directly or indirectly the act of the state. The easement is a legislative grant, whether made directly by the legislature itself, or by any one of its properly constituted instrumentalities.' See, also, *Saginaw Gaslight Co. v. Saginaw City* (C. C.) 28 Fed. 529; *Weston v. Charleston*, 2 Pet. 462, 7 L. Ed. 481; *Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525. That the complainant had a contract with the city is entirely clear. It was so held by the supreme court of Indiana in *Western Pav. & S. Co. v. Citizens' St. R. Co.*, 128 Ind. 525, 26 N. E. 188, 28 N. E. 88, and 10 L. R. A. 770, in which the liability of the company for certain street improvements was discussed and passed upon. It is true that by section 11 of the original act of 1861 a right was reserved to the general assembly to amend or repeal at their discretion the act authorizing the incorporation of street-railway companies; but that was a right reserved to the general assembly itself, and was never delegated, if in fact it could be delegated, to the common council of the city. That the city did attempt to impair this contract by the agreement of April 24, 1893, with the City Railway Company, and its ordinance ratifying the same, is equally clear. This contract was entered into in pursuance of a supposed right given by the act of the general assembly of March 6, 1891, known as the 'City Charter,' the fifty-ninth section of which enacted that 'the board of public works shall have power \* \* \* to authorize and empower by contract telephone, telegraph, electric light, gas, water, steam or street car or railroad companies to use any street, alley or other public place in such city: \* \* \* provided, that such contracts shall, in all cases, be submitted by said board to the council of such city, and approved by them by ordinance before the same shall take effect.' This contract and ordinance of April 24, 1893, even if otherwise valid, could not be construed to interfere with the rights of the complainant to occupy the streets of the city under the act of 1861 and the ordinance of January 18, 1864, without coming in conflict with that provision of the constitution which forbids states from enacting laws impairing the obligation of contracts. Whether the state had or had not impaired the obligation of this contract was not a question which could be properly passed



upon, on a motion to dismiss, so long as the complainant claimed in its bill that it had that effect, and such claim was apparently made in good faith, and was not a frivolous one. *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 88, 12 Sup. Ct. 142, 35 L. Ed. 943."

In the same volume (page 673, 166 U. S., page 696, 17 Sup. Ct., and page 1160, 41 L. Ed.) is the case of *City of Baltimore v. Baltimore Trust & Guarantee Co.* This case is important only because the court seems to accept the decision of the court below (*Baltimore Trust & Guarantee Co. v. Mayor, etc.* [C. C.] 64 Fed. 153) on the subject of jurisdiction, without question. The supreme court decided the merits of the matter, and in order to do this it was necessary to agree with the court below on the question of jurisdiction. There was a contention between the city and a street-railroad company as to the power of the city to withdraw a right which it had granted to lay double tracks on a certain street, and to restrict the company to laying only one track, after the company had commenced and partly executed the work of laying double tracks. Both parties were citizens of Maryland, and unless a federal question had been involved there was no jurisdiction in the court to hear the case. On this subject Circuit Judge Goff, deciding the case in the circuit court, says:

"I find from the decisions involving the questions I have been considering that where rights and privileges have been lawfully granted to and accepted by either a private or public corporation, and valuable improvements have been made on the faith of such grant, a contract has been thereby entered into, the impairment of which by a law of the state making such grant, passed by the legislature thereof or by a municipality authorized by it, or acting under the authority of a statute supposed to give the power (the right so to do not having been reserved), is forbidden by section 10 of article 1 of the constitution of the United States. *Trustees v. Woodward*, 4 Wheat. 518, 4 L. Ed. 629; *Chicago v. Sheldon*, 9 Wall. 50, 19 L. Ed. 594; *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *New Jersey v. Yard, Id.* 104, 24 L. Ed. 352; *Railroad Co. v. Richmond*, 96 U. S. 521, 24 L. Ed. 734; *Wright v. Nagle*, 101 U. S. 791, 25 L. Ed. 921; *Greenwood v. Freight Co.*, 105 U. S. 13, 26 L. Ed. 961; *Railroad Co. v. Delamore*, 114 U. S. 501, 5 Sup. Ct. 1009, 29 L. Ed. 244; *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525; *Sioux City St. Ry. Co. v. Sioux City*, 138 U. S. 98, 11 Sup. Ct. 226, 34 L. Ed. 898; *St. Louis v. W. U. Tel. Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380; *Saginaw Gaslight Co. v. City of Saginaw* (C. C.) 28 Fed. 529; *Coast-Line R. Co. v. Mayor, etc.* (C. C.) 30 Fed. 646; *Citizens' St. R. Co. v. City of Memphis* (C. C.) 53 Fed. 715; *State v. Corrigan Consol. St. Ry. Co.*, 85 Mo. 263; *City of Burlington v. Burlington St. Ry. Co.*, 49 Iowa, 144."

There was a dissenting opinion by District Judge Morris, but the dissent is not as to jurisdiction, but on the merits of the case.

The next case is a waterworks case, from Texas. *Insurance Co. v. City of Austin*, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626. The case is not particularly important here, except for an expression by Mr. Justice White in the opinion as to the recognition of municipal ordinances as state laws, which is as follows:

"Not only were the averments of the bill as to the invalidity of the state law adequate, but so, also, were the allegations as to the nullity of the city ordinances. These ordinances were but the exercise by the city of a legislative power which it assumed had been delegated to it by the state, and were

therefore, in legal intendment, the equivalent of laws enacted by the state itself,"—citing *City Ry. Co. v. Citizens' St. R. Co.*, supra, and cases there cited.

The latest decision by the supreme court, which is important to a determination of this question, is the case of *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. This was a waterworks case, also, and a case in which the city had granted certain rights to the water company, and subsequently proposed to erect waterworks of its own. A few extracts from the opinion will show the views of the court. The allegations of the bill in that case, upon which jurisdiction depended, are referred to in the opinion as follows:

"(1) The jurisdiction depends specifically upon the allegations in the bill that defendants insist that the contract of the city with the plaintiff was not a valid and binding contract, either in respect to the stipulation binding the city not to erect, maintain, or become interested in any system of waterworks other than those of the plaintiff, or in respect to the stipulation for furnishing water to the city by plaintiff, and that, regardless of plaintiff's rights, the city refuses to be bound by the contract, and is proposing to borrow money to erect and maintain waterworks of its own, and become a competitor with the plaintiff for the trade and custom of the customers of water; \* \* \* and, in short, that the proposed action of the city is in fraud of plaintiff's rights under its contract with the city, and the protection guarantied to it under the constitution of the United States."

After stating that these allegations upon their face raise a question of the power of the city to impair the obligation of its contract with the plaintiff, the court proceeds to state the argument for the defendant, which is so much like the argument for the defendants in this case that it will be quoted, as follows:

"The argument of the defendant in this connection is that the action of the city in contracting with the water company, and in passing the ordinance of 1893 providing for the erection of waterworks, was not in the exercise of its sovereignty; that in these particulars the city was not acting as the agent of the state, but was merely exercising a power as agent of its citizens, and representing solely their proprietary interest; that the council in such cases, as trustee for the citizens, stands in the relation to them as directors to stockholders in a private corporation, acting solely as the agent of the citizens, and no wise as the agent of the state, and therefore that neither the state, nor the city as its agent, can be charged either with the making or the impairing of the original contract; that for these reasons the constitution of the United States has no application to the case, the federal court has no jurisdiction, and the bill, upon its admitted facts, presents only a violation by a citizen of the state of its contract with another citizen, and the plaintiff is bound to resort to the state courts for its remedy."

A further extract from the opinion of the court will be sufficient to show what was decided as to the contention just stated:

"It may be conceded as a general proposition that there is a substantial distinction between the acts of a municipality as the agent of the state for the preservation of peace and the protection of persons and property, and its acts as the agent of its citizens for the care and improvement of the public property and the adaptation of the city for the purposes of residence and business. Questions respecting this distinction have usually arisen in actions against the municipality for the negligence of its officers, in which its liability has been held to turn upon the question whether the duties of such officers were performed in the exercise of public functions or merely proprietary powers. It is now sought to carry the distinction a step further, and to hold that, if

a contract be made by a city in its proprietary capacity, the question whether such contract has been substantially affected by the subsequent action of the city does not present one of impairment by act of the state or its authorized agent, but one of an ordinary breach of contract by a private party, and hence the case does not arise under the constitution and laws of the United States, and the court has no jurisdiction, unless there be the requisite diversity of citizenship. How far this distinction can be carried to defeat the jurisdiction of the court, or the application of the contract clause, may admit of considerable doubt, if the contract be authorized by the charter; but it is sufficient for the purposes of this case to say that this court has too often decided, for the rule to be now questioned, that the grant of a right to supply gas or water to a municipality and its inhabitants through pipes and mains laid in the streets, upon condition of the performance of its service by the grantee, is the grant of a franchise vested in the state, in consideration of the performance of a public service, and, after performance by the grantee, is a contract protected by the constitution of the United States against state legislation to impair it. *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co.*, 115 U. S. 650, 660, 6 Sup. Ct. 252, 29 L. Ed. 516; *Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525; *St. Tammany Waterworks Co. v. New Orleans Waterworks*, 120 U. S. 64, 7 Sup. Ct. 405, 30 L. Ed. 563; *Crescent City Gaslight Co. v. New Orleans Gaslight Co.*, 27 La. Ann. 138, 147. It is true that in these cases the franchise was granted directly by the state legislature, but it is equally clear that such franchises may be bestowed upon corporations by the municipal authorities, provided the right to do so is given by their charters. State legislatures may not only exercise their sovereignty directly, but may delegate such portions of it to inferior legislative bodies as, in their judgment, is desirable for local purposes. As was said by the supreme court of Ohio in *State v. Cincinnati Gaslight & Coke Co.*, 18 Ohio St. 262, 293: 'And, assuming that such a power [granting franchises to establish gas works] may be exercised directly, we are not disposed to doubt that it may also be exercised indirectly, through the agency of a municipal corporation clearly invested, for police purposes, with the necessary authority.' This case is directly in line with those above cited. See, also, *Wright v. Nagle*, 101 U. S. 791, 25 L. Ed. 921; *Hamilton Gaslight & Coke Co. v. Hamilton City*, 146 U. S. 258, 266, 13 Sup. Ct. 90, 36 L. Ed. 963; *Bacon v. Texas*, 163 U. S. 207, 216, 16 Sup. Ct. 1023, 41 L. Ed. 132; *New Orleans Waterworks Co. v. City of New Orleans*, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518."

Without referring to other decisions of the circuit courts and the circuit courts of appeal, reference will be made to the very recent decision of the circuit court of appeals for the Sixth circuit in the case of *Iron Mountain R. Co. v. City of Memphis*, 37 C. C. A. 410, 96 Fed. 113. It may be first remarked as to this case that it is cited with peculiar appropriateness immediately after the *Walla Walla Case*, because, in the opinion by Circuit Judge Taft, he first uses this expression:

"There are many cases in which the supreme court has declared a city ordinance to be a law within the contract clause of the constitution, which have much less of legislative character than public forfeitures of rights in the streets by municipal legislatures. Such a case is that of *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341."

And then, after quoting the extract which has been herein given from the opinion of Mr. Justice Brown in the *Walla Walla Case*, Judge Taft proceeds:

"Here the contract, the obligation of which was found to be impaired, concerned only the furnishing of water to the citizens of a municipal corporation,—a subject-matter certainly not regarded as more within the governmental functions of a city than the supervision and control of the streets, and the granting and resuming of public rights therein; and the law which was held

to impair the obligation of the contract was merely another ordinance providing for the construction of other waterworks by the city. Such municipal action as the building of waterworks has usually been regarded as proprietary, rather than governmental, and yet the ordinance directing it was held to be a law in violation of the federal constitution."

So much of the opinion as is exactly in point here is as follows:

"We come then to the question, did this resolution violate that part of section 10, art. 1, of the constitution of the United States declaring that 'no state shall \* \* \* pass any \* \* \* law impairing the obligation of contracts'? First. Was the resolution a law of the state, within the meaning of this clause? It has frequently been decided that where a municipal council passes an ordinance, in pursuance of authority vested in it by the state legislature, which is legislative in its character, and which is merely the exercise of delegated authority to make laws that the legislature might have made directly, such an ordinance is a law within the inhibition of the constitution, if it impairs the obligation of a contract. *Murray v. Charleston*, 96 U. S. 482, 24 L. Ed. 760; *U. S. v. New Orleans*, 98 U. S. 381, 392, 25 L. Ed. 225; *Meriwether v. Garrett*, 102 U. S. 472, 26 L. Ed. 197; *Waterworks Co. v. Rivers*, 115 U. S. 674, 6 Sup. Ct. 273, 29 L. Ed. 525; *City of Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341. If such ordinance is administrative, rather than legislative, then it is not within the constitutional inhibition, even though it impairs the obligation of a contract. *New Orleans Waterworks Co. v. Louisiana Sugar-Refining Co.*, 125 U. S. 13, 8 Sup. Ct. 741, 31 L. Ed. 607. The resolution in the case before us is admitted to have been passed with all the forms required, and by the vote necessary to enact an ordinance. It concerned the occupancy of the streets, which, as we have seen, the legislative council controls under delegated authority from the state legislature, as an agency of the state and a trustee for the public at large."

But a case has recently been decided in the circuit court for the Western division of this district, by Circuit Judge Pardee, which is itself sufficient authority for overruling the demurrer in this case. It is the case of *Columbia, etc., Trust Co. v. City of Dawson*.<sup>1</sup> In that case, after it had been argued and submitted, there being a difficulty about the parties, very much as in this case, the court allowed an amendment raising a federal question to be filed. So much of the amendment as is important here is as follows:

"Your orator shows that notwithstanding the validity of the aforesaid contract contained in the aforesaid ordinance of February 21, 1890, and notwithstanding the fact that the bonds were marketed on the faith of said contract, and the waterworks were erected at great expense, and the Waterworks Company complied with the terms and conditions of the contract, the said city of Dawson has by its ordinances and conduct attempted to impair the obligation of said contract, and has thereby greatly diminished and largely destroyed the value of the property of said Waterworks Company, which constitutes the security possessed by the bondholders, and has deprived bondholders of the rentals which were to be paid by said city under said contract, and said action and threatened action of said city are in fraud and destruction of the rights of bondholders and your orator, as their trustee, under said contract with the city, and the protection guaranteed under the constitution of the United States. The aforesaid ordinance passed by said city council of Dawson on June 27, 1894, whereby said city undertook to repudiate said contract, was an attempt on the part of said city of Dawson to impair the obligation of said contract in violation of the constitution of the United States, and the protection thereby guaranteed to private rights. The said city has also passed other ordinances and done acts in attempted impairment of said contract, namely, the ordinance passed by said city of Dawson on October 4, 1894, ordering an election for the purpose of determining whether two-thirds of the

<sup>1</sup> No opinion filed.

qualified voters of said city should by their assent authorize said city to issue \$35,000 of 6% bonds for the purpose of buying or erecting a system of water-works and an electric light plant for said city, and the ordinance passed by said city of Dawson on November 5, 1894, on the same subject and to the like effect, and the holding of the election on December 12, 1894, pursuant to the provisions of said two last-mentioned ordinances, and the carrying of said proposition by the requisite two-thirds of the qualified voters of said city, and the ordinance passed by said city of Dawson on the 13th day of December, 1894, whereby the result of said election was declared to be in favor of the issue and sale of bonds for said purposes, as well as the subsequent conduct of the said city in giving effect to said ordinances by refusing to pay the water rentals stipulated in said contract, or to levy a tax for the purpose as required by the contract, and by claiming that it was no longer bound by said contract. All of said ordinances and acts are an effort and attempt on the part of said city of Dawson to impair the obligations of said contract under color of a claim of authority from the constitution and laws of the state of Georgia, in violation and attempted impairment of the protection guarantied to said contract under the constitution of the United States."

It will be seen that no part of the action of the city of Dawson in the passage of ordinances and resolutions is claimed to be based on any specific legislative authority. The ordinances and resolutions were passed under the general power and authority of the city on the subject. Yet the court must have held this action of the city council of Dawson, or some part of it, to be a law of the state, because jurisdiction was retained of the bill, and an injunction granted, pursuant to complainant's prayer. My understanding is that jurisdiction was retained solely because of the federal question raised in the manner stated. The case is very similar to the Walla Walla Case, and the action of the court was based very largely, I think, on that decision.

There is no escape from the conclusion that these authorities establish the proposition that an ordinance passed by a municipal corporation in its legislative and governmental capacity, especially with reference to the control of the streets and the granting of rights and privileges therein, is a law of the state, within the meaning of the provision of the constitution of the United States in question.

It is earnestly contended, however, by the defendants that the question which will be at issue in this case, should the court proceed with it, is one of the construction of a contract, and that it is not, in effect, a law impairing its obligation. As I understand the argument, it is that for a municipal ordinance to be a state law, as here contemplated, it should be an ordinance withdrawing a right, and not one merely construing the effect of a grant. I am wholly unable to see the force of this contention. If a municipality grants a right in the streets or otherwise, such as that, when accepted and acted upon, a binding contract comes into existence between the grantee and the municipality, and the city, by a limited construction of the effect of the grant, deprives the grantee of a part of the rights obtained thereby, this would seem to be as much an impairment of its obligation as if the city should by express action withdraw part of the rights so granted. In the Walla Walla Case it is said that the contention was that the facts made a case of "only a violation by a citizen of the state of its contract with another citizen, and the plaintiff is bound to resort to the state courts for its remedy," yet that contention was disposed of as has been already referred to. The

contention on this subject has been strongly presented by able counsel, but I am unable to agree with them in their views. I am wholly unable to see how the city can impair the binding force and full legal effect of a contract any more by construction than it could by direct withdrawal of rights granted. It is unnecessary to determine more than this at present. Several interesting features of the argument need not be noticed at this time. No opinion whatever is expressed, of course, upon the merits of the matter in controversy between the parties. The only question for determination at present is whether the ordinance passed by the city in 1899 is a law of the state, within the meaning of the constitutional provision as to the impairment of the obligation of contracts, and whether the bill charges a case of the making of a contract, and an effort to impair it, sufficient on its face to justify the court in entertaining jurisdiction of the suit. Believing that it does, the case will be retained. It will be necessary, however, in this view of the case, for the Atlanta Railway & Power Company to be made a party, and its interest will necessarily align it with the complainant. If this is done, the demurrer will be overruled; otherwise, the demurrer will be sustained for the want of necessary parties.

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EDWARDS et al. v. WEIL et al.

(Circuit Court of Appeals, Sixth Circuit. February 12, 1900.)

No. 729.

**MORTGAGES—PRIORITIES—JUDGMENT LIENS.**

Plaintiffs, who furnished money to pay off a mortgage on property in Tennessee, paid the money to their agent, who paid it to the mortgagee, receiving a release of the mortgage from the mortgagee, and a new mortgage from the mortgagor to himself, in trust for plaintiffs, which were recorded simultaneously. *Held*, that the release revested title in the mortgagor for a special purpose only, and a decree in favor of defendants against the mortgagor did not attach and become a prior lien on the property, under Shannon's Code Tenn. §§ 4708, 4710, making a decree of a court of record obtained in the county where the debtor resides a lien on the debtor's land for a period of one year.

**Appeal from the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.**

This is a bill to remove a cloud from the title to two fractional lots on Chestnut street, in the city of Chattanooga, Tenn. The lots in question originally belonged to A. J. & G. W. Stoops, who conveyed them by deed of trust to one Filmore Gibson, as trustee, to secure a large indebtedness. Subsequently the same lots were conveyed by mortgage deed of Xenophon Wheeler, in trust to secure an indebtedness of \$6,000 for borrowed money to Isaiah and Herman Weil. At the date of this last mortgage approximately \$6,000 remained unpaid of the debts secured by the prior conveyance to Gibson, and the object of this second conveyance was to secure money to discharge the balance then due under the Gibson deed, and thus save a foreclosure sale. To accomplish this purpose, the owner of the property applied to the Messrs. Weil for a loan upon the security of the property. The Weils agreed to lend the money on condition that it should be secured by a first lien, and the money used to disincumber the property. To carry out this plan, a mortgage was made and delivered July 12, 1892, to Wheeler, as agent for the Messrs. Weil, and the money was at the same time paid into his hands, to be applied by him in dis-

charging the prior mortgage and securing the title. Wheeler accordingly applied the Weil money to the payment of the mortgage debts, and on July 18, 1892, Gibson made and delivered a quitclaim deed to the mortgagees, acknowledging the payment and satisfaction of all the debts secured under the deed in trust to him. This deed was delivered to Wheeler, to be recorded simultaneously with the mortgage theretofore made to him. Wheeler thereupon caused the said quitclaim deed and the Stoops' mortgage to himself, as trustee, to be simultaneously recorded as of 10 a. m., July 18, 1892. Within one year thereafter the complainants caused an execution upon a money decree of the chancery court for the county of Hamilton, state of Tennessee, against A. J. & W. G. Stoops, to be levied on the lots so conveyed to Wheeler as the property of the judgment debtors, and caused same to be sold at sheriff's sale, and became the purchaser thereof, and they now hold and claim title by virtue of said levy, sale, and a sheriff's deed. Subsequently the mortgage to Wheeler was foreclosed, under the power of sale contained therein, and the property conveyed by the trustee to the complainants, who filed this bill for the purpose of quieting their title and removing the cloud arising out of the aforesaid sheriff's deed. The circuit court, upon the pleadings and evidence, granted the relief prayed, and the defendants have appealed.

George D. Lancaster, for appellants.

Xenophon Wheeler, for appellees.

Before TAFT, LURTON, and DAY, Circuit Judges.

LURTON, Circuit Judge, after stating the facts, delivered the opinion of the court.

In Tennessee judgments and decrees of any court of record, obtained in the county where the debtor resides at the time of rendition, are by statute a lien upon the debtor's land from the time same were rendered, for a period of one year from the rendition of the judgment or decree. Shannon's Code Tenn. §§ 4708, 4710. This statutory lien attaches to after-acquired lands, and continues for a year from the date of their acquisition, and a levy and sale within that period will overreach and avoid all intermediate alienations thereof. *Greenway v. Cannon*, 3 Humph. 178; *Davis v. Benton*, 2 Sneed, 665; *Bridges v. Cooper*, 98 Tenn. 394, 39 S. W. 723. The contention of the appellants is that when Gibson reconveyed the legal title, which had been vested in him as trustee, to the mortgagors, the Messrs. Stoops, the lien of their decree immediately attached, and that the title obtained under the levy and sale made within one year thereafter operated to pass the legal title to them as purchasers at the sheriff's sale. The appellees, who hold the title acquired through foreclosure of the mortgage made to Wheeler by the Messrs. Stoops, contend, on the other hand, that the seisin thus reacquired by the Messrs. Stoops was only for a particular purpose and use, and not for their own benefit, but as a mere instrumentality for passing the title to Wheeler, for the purpose of securing the repayment of the money to the Messrs. Weil, who had advanced the money to pay off the indebtedness secured by the former mortgage. The question as to whether the lien of the Edwards decree attached does not depend so much upon the duration of the estate which vested in the Messrs. Stoops, as a consequence of the Gibson deed of release, as upon the purpose and character of the seisin thus reacquired. If the title was beneficially reacquired, it matters little as to its duration, for the lien of the Edwards decree would

attach, however brief. The fact that the title was reconveyed simultaneously with its acquisition is, however, a most important fact in determining the beneficial or nonbeneficial character of the seisin. The indisputable facts are that the Weils proposed to furnish the money to pay off and discharge the Gibson mortgage upon condition that their money should be secured by a first lien upon the property conveyed to Gibson. To accomplish this, the Weils paid into the hands of Wheeler \$6,000, to be applied by him as their agent in paying off the unpaid debts secured by the conveyance to Gibson, and in obtaining from Gibson the legal title vested in him as trustee. This advance was secured by a mortgage dated and acknowledged as of July 12, 1892, and delivered on that date by the mortgagors to Wheeler, with the understanding and agreement that a release was to be obtained from Gibson, and the release and new mortgage simultaneously put to record. July 18, 1892, this release was made by Gibson, and on the same day and at same instant of time both the release and mortgage were duly recorded. The object and purpose of revesting the title in the Messrs. Stoops was to pass it to Wheeler, as trustee, for the Messrs. Weil, whose money had been used in relieving the property from the prior incumbrance. This temporary restitution of the title to the Messrs. Stoops was intended as a mere means of placing the title in Wheeler, where all parties agreed it should be placed for the benefit of the Weils.

The facts bring the case within the rule in *Huffaker v. Bowman*, 4 Sneed, 89, where the Tennessee supreme court construed the Tennessee statute, under which a lien is claimed to have arisen in behalf of appellants, and determined the character of the seisin necessary to bring into operation the statutory lien upon after-acquired property of a judgment debtor. In that case the facts were that the lands of Bowman had been sold to Kincaid under a mortgage, but were subject to redemption by Bowman or any judgment creditor. Huffaker, desiring to acquire the land free from Bowman's right of redemption, agreed with him to pay off the purchase money due to Kincaid, the purchaser at the trustee sale, and a further sum to Bowman for his equity of redemption. To extinguish Bowman's right of redemption, it was agreed that Kincaid should reconvey the land to Bowman, who should at once convey same to Huffaker. This was done. A judgment creditor levied on the land as the property of Bowman, claiming that the lien of his judgment had attached while the title was in Bowman, his debtor, under the conveyance from Kincaid. It was contended in behalf of the lien of the judgment creditor that the momentary seisin by Bowman of the title was sufficient for the lien of the judgment to attach upon the land as the property of the debtor. McKinney, J., in answering this, said:

"This reasoning is unsound. The transaction was one continuous, entire act. By the agreement and understanding of all the parties preceding the execution of the deeds, no interest was to be vested in Bowman. He was used merely as the medium for passing the title to the complainant; and the two deeds, being executed at the same time, and taking effect at the same instant, constitute but one act, the legal effect of which was to pass the title immediately and without intermission from Kincaid, through Bowman, to the complainant. This is a familiar principle in cases of dower. In treating of the ques-



tion, what will be a sufficient seisin of the husband to render the wife dowerable? Blackstone says (book 2, pp. 180-182): "The seisin of the husband for a transitory instant only, where the same act which gives him the estate conveys it also out of him again,—as where, by a fine, land is granted to a man, and he immediately renders it back by the same fine,—such a seisin will not entitle the wife to dower; for the land was merely in transitu, and never rested in the husband, the grant and render being one continued act. But, if the land abides in him for the interval of but a single moment, it seems that the wife shall be endowed thereof." See, also, *Jackson v. Dunsbagh*, 1 Johns. Cas. 95; *Stow v. Tift*, 15 Johns. 458; *Holbrook v. Finney*, 4 Mass. 569, and authorities referred to, where this subject is considered. It is clear, therefore, upon the principle above stated, that the lien of the defendant's decree did not attach upon the land, Bowman having no seisin thereof."

The later case of *Bridges v. Cooper*, 98 Tenn. 381, 39 S. W. 720, has been urged as in conflict with *Huffaker* and *Bowman*. To this we cannot agree. The facts were that a mortgagee released his mortgage to enable the mortgagor to sell and convey the property free from its lien, the mortgagor agreeing to assign to the mortgagee a sufficient number of the purchase-money notes, secured by a vendor's lien, to satisfy his mortgage debt. When this relinquishment was made, the mortgagor's equity of redemption was under the lien of a pending attachment bill. Subsequently the mortgagor sold the land, and assigned the vendees' notes to the mortgagee. The contest arose between the mortgagee, holding such purchase-money notes, and the creditor, who had attached the interest of the mortgagor in the same property before both the relinquishment and sale. The court very properly held that the effect of the relinquishment was to extinguish the mortgage as between the attaching creditor and mortgagee. *Huffaker v. Bowman* is not cited, and the cases, on their facts, are manifestly distinguishable. We must regard the release and Wheeler mortgage as but one continuous transaction, and as but a means adopted for passing the title to Wheeler, where all parties intended it should rest. It was not intended that the mortgagor should become beneficially seised of the title by the Gibson deed of release. The Stoops were a mere conduit, through whom the title was intended to pass to Wheeler, whose money had relieved the property from the Gibson incumbrance. There was no error in the decree, and it will be affirmed.

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### MONTGOMERY et al. v. CITY COUNCIL OF CHARLESTON.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1900.)

No. 335.

#### 1. EQUITABLE SUBROGATION—VOLUNTEER.

One who voluntarily pays a tax to a city, for which neither he nor his property is liable, is not entitled to be subrogated in equity to the rights of the city as against the property or its owner.

#### 2. EQUITY—MISTAKE AS GROUND FOR RELIEF—NEGLIGENCE.

The fact that one who voluntarily paid taxes to a city on property of another, for which he was in no way liable, was ignorant of the fact that the validity of such taxes was disputed by the owner of the property and was in litigation, does not entitle him to relief in equity on the ground

of mistake, either against the city or the property owner, where he could have learned such facts by reasonable inquiry, but made no inquiry whatever.

**8. SAME—VOLUNTARY PAYMENT OF TAXES—PURCHASER AT JUDICIAL SALE.**

A purchaser at foreclosure sale of the property of a manufacturing corporation, which he was entitled to have delivered to him free from tax liens before complying with his bid, paid certain taxes levied against the property by a city, and sought to have the amount deducted from the purchase price. Both the corporation and its mortgagees claimed that the property was exempt from such taxes under an ordinance, and the city had filed an intervening petition in the foreclosure suit, seeking to have the taxes established as a lien upon the fund in court, which petition had not been passed on. *Held*, that the action of the purchaser in voluntarily paying the taxes eliminated the issue as to their validity from the case, and he could not require the court to determine it for his benefit, and to allow the amount as a credit on his bid if the tax was found valid, or to compel the city to refund it if found invalid.

**4. PARTIES—INTERVENER—EXTINGUISHMENT OF INTEREST.**

The city, having no interest in or connection with the suit, except for the collection of its taxes from the fund in court, on the payment of such taxes ceased to be a party, and could not again be brought into such suit for the purpose of litigating the validity of the taxes; nor could that question be determined in its absence.

Waddill, District Judge, dissenting.

**Appeal from the Circuit Court of the United States for the District of South Carolina.**

This case comes up on appeal from the circuit court of the United States for the district of South Carolina. In order to a complete understanding of the case, it is necessary to state the facts somewhat in detail:

On 8th February, 1888, there was incorporated the Charleston Cotton Mills, a corporation organized for the purpose of manufacturing cotton cloth in the city of Charleston, S. C. It erected a mill building on its lands, and owned real estate adjacent thereto, on which were a cotton warehouse and residences for its operatives. In March, 1896, it became embarrassed, ceased operations, and finally, under decrees for foreclosure, its property was sold under two mortgages executed by it,—the one to secure certain bondholders, and the other to secure a debt due to O. H. Sampson & Co. O. H. Sampson & Co. purchased the parcel of realty mortgaged to them. The bondholders, through a committee, purchased the mill site, buildings, and machinery. On 6th April, 1897, the Charleston Mills was incorporated under a general law, composed of the bondholders of the Charleston Cotton Mills and new stockholders. To this corporation the committee of bondholders conveyed all the property purchased by them under the foreclosure proceedings. The new company expended large sums of money in providing new machinery and repairing that purchased at the sale, and engaged in the business of manufacturing cotton goods.

The constitution of South Carolina, adopted 4th December, 1895, authorized cities and towns to exempt from all taxes, except those for school purposes, manufactories established within their limits; the exemption to be for five years; the exempting ordinance to be ratified by a majority of the qualified electors of the municipality. Article 8, § 8. In 1896 the city council of Charleston, under this authority, passed an ordinance exempting for five years from taxation, except for school purposes, all manufactories established after the ratification of this ordinance by the qualified voters of Charleston, within the corporate limits of said city, and doing business therein, employing ten hands, and having a paid-up capital of \$10,000, with this proviso: "Provided, however, that should any manufactory entitled under this ordinance to such exemption from taxes, fail in business and be reorganized or convey its plant and property to another person, firm or new company or corporation, the exemption of said plant or property shall be continued or extended for the five years from the original establishment of said manufactory and no longer." This ordinance was ratified by popular vote on the fourth Tuesday in April, 1896. The

Charleston Mills set up a claim for exemption under this ordinance, and so notified the city authorities. On 19th November, 1898, pending this claim for exemption on the part of the Charleston Cotton Mills, Walters and others filed their bill for foreclosure in the circuit court of the United States for the district of South Carolina against the Charleston Mills, praying sale and foreclosure of its property; and under it C. O. Witte, Esq., was appointed receiver. On 13th December, 1898, the city council of Charleston filed its petition in the cause, setting forth that the Charleston Mills was indebted to it for municipal taxes in the sum of \$3,356.52, and that they were unpaid, and, recognizing that the property of its debtor was in the hands of a receiver of that court, and so out of reach of an execution, prayed that provision be made for these taxes out of the first moneys coming into the hands of the receiver. After that an order for the sale of the property under a decree for foreclosure was had. The property was sold for \$100,000, and was bid in by John H. Montgomery for himself and others, who organized themselves into a corporation in due form of law, under the name of the Vesta Mills. Before he complied with his bid,—indeed, the day after the sale,—Mr. Montgomery paid the state and county taxes due upon the property of the Charleston Mills, and also paid, without protest or exception, the amount of the taxes claimed by the city council of Charleston, and took full acquittance and discharge therefor. When he was ready to comply with his bid, he produced the receipted tax bill for state and county purposes, and asked the special master that it be received as so much cash. This was assented to. He then produced the tax receipt of the city council, and made a similar request. This was refused, the special master (knowing that the claim was disputed) not feeling himself authorized so to receive it without the decision and order of the court. Thereupon it was agreed between them that the matter be brought before the court. Accordingly Mr. Montgomery and the Vesta Mills filed their petition in the cause, setting forth the matters above stated; “that Mr. Montgomery now has been informed that the liability of the property of the Charleston Mills to general municipal taxes is denied”; that, wholly ignorant of this, on the day the property was sold he paid the city taxes upon it, securing thereby a remission of all penalties, and also in order to anticipate a levy on the property under execution; that, having so paid this tax, he sought credit therefor in completing the terms of sale, and that the special master declined to recognize the payment of the taxes made to the city; “that thereafter your petitioners arranged with the said special master to pay into his hands the purchase money for the property bought at said sale, including the amount of the city taxes aforesaid (the said special master not feeling himself authorized to allow such reduction without the decision and order of the court), but that it was at the same time agreed that the said matter of the city taxes should be forthwith brought to the attention of the court in this case, so that the said court could decide whether or not the city taxes were by law due and payable, and a lien upon the property of the Charleston Mills, and that if the said taxes were decided by the said court to have been so due and payable, and a lien as claimed, then the said amount should be refunded to your petitioners by the special master, as having been already paid on account of the purchase money, but that, if the said court should decide that the taxes were not due and payable, then, by proper order of this court, the city council of Charleston should be directed, after proper hearing and adjudication, to refund and repay into the registry of this court the amount of city taxes paid to it by the said John H. Montgomery, to wit, the sum of \$3,076.02.” The petition prayed that a copy of it be served on the city council of Charleston and on C. O. Witte, special master, and that the court would afford relief. The city council of Charleston answered the complaint,—stating, in effect, that the tax on the Charleston Mills was due and unpaid, and that execution had been issued therefor in the sum of \$3,356.52; that it was stayed by the proceedings in the circuit court, and that petition had been filed for its payment under the order of court; that afterwards Mr. Montgomery paid the sum of \$3,076.02, and obtained a receipt in full; “that the said payment was made freely and voluntarily, and for the purpose of obtaining remission of the penalties.” The answer denies in toto the exemption claimed for the Charleston Mills, and adds that this honorable court has no jurisdiction to adjudicate the matters set forth in said petition,

as between John H. Montgomery and the said city, for the reason that it is simply an attempt on the part of the said John H. Montgomery to recover money from the city council of Charleston in a matter entirely foreign and outside of the purpose and purport of the bill filed herein. The answer of the special master admits the offer of Mr. Montgomery to deduct the amount paid to the city, and insists that the Charleston Mills are exempt from taxation.

The matters set out in the petition and answers, with testimony, were heard by the circuit court. The court was of the opinion that the city council of Charleston, having received satisfaction in pais, was no longer a party to the controversy, and declined, under these circumstances, to pass upon the validity of the exemption. To this action on the part of the court, exception was taken, an appeal was allowed, and the cause is here on several assignments of error, directed to the reasons given by the court for its action, and ending with the following: "Because his honor should have held that the city taxes were a lien on the property purchased, legally, and payable by the seller, and that under the law, and in accordance with the agreement made at the time of settlement with the receiver and special master, referred to and set out in the record, the portion of said purchase money so paid twice, to wit, the sum of \$3,076.02, by the purchaser, should be repaid him; it being against the law and equity and good conscience to have such sum retained by said special master and receiver."

Augustine T. Smythe and Frank R. Frost, for appellants.

W. A. Holman, J. N. Nathans, and H. A. M. Smith (George S. Legare, on the brief), for appellee.

Before SIMONTON, Circuit Judge, and PAUL and WADDILL, District Judges.

SIMONTON, Circuit Judge (after stating the facts as above). In discussing this case, these facts must be kept in mind: That under the Walters bill the property of the Charleston Mills had been put into the hands of a receiver, and, under an order of the court, had been sold. That pending the suit the city council of Charleston had presented its claim for the tax of 1898, and had prayed that it be paid out of funds in the hands of the receiver. That anterior to the suit the Charleston Mills had set up its claim to exemption from the tax. That the petitioner, John H. Montgomery, was the highest bidder at the sale. That the day after the sale he paid to the city the sum of \$3,076.02 in full of its claim against the Charleston Mills. That, in settlement of his bid, Mr. Montgomery demanded credit for this payment, which demand the special master did not recognize, and refused to admit, except under the instruction of the court. Thereupon John H. Montgomery and the Vesta Mills, a corporation for which he had been acting, filed their petition, praying that the court pass upon the validity of the tax, and, if it be declared valid, that the money paid by Montgomery on account thereof be refunded to him out of the purchase money, and, if it be declared invalid, that the city council be instructed to return it to him. If the tax be valid, he, in effect, claims the equity of subrogation; that is, having paid the tax, he stands in the place of the city council, and is entitled to the money paid to it. He was under no obligation whatever to pay the tax, nor was any proceeding threatened against the property of which he was the prospective owner. The city council had already submitted itself to the court, and had asked that it be paid out of funds in the control of the court; in

effect, transferring its claim from the property to these funds. Its hand was stayed, and any attempt by execution to collect its claim would have been in contempt of court. In *re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689. Mr. Montgomery was not bound to pay the tax, and he had an unquestionable right to demand that it be satisfied before complying with his bid.

In *Gadsden v. Brown*, Speer, Eq. 37, David Johnson, Chancellor, lays down the law of subrogation, and his language has received the unqualified approval of the supreme court of the United States in *Hedges v. Dixon Co.*, 150 U. S. 191, 14 Sup. Ct. 71, 37 L. Ed. 1044, and in *Prairie State Nat. Bank v. U. S.*, 164 U. S. 231, 17 Sup. Ct. 142, 41 L. Ed. 412. "The doctrine of subrogation," says the chancellor, "is a pure, unmixed equity, having its foundation in the principles of natural justice, and, from its nature, never could have been intended for the relief of those who were in any condition in which they were at liberty to elect whether they would or would not be bound."

In *Insurance Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537, the supreme court says:

"One of the principles lying at the foundation of subrogation in equity, in addition to the one already stated, that the person seeking this subrogation must have paid the debt, is that he must have done this under some necessity to save himself from loss which might arise or accrue to him by the enforcement of the debt in the hands of the original creditor."

The same case adopts this language of *Sheld. Subr.* § 240:

"The doctrine of subrogation is not applied for the mere stranger or volunteer who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make the payment, and without being compelled to do so for the preservation of any rights or property of his own."

And in *Suppinger v. Garrels*, 20 Ill. App. 625, it is said:

"A stranger, within the meaning of this rule, is not necessarily one who has nothing to do with the transaction out of which the debt grew. Any one who is under no legal obligation or liability to pay the debt is a stranger, and, if he pays the debt, is a mere volunteer."

A mere volunteer is not favorably regarded in equity. *Fonbl. Eq.* 349. "*Volenti non fit injuria.*" Apart from this, the creditors of the Charleston Mills, to whom the proceeds of sale belong, and who must suffer by any diminution of them, repudiate the act of Mr. Montgomery, and deny all liability for the tax. Nor is this position without plausibility. The constitution of South Carolina of 1895 gave authority to municipalities to grant exemption from taxation to manufacturers for five years, upon certain conditions. The city council of Charleston fulfilled these conditions, and by ordinance exempted from taxation all manufactories established after the fourth Tuesday in April, 1896, within the corporate limits of said city, and doing business therein, employing 10 or more hands, and having a paid-up capital of \$10,000. The Charleston Mills, having over \$50,000 capital, and employing more than 10 hands, was established April 6, 1897, within the corporate limits of Charleston, and doing business therein, and thus may be said to come within the words

of the ordinance, and would be entitled to the exemption, unless precluded by the proviso. This proviso is in these words:

"Should any manufactory entitled under this ordinance to such exemption from taxes, fail in business and be reorganized or convey its plant and property to another person, firm or a new company or corporation, the exemption of said plant or property shall be continued or extended for the five years from the original establishment of said manufactory and no longer."

The mill and a large part of the plant owned by the Charleston Mills were formerly the property of the Charleston Cotton Mills, which failed, was put up for sale, and its mill house and plant were purchased by persons who subsequently formed the Charleston Mills. But the Charleston Cotton Mills was incorporated and established February 8, 1888,—anterior to the constitutional provision, and anterior to the ordinance of 1896. It therefore can with much plausibility be said not to have been one of the manufactories referred to in the proviso of the ordinance, as it was not a manufactory entitled under the ordinance of 1896 to such exemption from taxes, and so the Charleston Mills may not be affected by that proviso. Under these circumstances, the creditors may well complain of the action of John H. Montgomery, and, as far as they can, repudiate the same. There can exist here no equity of subrogation.

The petitioner again sets up an equity of mistake. He knew nothing of the claim of exemption set up by the Charleston Mills, nor had he any knowledge of the petition of the city council in the main cause. There is no question that a court of equity will relieve a party from the consequences of a mistake of fact,—sometimes of a mistake of law, if the matter be executory. But it will grant such relief only when the mistake is mutual, material, and not caused by the negligence of the party seeking relief. Foster, Fed. Prac. § 2. Mr. Story, in his Equity Jurisprudence (section 146), says:

"It is not sufficient, however, in all cases, to give the party relief, that the fact is material, but it must be such as he could not, by reasonable diligence, get knowledge of when he was put on inquiry; for if, by such reasonable diligence, he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence. Thus, if a party has lost his cause at law from the want of proof of a fact which by ordinary diligence he could have obtained, he is not relievable in equity; for the general rule is that if a party becomes remediless at law, by his own negligence, equity will not relieve him."

In the case at bar Mr. Montgomery, before the sale was approved, before he had complied with his bid, and, under the rules of the court, before he could comply, paid off this claim. A question to his counsel would have informed him of the course taken by the city council in applying to the court for its claim. A question put to the special master selling the property would have put him in the possession of the fact that the claim of the city was denied. The fact that he was a stranger in the community, with no opportunity theretofore of knowing the laws of the municipality, should have put him doubly upon his guard, and have induced inquiry before action. Instead of this, consulting no one, asking no question, relying upon his own knowledge, he paid off a claim, not his own or which could affect him, anticipated and forestalled the action of

the court, and, in so far as lay in his power, decided the controversy of the creditors with the city against them. The petitioner cannot set up this equity. Nor can he, under it, obtain relief from the city council. Asking no questions, making no protest, threatened with no proceedings, of his own motion he paid this sum in full of the tax.

In *Little v. Bowers*, 134 U. S. 548, 10 Sup. Ct. 620, 33 L. Ed. 1016, there had been a controversy between the Central Railroad Company of New Jersey and the city of Elizabeth relative to its taxes. The decisions of the courts of New Jersey were against the railroad company, and by writ of error the case was carried to the supreme court. Pending the writ of error the taxes in dispute were paid. This ended the case, notwithstanding that the appellants insisted that there was no right to the tax in the city of Elizabeth. In that case the supreme court quote with approval the language of Chief Justice Shaw in *Preston v. City of Boston*, 12 Pick. 7:

"When a party not liable to taxation is called upon peremptorily to pay upon a warrant, and he can save himself and his property in no other way than in paying the illegal demand, he may give notice that he so pays it by duress, and not voluntarily, and, by showing that he is not liable, may recover it back as money had and received."

But, say the court, this rule does not apply when no attempt has been made by the treasurer to serve his warrant, no demand personally made on the company, nothing done to show an intent to use the legal process,—when all that appears is that the company was charged with the tax on the tax list; that it was delinquent; that, before any active steps were taken to enforce collection, the company presented itself at the treasurer's office, and, in the usual course of business, paid in full everything against it, under protest.

In *Robinson v. City Council of Charleston*, 2 Rich. Law, 319, the plaintiff had been called upon to pay, and had paid, a tax imposed by the city council of Charleston, which the court, in *State v. City of Charleston*, 2 Speer, 719, had decided unlawful. He brought his action to recover it back. It was dismissed. Says the court:

"In the case under consideration, the plaintiff paid his money without objection or reservation. He could have tendered the money demandable, and have gone on and submitted to legal proceedings against him, and in such proceedings he must have succeeded. In waiving his legal right, he may be regarded as having voluntarily given so much money to the city council for the privilege of letting his slaves work in the city without molestation. Like many others who have not complained, he may not have thought the tax wrong at the time, and may have regarded it as the price of protection and profitable employment."

In *Peebles v. City of Pittsburg*, 101 Pa. St. 304, it was held that an assessment for municipal improvements, voluntarily paid, cannot be recovered back, although the payment was under protest, and the law authorizing the assessment was subsequently adjudged unconstitutional. Many cases are cited in the opinion. The petitioner cannot rely upon his want of knowledge. The means of knowledge were within his touch. He sought none, used none. His own ignorance suggested inquiry. This cannot avail him. Under these circumstances, the court below refused to entertain the petition. It was of the opinion that the city council of Charleston was not

properly a party to the petition. But, even admitting that it was a party, how could the court pass upon the question of the validity or invalidity of this tax, when the action of the petitioner precluded absolutely any question? The creditors and the corporation wished the question decided. At the threshold the court was met by the fact that a decision was unnecessary, and could not be made, as the tax was already paid. *California v. San Pablo & T. R. Co.*, 149 U. S. 308, 13 Sup. Ct. 876, 37 L. Ed. 747; *Little v. Bowers*, 134 U. S. 558, 10 Sup. Ct. 620, 33 L. Ed. 1016.

Exception was taken and error assigned to the ruling of the circuit court that the city council was not a party before it. When the main case was pending, the city council, pursuing the course most advisable under the circumstances, intervened in the cause, and presented its petition that the tax claimed by it be paid by the receiver. The only means of paying the tax was out of the proceeds of sale. Before this petition was answered, before it could be heard, before the only funds out of which it could be paid (the proceeds of sale) were realized, Mr. Montgomery forestalled the action of the court, and paid the tax, satisfying the claim of the city. Thenceforward there was no controversy. There was nothing upon which the petition or the court could operate, and the whole thing fell to the ground. *San Mateo Co. v. Southern Pac. R. Co.*, 116 U. S. 141, 6 Sup. Ct. 317, 29 L. Ed. 589; *Kimball v. Kimball*, 174 U. S. 163, 19 Sup. Ct. 639, 43 L. Ed. 932. The sole purpose of the intervention was accomplished, and the connection of the city council with the case, due solely to this intervention, ceased. When, therefore, the present petitioner filed his petition, the city council was practically out of the court; and he endeavored to bring it in again, not upon an issue necessarily or incidentally arising out of the main case, and the issues there involved, but to protect himself from an improvident act on his part. A purchaser at a sale under foreclosure is not a party to the suit for all intents and purposes. By his bid he makes himself a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase, and with a right to be heard on all questions thereafter arising affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree. *Kneeland v. Trust Co.*, 136 U. S. 95, 10 Sup. Ct. 950, 34 L. Ed. 379. But this does not authorize him to bring in a new party, or to raise new issues.

The court below, having reached the conclusion that the city council was not a party to the suit, declined to pass upon the question of the validity of the exemption claimed by the Charleston Mills, in the absence of the city council. This is assigned as error. That the appellant considered the city council a necessary party is shown by his seeking to make it a party. By his prayer he demonstrated the necessity. He sought reimbursement for his outlay in paying this tax,—from the receiver if the claim for exemption was invalid, and from the city council if the claim for exemption was valid. Indeed, under the well-known principle of equity “that a court of chancery will not make a decree unless all those who are substantially interested be made parties to the suit” (*Osborne v. Bank of United States*, 9



Wheat. 842, 6 L. Ed. 204), the city council was a necessary party. It is said, however, that it was competent for the court to go on and decide this question, as between the receiver and Mr. Montgomery, without the presence of the city. Cases are cited in which a course like this was pursued. Thus, courts frequently pass upon the validity of acts of the legislature, and construe acts whose validity is not disputed, in questions between citizen and citizen, without requiring or deeming it necessary to make the state a party. This is perfectly true, and the rule exists because of the impossibility of making the state a party without imperiling the jurisdiction of the court. See *Osborne v. Bank of United States*, *supra*. In cases arising under tax titles from municipalities, the municipality has no interest in the result of the action; for its interest had ceased, and the purchaser had taken under the rule of *caveat emptor*. But in the present case there is no question of the invalidity of the ordinance. The question made is one in which the city council had a direct, immediate, pecuniary interest, involving the right to \$3,076.02. One of the alternatives relied on by the petitioner is that, when he paid the money to the city sheriff, it was a gratuitous act; that the money was received in violation of the contract of exemption made by the city with the Charleston Mills, under which the former exempted the latter from taxation for five years; that under these circumstances, *ex æquo et bono*, the city must return it. The other alternative is that there was no such contract of exemption. The petitioner, standing in court, claims that one or other—the receiver or the city council—must make him whole. To sustain him, both of these parties must be before the court. The conclusion reached by the circuit court in dismissing the petition is affirmed. Affirmed.

WADDILL, District Judge. I am unable to concur with the reasoning or in the result reached by the majority in this case. The appellant, John H. Montgomery, was a purchaser at a judicial sale, and, after making his purchase (imprudently, it may be, but in good faith), paid the taxes due on the property for the year 1898 to the city of Charleston. The special master, from whom he purchased, refused to allow him, in making settlement, a credit for the taxes thus paid; and he thereupon, in good faith, paid the same again to the special master, who brought the amount into court. The court, in my judgment, should at least have determined the question of whether the taxes were due to the city. If due, the fund was not prejudiced by payment of the same to the city, and the amount paid to the special master should be refunded. If the taxes were, as a matter of fact, due, the city will have received the same from this purchaser at a judicial sale, and the court by this decision will take the same money, and give it to the lien creditors, who, confessedly, would not be entitled to the amount if the city was. A purchaser at a judicial sale is neither a volunteer nor a stranger to the proceedings. The city council having prior to the sale intervened to have this question of the right to its taxes for that year settled, the city and the purchaser were before the court, and subject to its jurisdiction in the matter of the determination of their rights in the premises.

### Petition for Rehearing.

**PER CURIAM.** The opinion of the court having been filed in this case, affirming the conclusions reached by the circuit court, the appellant has filed a petition for rehearing. This petition has been carefully considered. The cause was fully argued before this court by able and exhaustive briefs and oral arguments. No new point has been presented, and no change has been effected in the mind of the court in the general principles set forth in the opinion. It cannot see why the receiver should be instructed to recognize the voluntary payment of the claim of the city council made by Mr. Montgomery, while the validity of the claim is denied, and we think with reason, by the creditors of the Charleston Mills. Nor would it be proper to order the receiver to indemnify Mr. Montgomery for his voluntary payment, and to assume the burden and responsibility of litigation upon it with the city council of Charleston. The prayer of the petition, therefore, will not be granted.

But the petition for rehearing brings to the attention of the court a fact which has been overlooked in the case, and which was not considered. The ordinance of the city council of Charleston exempts manufacturing companies from all municipal taxes, except taxes for school purposes. When he paid the claim of the city council, Mr. Montgomery paid the entire claim, in which was included a tax for school purposes. The Charleston Mills was certainly liable for this school tax. To this extent Mr. Montgomery is clearly entitled to be repaid. Provision for such repayment should have been made for him. It is therefore ordered that the circuit decree appealed from be modified in this respect. The cause is remanded to the circuit court, with instructions in this respect to modify its decree, and to order that, out of the funds in court, repayment be made to John H. Montgomery of so much of the claim of the city council paid by him as embraces the tax for school purposes. The costs of this court will be paid, one half by the appellant, and the other half out of funds in the hands of the receiver and special master.

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HOSTETTER CO. v. COMERFORD et al.

(Circuit Court, S. D. New York. March 1, 1900.)

#### **EQUITY—REHEARING.**

A court of equity will not grant a rehearing to enable a complainant to have an analysis made of alleged spurious bitters, which defendants were charged with having sold as the product of complainant, where it was fully known before the hearing that the court regarded such analysis as material.

**On Motion for Rehearing.** For former opinion, see 97 Fed. 585.

**COXE, J.** No tenable ground for a rehearing is stated in the moving papers. There is no pretense that the court has overlooked a controlling fact or principle of law. No newly-discovered evidence is presented. The argument now advanced is only a repetition of the argument at final hearing. In substance it is reasserted

that the court should have accepted the testimony of the complainant's witnesses and should have disregarded the testimony of the defendants' witnesses.

In answer the court can only restate the grounds upon which the former decision rests. The burden was heavily upon the complainant to prove fraud. It attempted to do this by calling a number of interested witnesses, some of them continuously in the employ of the complainant and others paid for the time spent in procuring testimony against suspected dealers, who testified to the bogus character of the defendants' goods. These witnesses relied for their opinion upon the difference in appearance, taste and smell, between the defendants' bitters and the genuine bitters of the complainant, it being conceded that the resemblance was very close. The complainant had absolute proof in its possession which it withheld because it did not desire to disclose the secrets of its business. It also failed to produce an analysis of the genuine and alleged fraudulent bitters although its failure to do so in a former case was commented upon by the court. Such an analysis, without disclosing the complainant's formula, would, it is thought, discover any marked difference in the two liquids; and such a difference would tend strongly to support the complainant's theory. On the part of the defendants there was an explicit denial of fraud and proof that the bitters used by them were purchased from a reputable house. In these circumstances the court declined to accept the complainant's testimony as proof of fraud, first, because the witnesses were all interested, second, because the complainant had in its possession much stronger proof which was withheld, third, because the defendants flatly denied the fraud, and fourth, because conceded purchases from Acker, Merrill & Condit of genuine bitters by the defendants tended to corroborate their denial. If the complainant considers itself aggrieved in such circumstances its remedy is not by petition for a rehearing, but by appeal.

The first reason for a rehearing stated in the petition is in these words:

"The court appears to be of the opinion, the bitters sold by the defendants should have been analyzed, when in point of fact an analysis cannot be made of any such liquid."

This proposition is supported by an affidavit of Prof. Riley, who states that "an accurate quantitative analysis of Hostetter's Bitters would be, in the present state of our knowledge and information on the subject of chemistry, impossible." The concluding paragraph of the complainant's brief is as follows:

"Complainant asks that the case be referred back to the examiner (the court having intimated the existence of a doubt regarding the charges made by complainant) so that the professor of chemistry in Columbia College, and others, may be called as witnesses to determine whether like ingredients are contained in both articles."

It might, perhaps, seem inconsistent for the complainant to ask for an opportunity to do that which it asserts to be impossible, but it is enough to say that every element necessary to make a case for a rehearing upon the ground of newly-discovered evidence, is lacking.

There is no proof that an analysis has ever been made and there is nothing to show that, if made, it would uphold the complainant's contention. On the contrary, the only chemist produced by the complainant contends that it would prove nothing. But were such an analysis attached to the moving papers the objection that it was not newly discovered would be fatal. Ever since the decision in the Bower Case (C. C.) 74 Fed. 235, the complainant has known that the court regarded the absence of an analysis as significant. All this was known when the proofs in this cause were taken and it is manifest that the complainant is precluded from asserting that the wisdom of producing an analysis is "newly discovered." The motion for a rehearing must be denied.

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STOKES et al. v. FARNSWORTH.

(Circuit Court, D. Utah. February 12, 1900.)

No. 327.

**1. EQUITY PLEADING—LEAVE TO FILE AMENDED ANSWER—WAIVER OF OBJECTION.**

Where, on the sustaining of exceptions to an answer, an order is made granting the defendant leave generally to file an amended answer, to which order plaintiff consents, he cannot thereafter object that the order did not specify the particular amendment to be made, or authorize an amendment setting up a new defense.

**2. SAME—ATTACKING SUFFICIENCY OF ANSWER.**

In equity, a demurrer to an answer is not permitted, nor can the question of the legal sufficiency of the facts averred to constitute a defense to the case made by the bill be presented to the court on exceptions to the answer for impertinence, or on a motion to strike out such defense.

**3. SAME.**

A defense pleaded in an answer cannot be stricken out on the ground that it is rambling and verbose.

On motion to take from the files an amended answer, and to strike out a defense therein pleaded.

Dey & Street, for plaintiffs.

Barlow, Ferguson, Pierce, Critchlow & Barrette, for defendant.

MARSHALL, District Judge. Exceptions to defendant's original answer were sustained. Thereafter, leave of court having been obtained, defendant filed an amended answer, setting up a new affirmative defense. The plaintiffs move to take from the files the amended answer, and also to strike out the new defense, on the grounds: (1) That it was irregularly filed, in that no special permission of the court was obtained; (2) that the new defense is impertinent, irrelevant, sham, rambling, and verbose. Was there any irregularity in the making of the amendment of which the plaintiffs can take advantage? The minutes of the court show that on the sustaining of the exceptions to the original answer counsel for the defendant asked leave to file an amended answer, but did not indicate the particular amendments desired. The counsel for the plaintiffs then present consented that leave should be granted, and

an order was thereupon made giving leave to the defendant to file an amended answer. Undoubtedly, a new defense cannot be interposed by a defendant as of course. Such an amendment would ordinarily only be allowed on motion supported by affidavit showing good cause and on notice. The proposed amendment should also be presented to the court, and the order permitting an amendment should specify the amendment permitted. But all of these proceedings may be waived; and where the plaintiffs, as in this case, consent that the defendant may file an answer, amended as he may be advised, it is too late to object upon the filing of the new answer that the leave granted did not specify the particular amendments made. The setting up of a new defense in an answer is a well-settled mode of amending the answer (Eq. Rule 60), and in this case no replication had been filed, nor the cause set down for a hearing upon the bill and answer. If, instead of granting leave to amend, the order had simply directed the defendant to further answer the plaintiffs' bill, an answer specially directed to the matters excepted to, and restricted to supplying the deficiencies found to exist in the first answer, would have been intended. *Board of Sup'rs of Fulton Co. v. Mississippi & W. R. Co.*, 21 Ill. 338. The objection of irregularity cannot be sustained.

2. Under the objection for impertinence the plaintiffs seek to raise the question whether the new defense interposed is in fact a defense to the suit; in other words, to make this motion serve the purposes of a demurrer at common law. A demurrer to an answer in equity is not permitted (*Banks v. Manchester*, 128 U. S. 244, 9 Sup. Ct. 36, 32 L. Ed. 425), and neither an exception for impertinence nor a motion to expunge is an authorized mode of testing the validity of a substantive defense not responsive to the bill (*Adams v. Iron Co.* [C. C.] 6 Fed. 179; *Grether v. Wright*, 23 C. C. A. 498, 75 Fed. 742). Prof. Langdell says:

"As to the defenses in the answer, there is no way of raising immediately and directly the question whether they are good in law or not, there being no demurrer to an answer. If they are not good, the proof of them will be of no avail, and the plaintiff will have the full benefit of his objections at the hearing." Langd. Eq. Pl. (2d Ed.) § 83.

In *Shiras*, Eq. Prac. § 58, it is said:

"Exceptions to the answer do not perform the office of a demurrer in presenting the question whether the facts averred in the answer constituted a defense to the case made in the bill, and, as it is not permissible to file a demurrer to an answer, if it is desired to submit the case on the questions of law arising on the answer, the only method is by setting down the case for hearing on bill and answer."

There is the practical inconvenience in setting a case down for hearing on bill and answer that the plaintiff thereby admits the truth of the defenses pleaded, but not that they, in point of law, are good defenses. If either the equity of the plaintiffs' bill cannot be proved by the admissions of the answer, or any affirmative defenses therein are held good, the bill must be dismissed. But this inconvenience seems not to have been regarded as sufficient to induce the borrowing from the common law of a demurrer to an answer.

Perhaps the reason is that, if a demurrer was sustained to a defense, such defense would be eliminated from the record. No evidence could be taken to support it, and, if an error was committed, the appellate court could make no decree finally disposing of the case, because the evidence would not be before it. *Davis v. Cripps*, 2 Younge & C. Ch. 443. Of course, there is such a thing as an exception to an answer for impertinence. Eq. Rule 27; *Mitt. Eq. Pl.* 248; *Story, Eq. Pl.* §§ 863, 868. It lies under the same circumstances as to a bill. "Impertinence is the same description of fault in pleadings in equity which in those at common law is denominated 'surplusage.'" 1 *Daniell, Ch. Prac.* 356. An exception for impertinence impliedly admits that there is a proper residue as to which the matter sought to be expunged is surplusage. An entire defense or an entire cause of action cannot be attacked as surplusage. Matter claimed to be impertinent must be considered in relation to the cause of action or defense attempted to be set up. Assuming the cause of action or defense good, is the matter claimed to be impertinent relevant to it? If it is, then the exception must be overruled. The objection that the answer is sham cannot be sustained. "A sham answer is one good in form, but false in fact; one not pleaded in good faith." *Piercy v. Sabin*, 10 Cal. 22; *People v. McCumber*, 18 N. Y. 315; *Gostorfs v. Taaffe*, 18 Cal. 385; *Greenbaum v. Turrill*, 57 Cal. 285; *Glenn v. Brush*, 3 Colo. 26. The answer is not self-stultifying, and there is no fact presented by the defendant's pleadings in this case so inconsistent with it as to justify striking it out. The objection that the entire defense is rambling and verbose is obviously untenable. "An exception for impertinence must be allowed in whole, or not at all." *Chapman v. School Dist.*, *Deady*, 108, Fed. Cas. No. 2,607; *Insurance Co. v. Cokefair*, 41 N. J. Eq. 142, 3 Atl. 686; *Conway v. Wilson*, 44 N. J. Eq. 457, 11 Atl. 734. It follows that the plaintiffs' motion must be denied.

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#### CITY OF TERRE HAUTE v. FARMERS' LOAN & TRUST CO.

(Circuit Court of Appeals, Seventh Circuit. March 2, 1900.)

No. 621.

#### 1. MUNICIPAL CORPORATIONS—ACTIONS AGAINST CITY.

A suit against the city to enjoin the opening of a street, in the exercise of its power of eminent domain, is not a suit against the state, within the prohibition of the constitution of Indiana, as construed by the supreme court of the state.

#### 2. SAME—CONDEMNING LAND FOR STREET—ENJOINING PROCEEDING PENDING APPEAL.

A provision of a statute that an appeal from a proceeding by a city to appropriate land for street purposes shall not prevent the city from proceeding with the appropriation cannot be construed to prevent the granting of an injunction against the taking of the property pending an appeal, where fraud or a failure to comply with statutory requirements which would render the proceedings nugatory from the beginning is charged, and it is shown that the immediate execution of the order would result in irremediable injury to the complainant, while delay would result in little or no harm to the city or public.

**8. APPEAL—REVIEW—ORDER REFUSING TO DISSOLVE INJUNCTION.**

An order of a circuit court refusing to dissolve a temporary injunction will not be disturbed on appeal, where the bill makes a *prima facie* case for the granting of the injunction, and the showing leaves the question fairly within the discretion of the court.

Appeal from the Circuit Court of the United States for the District of Indiana.

C. A. Korbly, for appellant.

John E. Iglehart and Edwin Taylor, for appellee.

Before WOODS, Circuit Judge, and BUNN and ALLEN, District Judges.

**PER CURIAM.** This appeal is from an order refusing to dissolve an interlocutory order of injunction against the opening of a street in the city of Terre Haute, Ind., pending an appeal from the order of the city council approving the report of the commissioners and directing that the street be opened. The appeal from the order of the city council was to the circuit court of Vigo county, from which the venue was changed to the circuit court of Parke county, and from that court the proceeding was removed, on the petition of the Farmers' Loan & Trust Company, to the circuit court of the United States for the district of Indiana, and is still pending in that court. The city council, notwithstanding the appeal, passed a resolution directing that the street be opened in accordance with its order, and thereupon the appellee, the trust company, brought the bill on which the interlocutory order was granted. The city entered a special appearance in opposition to the granting of a temporary restraining order, but did not answer or demur to the bill, and, it is insisted by counsel for the appellee, did not, by a full or satisfactory showing by affidavit or otherwise, refute the charges of fraud and bad faith contained in the bill.

The questions of law and fact which have been pressed upon the attention of the court are numerous, and have been argued with great elaboration on both sides; but in the opinion of the court, after a careful reading of the briefs, they need not and should not be passed upon now, but should be left to the untrammelled consideration of the court below at the final hearing in that court. There is no controlling and unquestioned proposition of law or fact on which it can be said that the interlocutory order is clearly wrong and ought to be set aside. It is contended that, in the exercise of the power of eminent domain, the city represented the sovereignty of the state, and that the suit against the city is therefore, in effect, a suit against the state, which is forbidden by the constitution of the state; but reason and the decisions of the supreme court of the state seem to be to the contrary. *City of Ft. Wayne v. Ft. Wayne, W. & J. R. Co.*, 149 Ind. 25, 48 N. E. 242; *Kyle v. Board*, 94 Ind. 115; *Erwin v. Fulk*, Id. 233; *City of New Albany v. White*, 100 Ind. 206; *Sidener v. Turnpike Co.*, 23 Ind. 623.

The statute under which the proceeding was prosecuted allows appeals, but also provides that "such appeals shall not prevent such city from proceeding with the proposed appropriation, nor from mak-

ing the proposed change or improvement"; but this provision, it must be, was not intended to apply to a case in which fraud of a character to annul the proceedings from the beginning, or a failure to comply with the statutory requirements in some respect equally fatal, is charged, and it is shown that the immediate execution of the order will work irremediable harm to the complaining party, while delay will do little or no harm to the city or public. The situation is one in which delay in the opening of the street is of no vital significance, while, on the other hand, an immediate opening, if the proceeding shall finally be determined to have been invalid, or if the city should, as it may, abandon the work, if unwilling to pay the damages which shall be assessed against it, will cause to the appellee serious injury, for which no remedy seems to be provided. The bill made, at least, a prima facie case for the granting of the interlocutory order, and the showing on the motion to dissolve, at most, left the question fairly within the discretion of the court. The order denying the motion to dissolve is therefore affirmed.

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**COWLEY et al. v. CITY OF SPOKANE et al.**

(Circuit Court, D. Washington, E. D. February 17, 1900.)

**1. DEDICATION OF STREETS—FAILURE OF DEDICATOR'S TITLE—RATIFICATION BY TRUE OWNER.**

A decree in a suit involving the title to real estate, entered upon a stipulation by which the prevailing party relinquished all claim to certain portions of the property, which the other party had platted into lots and sold.—such lots being designated in the stipulation and decree by reference to the recorded plats,—operates also to confirm in the public the title to the streets dedicated by such plats, and upon which the lots released abut.

**2. MUNICIPAL CORPORATIONS—IMPROVEMENT OF STREET—ESTOPPEL OF OWNER.**

Where a landowner permits a city which is vested with the power of eminent domain to expend money or incur liability in grading and otherwise improving streets laid out over his property, without taking active steps to prevent, he is estopped thereafter to assert his right to possession of the land occupied by such streets, although they were occupied by the city under a dedication made by an adverse claimant of the property, and without his consent.

**3. SAME—SPECIAL ASSESSMENTS.**

Such estoppel, however, does not extend to assessments made by the city upon abutting property of such owner for the cost of improving the streets, so as to prevent him from contesting the validity of such assessments.

**4. SAME—ASSESSMENTS FOR STREET IMPROVEMENT—CONSTITUTIONALITY.**

Special assessments levied on abutting property for the cost of street improvements under the statutes of Washington, which require the assessment of the entire cost of such improvements on the abutting property, and which are levied by the front-foot rule, or other methods having no reference to benefits accruing thereto, are in violation of the provision of the constitution of the United States against the taking of private property for public use without just compensation.

This is a suit in equity to determine the right of the city of Spokane to certain streets, and to enjoin the enforcement of special assessments for their improvement.

R. B. Blake and F. H. Graves, for complainants.

A. G. Avery and F. M. Dudley, for defendants.



**HANFORD, District Judge.** This is a suit in equity to obtain a declaratory decree as to the right of the city of Spokane to continue in the use and enjoyment of certain streets crossing lands owned by the complainants, the land within the boundaries of said streets not having been purchased, condemned, or dedicated by the owner for the use of the public, and also to restrain the city and its officials from proceeding to enforce against the property of the complainants abutting upon said streets liens for assessments levied by the city, pursuant to its charter and the laws of the state, to pay the cost of grading several of said streets and constructing sidewalks. The parties to this suit have agreed as to all the material facts, and have set the same forth in a stipulation, a condensed statement thereof being as follows: Several years before the construction of the Northern Pacific Railroad, Mr. Cowley, one of the complainants, obtained a contract from the railroad company giving him the right to purchase a tract, including the land in controversy, for a stipulated price, and thereupon took possession of the tract and made valuable improvements. After he had made said improvements, and had actually occupied the premises for several years, the railroad company denied its obligation to sell the land to him, and commenced an action against him to recover possession. Cowley defended the action, and also filed a cross complaint setting up his right to the land under the contract, and praying for a decree for specific performance of the contract, which was permissible under the practice of the territorial district court in which the action was brought. The case was pending many years in the territorial court and in this court, to which it was transferred, and in the supreme court of the United States. See *Cowley v. Railroad Co.* (C. C.) 46 Fed. 325; *Id.*, 159 U. S. 569, 16 Sup. Ct. 127, 40 L. Ed. 263. And a decision on the merits was finally rendered by this court in favor of Cowley in the year 1898. Very soon afterwards the parties agreed to settle the controversy, and a decree was entered in accordance with the terms agreed to and stipulated by them. While said case was in progress, Cowley and his wife, in consideration of professional services to be rendered by their co-complainants, contracted with them to convey to them an undivided interest in the property. The railroad company platted a portion of the land as additions to the city of Spokane, and assumed to dedicate for public use the streets laid off on said plats, and also sold, and assumed to convey the title to, a number of lots shown upon said plats. After said plats had been filed for record the city of Spokane caused some of the streets to be improved by grading the same and constructing sidewalks, pursuant to its charter and the laws of the state, which require that the entire cost of such improvements be raised by local assessments upon the property abutting upon streets so improved, and levied assessments upon the property owned by the complainants for a portion of the cost of said improvements. It is a stipulated fact that the city officials, in making assessments for the improvements referred to, gave no consideration to the benefits to accrue or injury which might result to the abutting property by reason of said improvements, and did

not apportion the costs or assess the abutting property with reference to any special benefit to said property, but made the assessment upon an *ad valorem* basis, or else upon the per front foot plan. The complainants deny the validity of the plats on the ground that they were the true owners of the property when the platting was done, and, Mr. Cowley being in actual and visible adverse possession, the railroad company could not by any act create an interest in or right to any part of the land without their consent; and they contend that the city, in all that was done in making the improvements, was a mere trespasser. It is stipulated, however, that the complainants took no steps to restrain the city from making expensive improvements in said streets, except that Mr. Cowley, at or before the commencement of the first improvements, notified the mayor of the city that he claimed to own the property, and that the railroad company had no authority to make the plats or dedicate the streets. All the street improvements referred to were fully completed several years before the stipulation upon which the decree in said case was entered. Said stipulation was assented to by all the complainants in this case, and, among other things, it contains a relinquishment on the part of Cowley and wife of all claims to certain parts of the land, and as consideration for such relinquishment the railroad company paid them a sum of money. This arrangement was made for the purpose of confirming the titles conveyed by the railroad company to numerous vendees of lots shown upon said plats, and described the lots so relinquished by reference to said plats.

The stipulated facts eliminate from the controversy some of the streets and some of the property claimed by the complainants' bill. The decree to be entered will therefore declare against their claim to Sprague street, and to that part of Bernard street which is south of Third avenue, and all of Fernhill addition. As to the remaining portion of the property covered by the plats, I hold:

1. The agreement and stipulation of the parties upon which the decree above referred to was made must necessarily have the effect to confirm the title of the Northern Pacific Railroad Company's vendees to the ground within the boundaries of the lots sold to them, and also confirms the right of the public to the use of all the streets shown in the plats of Second addition to Railroad addition and Fourth addition to Railroad addition. These purchasers are entitled to have their lots with the boundaries described (that is to say, the streets shown by the plats); and the complainants, by referring to the plats in their stipulation for the purpose of describing and identifying the particular lots which they relinquished for a money consideration, have in fact adopted said plats for that purpose, and by adoption have ratified the plats as recorded. It is impossible to give full effect to the stipulation and decree without recognizing the streets in the plats therein referred to as public streets, and the complainants are therefore estopped from disputing the lawful dedication of the streets shown by the plats of said additions, whether the same have been accepted or used or improved by the city or not. This estoppel, however, extends only to the Second

and Fourth additions to Railroad addition, and does not affect the rights of the complainants in and to Cliff Park addition nor First addition to Fourth addition to Railroad addition. In my opinion, the complainants have a clear title to all of said Cliff Park addition in its entirety, including the streets, to the same extent as if no plats thereof had ever been recorded.

2. I hold, also, that the complainants have a complete title to all of First addition to Fourth addition to Railroad addition, including the streets therein, except Pacific avenue and Second avenue, both of which have been graded. The labor and expense of making said improvements, and the possession and use of the street as a public thoroughfare, create a right in favor of the public superior to any right of the defendants to have possession of the area within the boundaries of said streets. In the case of *Roberts v. Railroad Co.*, 158 U. S. 1-30, 15 Sup. Ct. 756, 39 L. Ed. 873, it was decided by the supreme court of the United States that if a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with a statute requiring either payment by agreement or proceedings to condemn, remains inactive and permits it to go on and expend large sums in the work, he is estopped from maintaining either trespass or ejectment for the entry, and will be regarded as having acquiesced therein, and will be restricted to a suit for damages. The city of Spokane is a municipal corporation, in which the power of eminent domain is vested, and it has the control of public streets and thoroughfares within its limits. I consider the rule applied by the supreme court in the case of *Roberts v. Railroad Co.* to be eminently just, and that it is applicable to cases where landowners have knowingly permitted a city government to incur expense or liability in the actual improvement of a thoroughfare required for the use and convenience of its inhabitants.

3. The estoppel which prevents the complainants from asserting a right to the possession of streets does not extend further, and does not have the effect to validate the liens for assessments levied by the city upon the complainants' property for the cost of street improvements. The acts from which the estoppel results were subsequent in time to the unauthorized assumption by the city of the right to levy the assessments. The assessments, being unlawful at the time they were made, do not become valid, as against the complainants, by their subsequent acquiescence in the dedication of the streets; there being no evidence of an intention in the mind of any of the parties that the complainants should become liable for the assessments, or waive their rights to resist the collection thereof. It is one thing for an owner of land to give up part of his land to the public for a highway, and quite a different thing for him to assume an obligation to pay the cost of grading and improving the highway.

I consider, also, that the stipulated facts entitle the complainants to a decree restraining the city from collecting the assessments, on the ground that they were made under a system for making local assessments which is contrary to the guaranty of the constitu-

tion of the United States that private property shall not be taken for public use without just compensation. There is a flagrant disregard of this principle whenever an attempt is made to levy a special assessment for a local public improvement without reference to the particular benefit to accrue to the property subjected to such special assessment by reason of the improvements. Streets and highways are for the use and convenience of the public, and private property can only be burdened with the cost of improving the same upon the theory that the improvements have a direct tendency to enhance the value of land in the immediate vicinity to a much greater degree than property more remotely situated, and it is just that the property so benefited should be required to contribute a proportionate share of the expense of creating such increased value. It is quite difficult to divide the expense between the general public, having the enjoyment of the use of streets, and the property specially benefited, according to a ratio that will be exactly just. Still, the burden must be distributed. Formerly the statutes of this state or of Washington territory provided a method of distributing the burden in incorporated cities by requiring each municipal government to raise a general fund by annual taxation, and the estimated cost of grading and paving the area of street intersections and specified kinds of improvements and repairs had to be paid out of this general fund, but the statutes have been amended from time to time so as to burden the abutting property with the entire cost of all improvements and repairs. This rule is repugnant to the last clause of the fifth amendment to the constitution of the United States. This subject received consideration by the supreme court of the United States in the case of *Village of Norwood v. Baker*, 172 U. S. 269-303, 19 Sup. Ct. 190, 43 L. Ed. 447. The opinion of the court, by Mr. Justice Harlan, contains the following expressions:

"But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go, consistently with the citizen's right of property. As already indicated, the principle underlying special assessments to meet the costs of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not in fact pay anything in excess of what they receive by reason of such improvement. But the guaranties for the protection of private property would be seriously impaired if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvements, could not be questioned by him in the courts of the country. It is one thing for the legislature to prescribe it as a general rule that property abutting on a street opened by the public shall be deemed to have been specially benefited by such improvement, and therefore should specially contribute to the cost incurred by the public. It is quite a different thing to lay it down as an absolute rule that such property, whether it is in fact benefited or not by the opening of the street, may be assessed by the front foot for a fixed sum, representing the whole cost of the improvement, and without any right in the property owner to show, when an assessment of that kind is made or is about to be made, that the sum so fixed is in excess of the benefits received. In our judgment, the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.

We say 'substantial excess,' because exact equality of taxation is not always attainable, and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment."

The learned justice also quotes from Dillon's treatise on Municipal Corporations, and comments thereon, as follows:

"Special benefits to the property assessed (that is, benefits received by it in addition to those received by the community at large) is the true and only just foundation upon which local assessments can rest; and, to the extent of special benefits, it is everywhere admitted that the legislature may authorize local taxes or assessments to be made. \* \* \* When not restrained by the constitution of the particular state, the legislature has a discretion, commensurate with the broad domain of legislative power, in making provisions for ascertaining what property is specially benefited, and how the benefits shall be apportioned. This proposition, as stated, is nowhere denied. But the adjudged cases do not agree upon the extent of legislative power.' While recognizing the fact that some courts have asserted that the authority of the legislature in this regard is quite without limits, the author observes that 'the decided tendency of the later decisions, including those of the courts of New Jersey, Michigan, and Pennsylvania, is to hold that the legislative power is not unlimited, and that these assessments must be apportioned by some rule capable of producing reasonable equality, and that provisions of such a nature as to make it legally impossible that the burden can be apportioned with proximate equality are arbitrary exactions, and not an exercise of legislative authority.' Dill. Mun. Corp. § 761. He further says: 'Whether it is competent for the legislature to declare that no part of the expense of a local improvement of a public nature shall be borne by a general tax, and that the whole of it shall be assessed upon the abutting property and other property in the vicinity of the improvement, thus for itself conclusively determining not only that such property is specially benefited, but that it is thus benefited to the extent of the cost of the improvement, and then to provide for the apportionment of the amount by an estimate to be made by designated boards or officers, or by frontage or superficial area, is a question upon which the courts are not agreed. Almost all of the earlier cases asserted that the legislative discretion in the apportionment of public burdens extended this far, and such legislation is still upheld in most of the states. But since the period when express provisions have been made in many of the state constitutions, requiring uniformity and equality of taxation, several courts of great respectability, either by force of this requirement, or in the spirit of it, and perceiving that special benefits actually received by each parcel of contributing property was the only principle upon which such assessments can justly rest, and that any other rule is unequal, oppressive, and arbitrary, have denied the unlimited scope of legislative discretion and power, and asserted what must, upon principle, be regarded as the just and reasonable doctrine,—that the cost of a local improvement can be assessed upon particular property only to the extent that it is specially and peculiarly benefited, and, since the excess beyond that is a benefit to the municipality at large, it must be borne by the general treasury.'"

A decree will be entered in favor of the complainants for the relief prayed for, except with respect to the possession of Sprague avenue, Pacific avenue, Second avenue, all the streets in the Second and Fourth additions to Railroad addition, all of Fernhill addition, and the several lots and blocks which Cowley and wife relinquished by the stipulation upon which the decree in the case of Cowley v. Railroad Co., supra, was based. Although the complainants are not entitled to all the relief prayed for in their bill of complaint, they are the prevailing parties, and are entitled to recover costs. I do not find that they have vexatiously increased the costs of this case by claiming something in excess of what they are entitled to recover. Therefore I disallow the defendants' claim for costs.

**NEW YORK LIFE INS. CO. v. BOARD OF COM'RS OF CUYAHOGA  
COUNTY, OHIO.**

**NEW ENGLAND MUT. LIFE INS. CO. v. SAME.**

(Circuit Court, N. D. Ohio, E. D. January 27, 1900.)

Nos. 5,969, 5,970.

**1. STATUTE—RETROACTIVE EFFECT—LEGALIZING VOID MUNICIPAL BONDS.**

Act Ohio April 21, 1898 (93 Ohio Laws, p. 172), which authorizes county commissioners who have issued and sold bonds, and with the proceeds purchased land, and erected a building thereon, in accordance with a statute which has thereafter been adjudged unconstitutional, to fulfill the equitable and moral obligation to the holders of such bonds by paying the amount of the principal and accrued interest thereon, and which further provides that, in case of their refusal on demand to make such payment, an action may be maintained against them to collect the amount of such principal and interest, as applied to a case in which county commissioners had, prior to the passage of the act, issued bonds, and expended the proceeds in good faith in the building of an armory for the use of the state guard, as authorized by a statute which was later adjudged void, as well as the bonds issued thereunder, on the ground that the building was for a general state purpose, gives a new right, rather than a new remedy for an existing right, and is within the prohibition of Const. Ohio, art. 2, § 28, against retroactive laws.

**2. SAME—OHIO CONSTITUTION.**

The liability sought to be imposed upon the county by the act is not so clearly and obviously one of natural justice as to take the act out of operation of the constitutional provision, if such consideration may have that effect, within the rule laid down by the Ohio supreme court, although it provides that on payment of the amount of the bonds the property may be used for county purposes. Both having acted equally in good faith, the county would discharge its full equitable and moral obligation by surrendering the property to the bondholders, and the act goes beyond such duty when it, in effect, requires the compulsory purchase of the property by the county, when it may be neither suitable nor needed for county purposes, nor worth its cost for such purposes.

**3. FEDERAL COURTS—FOLLOWING STATE DECISIONS.**

The rules established by the highest court of a state for determining the validity of a statute under the state constitution are binding upon the federal courts.

These cases are submitted to the court on demurrers to the petitions.

Garfield, Garfield & Howe, for complainant New York Life Ins. Co.  
Squire, Sanders & Dempsey, for complainant New England Mut. Life Ins. Co.

P. H. Kaiser and F. L. Taft, for defendant.

DAY, Circuit Judge. Except as to the amount sued for, the petitions are substantially alike. Omitting formal parts, the allegations of the petitions, which, for the purposes of the demurrers, must be taken as true, are, in substance: That the board of commissioners of Cuyahoga county, on or about the 13th day of May, 1893, pursuant to a provision of an act of the legislature of Ohio passed April 27, 1893 (90 Ohio Laws, p. 115), entitled "An act to authorize the commissioners of any county containing a city of the first class, second

grade, to borrow money and issue bonds therefor, for the purposes of building and furnishing a central armory in any such city, for the use of the Ohio National Guard, and procuring a site therefor," did, in accordance with the provisions of said act, and under the authority thereof, by resolution duly adopted and spread upon the minutes of the meeting then held, authorize and direct the issue and sale of the bonds of said Cuyahoga county in the sum of \$225,000, for the purpose of raising money to erect and furnish an armory in the city of Cleveland for the use of the Ohio National Guard, and to procure a site therefor; said bonds to be dated July 1, 1893, to be in the sum of \$1,000 each, payable in 25 years after date, and redeemable after 10 years from date, with interest thereon at the rate of 5 per centum per annum, payable semiannually upon presentation and surrender of interest coupons attached thereto, and to be denominated "Central Armory Bonds." That thereafter the defendant, pursuant to the authority given by section 2 of said act of April 27, 1893, duly issued, advertised, and sold all of said issue of bonds so authorized, in accordance with the said statute, and received therefor the sum of \$227,065.05 in money, being par and accrued interest thereon from the date of said bonds to the date of their said sale, which said amount so received as the proceeds of said bonds was placed to the credit of the fund in the county treasury on account of which said bonds were issued and sold. That thereafter the said defendant, acting in pursuance of the act of the legislature under which the bonds were issued, and for the purposes contemplated in said act, and using the money for the purposes directed, purchased real estate in the city of Cleveland, in said county, taking legal title thereto in the name of said county, as a site for said proposed armory building, and erected thereon a building which has been substantially completed. That in the acquirement of said real estate and the construction of said building substantially all of the money from the issue and sale of said bonds has been expended. That the defendant, by such purchase, obtained and holds, in the name of the county, the legal title to said property so purchased and improved by the proceeds from said bonds, and has at all times and now does, exercise control and ownership over the same, and is in possession of said property and building, as well as of the moneys remaining, derived from the sale of said bonds. Plaintiffs further say that, after the issuing of said bonds, defendant, for the purpose of paying the interest thereon, and creating a sinking fund to redeem the same, did, in accordance with said act of April 27, 1893, cause to be levied a tax of one-tenth of one mill on each dollar of valuation of all of the property appearing upon the general tax duplicate of said county of Cuyahoga; that for a period of two years said tax was collected by the treasurer of said county, and the interest coupons attached to said bonds falling due on the 1st day of January and July in the years 1894 and 1895 were paid by the duly-authorized officials of said county. After the bonds had been so sold, and the proceeds expended for the purchase of said land, and after said building had been substantially completed, and after the said two years' coupons had been paid, legal proceedings were instituted by a taxpayer of said county of Cuyahoga, seeking to re-

strain the further levying of said tax and the payment of said bonds or the interest thereon, and thereafter such proceedings were had in such action that the act of the legislature of April 27, 1893, under which said bonds had been issued and said property so acquired, was, by the supreme court of Ohio, declared to be unconstitutional, and by the judgment of said court the said defendant and the county authorities of said county of Cuyahoga were enjoined from levying further taxes to pay the interest and principal of said bonds, which said judgment and injunction are still in effect; that of the moneys so collected by the levy of one-tenth of one mill aforesaid there remains unexpended in the hands of said defendant, in the "Central Armory Fund," so called, a balance of \$17,755.30. Plaintiffs further aver that, by reason of the ruling of the supreme court aforesaid, and by reason of said injunction issued by the supreme court as aforesaid, the said defendant and the said county of Cuyahoga cannot now pay its obligations as evidenced by said outstanding bonds and coupons in the form in which the said county, by the proceedings aforesaid, undertook and agreed to pay to the holders of said bonds and coupons. Plaintiff avers in the one case that it is the holder of 145 of said bonds, and in the other case that it is the holder of 50 of said bonds, each being in the sum of \$1,000; that plaintiffs purchased the bonds in the open market in the ordinary course of business, paying more than par therefor, and long prior to the beginning of the legal proceedings hereinbefore recited, and by the determination of which said officials of said county were enjoined from paying said bonds and interest thereon; that plaintiffs purchased said bonds and paid therefor in good faith in the one case the sum of \$155,495.10, and in the other case the sum of \$53,660, without knowledge or notice of any defect or irregularity in the same, and that the defendant herein, in so issuing said bonds and acquiring said property, acted in good faith; that said defendant still holds said property, which is now available to said county for general county purposes, and which is now used for county purposes. Plaintiffs aver that it is unconscionable and inequitable that the defendant should retain and hold and apply to county purposes the proceeds of said bonds and the property and building so acquired therewith without fulfilling its moral and equitable obligation to reimburse the plaintiffs for the bonds so held by them. Plaintiffs further say that on or about the 27th day of February, 1899, acting in accordance with the statutes of Ohio in such case made and provided, it made written demand upon the defendant herein to provide, as by law it was authorized to do, for reimbursing these plaintiffs in amounts equal to the principal and interest which had accrued upon the bonds respectively held by them, and to pay to the plaintiffs an amount equal to the principal and interest due upon said bonds upon a surrender of the same to the county for the purpose of cancellation; and that on or about February 28, 1899, the said defendant refused such demands so made by these plaintiffs, and notified these plaintiffs that it would not take any proceedings for the reimbursement of the plaintiffs, or the payment to them of the amounts of principal and interest so due to them by reason of the premises; that more than six months has elapsed since



these plaintiffs made such demand upon the defendant and its refusal to comply therewith. Plaintiffs bring the bonds by them held respectively into court for cancellation, and aver that by reason of the refusal of said defendant to make provision for the equitable and legal claims of the plaintiffs herein against the defendant, in accordance with the authority given by the statutes of the state of Ohio, particularly section 2834c of the Revised Statutes, rights of action have accrued to the plaintiffs to recover from defendant, as in an action for money had and received, an amount equal to the principal and interest represented by said bonds so owned and held by them respectively, and they pray judgment accordingly.

The act of the legislature of Ohio under cover of which these actions are brought (section 2834c of the Revised Statutes of Ohio) was passed April 21, 1898 (93 Ohio Laws, p. 172), and is as follows:

"Whenever the commissioners of any county, acting in accordance with an act of the legislature, have incurred obligations or have issued and sold bonds, and with the proceeds of such obligations or bonds have constructed an improvement or purchased land, and have wholly or partially completed a building thereon, and, after such proceeds have been so expended and the county thereby placed in the ownership and possession of such improvement or building, the statute under which such bonds were issued or obligations incurred has been, by the supreme court, declared unconstitutional and the county authorities enjoined from levying taxes to pay the interest and principal of such bonds or obligations, whereby the county has, with the proceeds of the bonds which it still retains, acquired such improvements or building, and, by reason of the unconstitutionality of the law under which it has acted, cannot pay its obligations outstanding in the form in which they were issued, such commissioners may, if they deem it for the best interest of the county so to do, fulfill the equitable and moral obligation of the county to reimburse the holders of said bonds or obligations to an amount equal to the principal and interest which has accrued thereon, and for the purpose of so doing, may issue and sell bonds of such county or borrow money in such amount and for such lengths of time and at such rate of interest as the commissioners may deem proper, not exceeding the rate of five per centum per annum, payable semi-annually, to be used in the reimbursement and payment of such equitable and moral claims and liabilities against such county: provided, that no such payment or reimbursement of any such moral or equitable claim shall be made of any claim that has remained due or unpaid for a longer period than ten years: provided, further, that should the county commissioners of any county, upon the written request of the holder of any such equitable claim against the county as in this section described, fail within six months after such demand to make provision for such claim under the provisions of this section, then, in such case, the holder of any such legal or equitable claim as in this section described against such county shall have a right of action in any court of competent jurisdiction to recover the amount of such claim and interest against such county at any time within a period of ten years from the time the cause of action accrues: provided, further, that the county commissioners may devote the building or improvement which the county has acquired in the circumstances mentioned in this act to any county purpose."

It thus appears that these actions are prosecuted for the purpose of recovering, under the section of the statute just quoted, an amount equal to the principal and interest of the bonds. The demurrers raise the question whether said act is in violation of the provisions of the constitution of the state of Ohio. From the allegations of the petitions it appears that the supreme court of Ohio, having been called upon to consider and determine the validity of the act under which the bonds were issued by the county commissioners and purchased by

the plaintiffs for the purpose of building an armory for the use of the Ohio National Guard in the city of Cleveland, decided that the act was passed in violation of the constitution of the state. The case in which this decision was rendered is *Hubbard v. Fitzsimmons*, 57 Ohio St. 436, 49 N. E. 477, decided January 26, 1898. An examination of the case will show that the supreme court of Ohio regarded the act of April 27, 1893, above recited, as void, because in violation of section 2 of article 12 of the constitution of the state, requiring taxes for general purposes of the state to be levied by a uniform rule on all the taxable property within the state, and held the erection of an armory for the use of the National Guard to be a general purpose of the state. The grounds of this decision are fully stated in the opinion of the court given by Judge Shauck. It thus appears that the bonds were issued without authority, and were, consequently, void, and of no effect. It is not a case where the act could have been lawfully performed or done under legislative power theretofore existing. Thereafter, on the 21st of April, 1898, the legislature of Ohio passed section 2834c, Rev. St., already quoted. In this section it is undertaken to give validity to the claims of the plaintiffs, in the first place, by the voluntary action of the commissioners if they shall see fit to take it; if not, then giving a right of action six months after the county shall have failed upon written request to make provision for the payment of the claims of the persons holding the bonds. It is claimed that this section of the statutes is retroactive, and consequently in violation of section 28 of article 2 of the constitution of 1851, which provides:

"The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state."

Is this statute retroactive, within the meaning of the constitution? It has been frequently decided by the supreme court of Ohio, and may be accepted as the law of the state, that the power to tax is derived primarily under the grant of the legislative power of the state to the general assembly, contained in article 2, § 1, of the constitution, which provides:

"The legislative power of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives."

This general power, thus broadly conferred, is subject to certain limitations, one of which is contained in section 28, above quoted, providing that the general assembly shall have no power to pass retroactive laws. The supreme court of Ohio has had occasion to define the meaning of this section, and in one of its latest opinions upon this subject has said:

"However, every statute that is designed to act retrospectively is not retroactive within the terms of section 28 of article 2 of the constitution of 1851, which forbids the general assembly of this state to pass 'retroactive' laws. Whether a statute falls within the prohibition of this provision of the constitution depends upon the character of the relief that it provides. If it creates a new right, rather than affords a new remedy to enforce an existing right, it is

prohibited by this clause of the constitution of this state. Judge Story defines a retrospective, or retroactive law, as follows: 'Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new liability in respect to transactions or considerations already past, must be deemed retrospective.' *Society v. Wheeler*, 2 Gall. 104-139, Fed. Cas. No. 13,156. This definition was approved by this court in *Ralrden v. Holden*, 15 Ohio St. 207. It was also adopted by the supreme court of the United States in *Sturges v. Carter*, 114 U. S. 511, 5 Sup. Ct. 1014, 29 L. Ed. 240." *Commissioners v. Rosche*, 50 Ohio St. 111, 33 N. E. 408, 19 L. R. A. 584.

While this statute, as to some causes of action, may be held to have a prospective operation in view of the use of the terms, "when-ever the commissioners of a county having incurred obligations," etc., yet, as applied to this case, the transactions upon which it is to have operation preceded the enactment of the statute. The claims of the plaintiffs, as evidenced by the bonds, accrued to them before the passage of the act, and the statute must be given a retrospective construction if it is to apply at all to the claims of the plaintiffs. In *Commissioners v. Rosche*, supra, the supreme court of Ohio said that the test as to whether a statute falls within the provisions of this section depends upon the character of the relief it provides. If it creates a new right, rather than affords a new remedy to enforce an existing right, it is prohibited by this clause of the constitution of Ohio. It is argued with great force and ability by plaintiffs' counsel that this section 2834c is remedial in its character, and only gives a new remedy for an old right. Let us examine this contention. It appears from the allegations of the petitions that all parties to the original transaction acted in good faith. The county commissioners, assuming the act to be within the scope of the authority of the state legislature, with the proceeds of the bonds purchased a site, and practically completed a building designed to be used as an armory for the National Guard, before any legal steps were taken to test the constitutionality of the act. Under such circumstances the bondholders would have no right to recover the money thus invested by the commissioners under the supposed authority of the act. The money had been practically expended, and was no longer in the hands of the county commissioners, or subject to their control. The supposed law under which they had acted was no law, and the attempt to procure title to a site and a building in the county for those purposes was nugatory. While this is true, the county should not be permitted to hold the property in which the money of the purchasers of the bonds had been invested. It was said by Mr. Justice Field in *Marsh v. Fulton Co.*, 10 Wall. 684, 19 L. Ed. 1043:

"The obligation to do justice rests upon all persons, natural and artificial, and, if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."

But what is the measure of justice which the law will afford in such a case? Whatever the rights of the purchasers of the bonds while the money was still in the hands of the county commissioners, when the board, acting in good faith and by authority of a supposed law, has invested the money in a building, the right of the bondholders is not to have restitution of the money, because that is no longer

in the county's control, but they can follow the property and building into which the money has gone, and to this extent obtain restitution and compensation. This is the principle recognized in *Chapman v. Douglass Co.*, 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378; *Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, 27 L. Ed. 238; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820, 29 L. Ed. 132. An examination of the terms of this section 2834c discloses that the holders of the bonds in these cases are given the right to recover, not the property itself, or the value thereof, but the amount of their claims, evidenced by the bonds, with interest. This is undertaking to give, not a new remedy, but a new right, to the holders of these bonds, and attaches to the county a new obligation. This right did not exist in favor of the bondholders until the passage of this statute, nor prior thereto did any such liability rest upon the county. Applying the test laid down by the supreme court of Ohio in *Commissioners v. Rosche*, *supra*, this act is retroactive, within the meaning of this section of the constitution. It is claimed, however, and strenuously urged upon the attention of the court, that this statute is in furtherance of natural justice, and was enacted to enable the plaintiffs to enforce a just and equitable claim, and is not within the prohibition of the constitution of Ohio against retroactive laws, and a large number of Ohio cases have been cited in support of that contention. See *State v. Hoffman*, 35 Ohio St. 435; *Board v. McLandsborough*, 36 Ohio St. 227; *Warder v. Commissioners*, 38 Ohio St. 643; *State v. Trustees of Richland Tp.*, 20 Ohio St. 362; *Trustees v. Dillon*, 16 Ohio St. 38; *Rairden v. Holden*, 15 Ohio St. 207; *Trustees v. McCaughy*, 2 Ohio St. 152. An examination of these cases will show that they arise under conditions of fact where the obligations of the county or town are clear and strong, admitting of no discussion as to the moral obligation to pay the claims in question. In such cases it may be conceded that the legislature can authorize one of the political subdivisions of the state to levy a tax to pay a demand not legally enforceable, but founded on moral considerations, or may even require that the levy shall be made for that purpose. This view of the law is taken by Judge Bradbury in giving the opinion in *Board of Education v. State*, 51 Ohio St. 531, 38 N. E. 614. While this is true, this doctrine has always been applied to cases of peculiar hardship, raising strong moral obligation for the payment of claims. After the cases above referred to were decided, the question came before the court in *Commissioners v. Rosche*, *supra*. In that case it appears that *Rosche Bros.* were—

"Tanners, engaged, in the city of Cincinnati, in manufacturing leather from the skins of animals. In the years 1875, 1876, 1877, and 1878 the auditor of state provided blank forms to be used by the assessors in the several townships and wards of the municipalities of the state, to secure a uniform listing for those years of the personal property within the state subject to taxation, and upon this form promulgated certain instructions to aid the assessing officers and property owners to determine what property should be listed, and the proper method of listing it. This form, with the instructions printed upon it, was provided and furnished to the county auditors of the several counties throughout the state. Among the instructions thus given by the auditor of state was the following: 'Manufacturers must include the average value of raw material used and on hand in the manufactured and unmanufactured

articles.' Pursuant to these instructions, the defendants, in the years above named, listed not merely the average monthly value of the raw material 'purchased, received, or otherwise held' to be used in manufacturing, but included also the average value of the raw material in manufactured articles on hand or in process of being manufactured. The defendants in error in the original action sought to recover the taxes that they had paid upon the raw material that was in the manufactured or partly manufactured articles on hand. These taxes were all paid, and all the assessments, except that of 1875, were made after it had been held by the supreme court commission that raw material in manufactured articles was not taxable. *Sebastian v. Candle Co.*, 27 Ohio St. 459." "In 1881 the defendants in error, and a number of others in like situation, including Eckstein, Hill & Co., manufacturers of white lead, etc., filed claims with the county auditor of Hamilton county, for the refunder of the taxes thus paid by them respectively. Payment being refused, Eckstein, Hill & Co. brought an action in the court of common pleas of Hamilton county against the county commissioners of that county to enforce their claims. They prevailed in that court, whereupon the county commissioners instituted proceedings in the district court of Hamilton county to reverse the judgment of the court of common pleas. The district court reversed the judgment of the court of common pleas upon the ground that in law there was no right of recovery (*Commissioners v. Eckstein*, 4 Wkly. Law Bul. 989), which judgment of the district court was afterwards affirmed by the supreme court. In the year 1890, after these adverse decisions had been made, and relief denied to parties situated like the defendants in error, the general assembly passed the following act (87 Ohio Laws, 212): 'That if in any county containing a city of the first grade of the first class, the county or state auditor has sent by any assessor to any person, firm or corporation a blank upon which to return property for taxation under section 2742 of the Revised Statutes of Ohio, with instructions in said blank showing and directing such person, firm or corporation how the said return should be made of such property for taxation, which instructions have been erroneous and contrary to the said section 2742, and such person, firm or corporation has made return in accordance with such erroneous instructions, and by reason of following said erroneous instructions, said person, firm or corporation has returned for taxation, and paid taxes upon property which, under the said section 2742 should not have been listed, such listing and payment shall be held to be involuntary, and the court of common pleas of said county, in an action brought by any such person, firm or corporation against the county commissioners of said county, and upon lawful proof of any such involuntary payment, shall render judgment for the recovery of the amount of said payment, but without interest or costs; and thereupon said county commissioners shall cause the same to be paid out of any unexpended funds belonging to said county in the county treasury. Provided, however, that no taxes so erroneously paid shall be so sued for and refunded by said county commissioners unless a claim in writing, duly verified by such person, firm or corporation, has been filed and presented therefor with the county auditor of such county within six years from the time of payment of such erroneous taxes.'

It was contended in that case that the act was not retroactive, because it was based upon a strong moral obligation, and was in furtherance of equity, and, therefore, within the Ohio decisions which it was claimed had supported similar acts. Passing upon that feature of the case, the court said, upon page 113, 50 Ohio St., page 410, 33 N. E., and page 586, 19 L. R. A.:

"Counsel contend that the statute is in furtherance of natural justice, and that the clause of the constitution under consideration does not prohibit retroactive laws of that character. *Lewis v. McElvain*, 16 Ohio, 347; *Trustees v. McCaughy*, 2 Ohio St. 152; *Acheson v. Miller*, Id. 203; *Burgett v. Norris*, 25 Ohio St. 308." "To uphold a statute on this ground, where it seeks to create a liability upon a past transaction, where none existed when it occurred, if it can be done at all, the natural justice of the object sought to be accomplished should be indisputable."

This must be taken, I think, as the latest declaration of the supreme court of Ohio upon this subject, and the court therein say that to uphold a statute on this ground, where it seeks to create a liability upon a past transaction, "if it can be done at all, the natural justice of the object sought to be accomplished should be indisputable"; and in that case the court says that the justice of requiring the taxpayers of Hamilton county to refund the entire tax which had been distributed in the state and city where the taxes had been collected upon an erroneous instruction of the auditor of state is a question upon which minds may well differ. Applying this rule to the present case, is there such clear and strong equity in favor of the holders of these bonds as against the taxpayers of Cuyahoga county, represented by the board of county commissioners, that the act should be held to be one for this reason not falling within this provision of the constitution? The petitions aver that the building erected from the proceeds of the bonds is capable of use for county purposes, and that it is now being so used by the county. The act in question, however, does not make the right to recover turn upon any such consideration. Its provisions are available to the holders of such bonds when the commissioners have issued bonds, and with the proceeds thereof have constructed an improvement, or purchased land, and wholly or partially completed a building thereon, thereby placing the county in possession and ownership of such improvement or building. It is true the statute provides that, when the claims of the bondholders have been satisfied, as required by the act, the county commissioners may devote the building so acquired to any county purpose; but the right of recovery is not predicated upon the kind or character of the building, the necessity of its use, or adaptability for the purposes of the county. If land had been purchased, and a building wholly or partially completed thereon, the county is compelled to pay the full amount of the bonds as issued, irrespective of the value of the building, the necessities of the county, and in no wise depending upon the character or fitness of the building for county purposes. It is practically a compulsory purchase, for the amount of the bonds, of the building, for the use of the county. It does not appear that any such building was desired for the uses of Cuyahoga county. It does appear that it was erected for the purposes of a state armory. Ordinarily, when a county desires to erect a county building, the question as to the desirability of such improvement, if it exceeds in cost the sum of \$10,000, must be submitted to a vote of the electors of the county. Rev. St. Ohio, § 2825, provides:

"The county commissioners shall not levy any tax, or appropriate any money, for the purposes of building public county buildings, purchasing sites therefor, or for lands for infirmity purposes, or for building any bridge, except in case of casualty, and except as hereinafter provided, the expense of which shall exceed ten thousand dollars, without first submitting to the voters of the county, the question as to the policy of building any public county building or buildings, or for the purchasing sites therefor, or for the purchase of lands for infirmity purposes by general tax."

The value of this building for other than armory purposes may be very much less than the claims of the plaintiffs secured to them under

the terms of section 2834c. The county was not undertaking to acquire a building for county purposes. The bonds were distinctly "armory bonds." The purpose, well understood by all parties, was to secure a site and build an armory for the Ohio National Guard. The case does not involve a statute which creates a liability upon a past transaction, the natural justice of the object sought to be accomplished being indisputable, and the question of moral obligation one upon which fair-minded persons cannot well differ. The purchasers of these bonds will be taken in law to be subject to the familiar rule which requires persons dealing with the acts of public officers to take notice of the limits of their authority. It is said in the petitions that these bonds were purchased in open market. The rule has been so frequently laid down that bonds issued without authority are void in the hands of an innocent purchaser that I think it by no means a hardship to require purchasers to take notice of this principle. Purchasers of bonds in open market know of this principle, and that they take the risk of the authority and power of public officials when they undertake to issue such obligations. It is not necessary to cite the numerous decisions of the supreme court which have made this principle familiar. There is no claim that the commissioners were guilty of misrepresentation or fraud. On the contrary, it is averred that they acted in good faith. It is not claimed that the commissioners refused to turn over the remnant of the fund and the real estate and building erected thereon to the purchasers of the bonds, or refused to account for the value of the property while insisting upon keeping it. Should they decline to surrender the property, a court of equity would compel its surrender. The act, upon its face, as applied to the claims of the plaintiffs, is clearly retroactive, and, in the judgment of the court, the claims of the plaintiffs are not founded upon any such strong moral and equitable rights as to deprive the law of its retrospective character within the terms of the constitution of the state. But it is argued that the legislature has determined this question, and we are cited to the decisions of the supreme court of the United States in which that court says that the question of moral obligation for which congress may give relief to claimants is one within its power, and rarely, if at all, subject to judicial review. *U. S. v. Realty Co.*, 163 U. S. 427, 16 Sup. Ct. 1120, 41 L. Ed. 215; *Guthrie Nat. Bank v. City of Guthrie*, 173 U. S. 528, 19 Sup. Ct. 513, 43 L. Ed. 796. It must be remembered in this connection that the supreme court is dealing with the constitution of the United States, which contains no provision against the enactment of retrospective laws. In the cases cited that court is dealing with the powers of congress under the federal constitution. The decisions of the supreme court of Ohio in construing the Ohio constitution are binding upon the federal courts. *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178; *Claiborne Co. v. Brooks*, 111 U. S. 400-410, 4 Sup. Ct. 489, 28 L. Ed. 470. It is true that the legislature in the act in question has undertaken to say that the obligations arising upon the claims of the plaintiffs are of an equitable and moral nature. As we understand the supreme court of Ohio, this determination, while entitled to respect, is not conclusive upon the courts. In

addition to the cases cited, see *Board of Education v. State*, 51 Ohio St. 531, 38 N. E. 614, in which the court says:

"We think, however, that whenever a contention arises between an individual and some public body respecting the existence of a claim against the latter, the controversy falls within the province of the judiciary. We do not deny the power of the general assembly to inquire into the merits of any claim when sought to be asserted through its agency, before granting relief to the claimant by legislative action. Not only has it such authority, but its exercise should be carefully and rigidly observed. Such investigation, subsequent determination, and resulting action, however, do not estop the parties from appealing to those judicial tribunals of the country that have been established under our constitution, and by it vested with the judicial power of the state, and by our laws provided with an appropriate procedure to conduct such inquiries. *Cooley*, Const. Lim. 115, and cases cited; 3 Am. & Eng. Enc. Law, 681."

We have, therefore, reached the conclusion that the declaration of the legislature as to the nature and character of this claim is not conclusive upon the courts when it becomes a matter of judicial inquiry. While we can see strong and sufficient grounds upon which the state might have taken this armory, and provided for the payment of these bonds, and like cogent reasons which would compel the restitution of the balance of the fund, and the turning over of the property acquired with the proceeds of these bonds to the bondholders, it does not appear that the compulsory purchase of the building and property in question appeals so strongly to the sense of justice and right that this statute can be upheld against the plain provision of the constitution prohibiting the enactment of retroactive laws in the state of Ohio. For the reasons herein stated, the demurrers will be sustained to both petitions.

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#### MCMASTER v. NEW YORK LIFE INS. CO.

(Circuit Court of Appeals, Eighth Circuit. December 11, 1899.)

No. 1,202.

#### 1. INSURANCE—CONTRACT—PAROL EVIDENCE TO VARY TERMS OF POLICY.

Parol statements made by an agent prior to, or contemporaneous with, the delivery of a life insurance policy to the insured, as to the contents or legal effect of such policy, cannot control plain provisions of the written contract in the absence of fraud or artifice, and where the insured had full opportunity to read the policy.

#### 2. SAME—FALSE REPRESENTATIONS—ESTOPPEL.

Nor does such statement by the agent in itself constitute fraud or artifice which will relieve the insured from the duty of reading the policy, or create an estoppel against the company which will prevent it from enforcing the written contract in accordance with its terms, in the absence of an actual fraudulent intent.

#### 3. SAME—CONTRACT.

Where an agent takes an application for life insurance, which he forwards to the company for acceptance or rejection, under an agreement with the applicant, which is also stated in the application, that, if accepted, the contract shall take effect from the delivery of the policy and payment of the premium, no contract of insurance is made until the policy is delivered and the premium paid; and the contract then made, and by which the company is bound, is that embodied in the policy delivered and accepted.



**4. SAME.**

An interlineation in the application of a request that the policy, if issued, be dated as of the date of the application, made by the agent without the knowledge of the applicant, is immaterial, and cannot affect the rights of the parties under a policy subsequently issued, as the applicant is free to refuse to accept the policy tendered, if the date is not satisfactory to him, and after its acceptance he is bound by its terms.

**5. SAME—CONSTRUCTION OF POLICY.**

A provision in a life insurance policy, or in the application, which forms a part of the contract, that premiums shall be paid annually, is not inconsistent with a further provision of the policy fixing the time for the payment of the second annual premium on a date which is 6 days less than a year from the date of the policy, and 14 days less than a year from the date when it was delivered and took effect, and making the policy forfeitable on default of payment on the date so named; nor do such provisions render the contract ambiguous, so as to authorize a court, by construction, to extend the life of the policy, on account of the first annual premium paid, beyond the date fixed therein for the maturity of the second premium.

**6. APPEAL—REVIEW—CASE TRIED TO THE COURT.**

When a case is tried in a circuit court without a jury, only the rulings of the court in the progress of the trial, and the sufficiency of the facts found to support the judgment, can be reviewed on a writ of error. The technical sufficiency of a pleading which substantially avers the facts constituting the cause of action cannot be considered by the appellate court where it was not challenged in the trial court.

**7. SAME—FINDINGS BY TRIAL COURT—VERITY.**

When a jury is waived, and a case is tried by the court, in pursuance of section 649, Rev. St. U. S., and the court makes a special finding of the facts, the facts so found must be accepted by the appellate court as absolute verity. Per Caldwell, Circuit Judge, dissenting.

**8. INSURANCE—AGENTS—STATEMENTS—AGREEMENTS—EFFECT.**

Under the Iowa statute one who is authorized to solicit insurance, take applications, receive premiums, and deliver policies in that state for an insurance company is the agent of the company, "anything in the application to the contrary notwithstanding"; and his statements and agreements in the course of his business in soliciting policies, taking applications, delivering the policies, and receiving the premiums are, in law, the statements and agreements of the company itself. *Society v. Clements*, 11 Sup. Ct. 822, 140 U. S. 226, 35 L. Ed. 497; *Indemnity Co. v. Berry*, 1 C. C. A. 561, 50 Fed. 511; *Cook v. Association*, 35 N. W. 500, 74 Iowa, 746; *Insurance Co. v. Chamberlain*, 10 Sup. Ct. 87, 132 U. S. 304, 33 L. Ed. 341; *Insurance Co. v. Russell*, 23 C. C. A. 43, 77 Fed. 94. Per Caldwell, Circuit Judge, dissenting.

**9. SAME—POLICY—INTERPOLATED CLAUSE—KNOWLEDGE OF ASSURED—ESTOPPEL—PRESUMPTION—CONSTRUCTION.**

An agent of the company in Iowa agreed with the insured, when the application for insurance was signed, "that the first year's premium was to be paid by the assured upon the delivery to him of the policies, and that the contract of insurance was not to take effect until the policies were delivered," and one of the conditions of the application, which was made a part of the policy, was "that any policy which may be issued under this application shall not be in force until the actual payment to and acceptance of the premium by said company"; and the agent of the company, when he tendered the policies to the assured, was asked by him if the policies were as represented, and if they insured him for the period agreed upon, namely, 13 months from that date, and the agent replied that they did so insure him, whereupon the assured paid the premiums, and received and put away the policies, without reading them. Without the knowledge or consent of the assured, the company had interpolated into the policies a clause by which the term of insurance, instead of dating from the payment of the premiums and the delivery of the policies as agreed upon, and as provided in the application and as represented by the agent when he

delivered them, was made to begin 14 days before that date, thus shortening the term of insurance by that number of days. Upon these facts, *held*: (1) That the assured was not "conclusively presumed" to have consented to the interpolated clause in the policies by merely receiving and putting them away without reading them; (2) that the assured was not estopped to show these facts, and that he never knew or assented to the interpolated clause shortening the term of insurance from that agreed upon and called for by the stipulations and conditions of his application; (3) that when the policies were delivered the assured had a right to presume that the term of insurance conformed to the agreement made with the agent and the stipulations and conditions of his application, and to rest confidently in that belief; (4) that the company will not be heard to say that the assured was guilty of culpable negligence in placing reliance on its agent's assurance that the policies conformed to their agreement and the stipulations of the application; (5) that upon the facts found the company is estopped to set up the interpolated clause as a defense to this action; (6) that the clause secretly interpolated into the policies contradicts and is inconsistent with the express stipulations of the application, which is made a part of the policy, and that under the settled canon for the construction of policies of insurance, which declares that, when they contain contradictory, conflicting, or inconsistent provisions, effect must be given to the provisions most favorable to the insured, the interpolated clause in the policies must be disregarded, and the policies construed according to the stipulations and conditions of the insured's application, which was made part of the policy. Per Caldwell, Circuit Judge, dissenting.

**10. TRIAL—FAILURE TO FIND FACTS—EFFECT.**

When the court makes a special finding of facts, the failure to find any fact, or the insufficient finding of any fact, essential to support the judgment, is fatal to it. Per Caldwell, Circuit Judge, dissenting.

**11. SAME—STATEMENTS IN FINDINGS OF FACT—CONCLUSION OF LAW.**

A statement in a special finding of fact of the legal effect of a document or paper which is neither in the record, nor made part of the findings, nor its contents anywhere disclosed, is not a finding of fact, but a mere conclusion of law upon the legal effect of an undisclosed document, and of no effect. Per Caldwell, Circuit Judge, dissenting.

**12. INSURANCE—FORFEITURE—STATUTORY NOTICE—FINDINGS—INSUFFICIENCY.**

Under the New York statute (Laws 1892, c. 690, art. 2, § 92), the forfeiture of a policy of life insurance does not depend upon the nonpayment of premiums according to the terms of the policy, *but upon their nonpayment after the notice prescribed by the statute has been given*. The requirements of this statute must be read into, and are part of, the policies in suit. One requirement of the statute is that notice of the time when the premium on a policy will be due shall be sent to the assured "at least 15 and not more than 45 days prior to the day when the same is payable"; and the giving of this notice is a condition precedent to the right of the company to declare a forfeiture of the policy for the nonpayment of the premium. The burden of proof to show this notice was given rests upon the insurance company. The insurance company alleged in its answer that it did give the required notice to the insured "at least 15 and not more than 45 days" before the premiums were due, as required by the statute of New York. This allegation of the answer was denied. The only finding of the court on this issue was "that not later than November 17, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the state of New York." *Held*: (1) That this finding did not show a compliance with the statute, and that the finding "that not later than November 17, 1894, notice was sent" did not show that the notice was sent "at least 15 and not more than 45 days" prior to the day the premiums were payable, as required by the statute, and hence that no forfeiture of the policies could be declared; (2) that the finding that the contents of the notice sent were "in accordance with the requirements of the statute of the state of New York" was a mere

legal conclusion, and not a finding of fact, and that the finding should have set out the notice, so that the appellate court could judge of its sufficiency. Per Caldwell, Circuit Judge, dissenting.

**In Error to the Circuit Court of the United States for the Northern District of Iowa.**

This was an action brought by the plaintiff in error, Fred. A. McMaster, administrator of the estate of Frank E. McMaster, deceased, against the defendant in error, the New York Life Insurance Company, upon five policies of insurance, of \$1,000 each, upon the life of Frank E. McMaster. The defense was that the insurance had ceased before he died, on January 18, 1895, because he had failed to pay the annual premiums due on December 12, 1894. The policies were dated on December 18, 1893, and contained these provisions: "This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and ——— cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy. \* \* \* If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company. After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5 per cent. per annum for the number of days during which the premium remains due and unpaid." The applications for these policies were in writing, and were dated on December 12, 1893, and contained this agreement: "I do hereby agree as follows: \* \* \* (2) That inasmuch as only the officers at the home office of said company, in the city of New York, have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, no statements, representations, promises, or information made or given by or to the person soliciting or taking this application for a policy, or by or to any other person, shall be binding on said company, or in any manner affect its rights, unless such statements, representations, promises, or information be reduced to writing, and presented to the officers of said company, at the home office, in this application." After the applicant had signed the applications, the agent who solicited them wrote into each of them, without the knowledge of the applicant, "Please date the policy same as application;" and copies of the applications, containing this interlineation, were attached to the policies which were delivered to the insured on December 26, 1893, when he paid his first annual premiums. He died on January 18, 1895, and the only question in the case was whether or not the second annual premiums, which he never paid, became due before December 18, 1894.

The court below tried the case without a jury, made special findings of the facts, and dismissed the action. 90 Fed. 40. The findings of facts, so far as they are material to the question at issue, were as follows: "(3) That in December, 1893, F. W. Smith, an agent for the New York Life Insurance Company, residing at Sioux City, Iowa, solicited Frank E. McMaster to insure his life in that company, and, as an inducement to taking the insurance, pressed upon McMaster the provision adopted by the company, and set forth in the circulars issued by the company, and printed on the back of the policies issued by the company, under the heading, 'Benefits and Provisions Referred to in This Policy,' in the following words: 'After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent. per annum for the number of days during which the premium remains due and unpaid. During said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of death during the said month this indebtedness will be deducted from the amount of the insurance.' (4) Relying on the benefits of this provision, and in the belief that if he accepted a policy of insurance upon his life from the New York Life Insurance Company, paying the premiums thereon annually, the company could not

assert the right of forfeiture until thirteen months had elapsed since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on, and attached to the petition; the same being made part of this finding of facts. (5) In the application, when signed by Frank E. McMaster, it was provided that the amount of insurance applied for was the sum of \$5,000, to be evidenced by five policies, for \$1,000 each, on the ordinary life table; the premium to be payable annually. (6) There now appears on the face of the application, interlined in ink, the words, 'Please date policy same as application.' These words were not in the application when it was signed by McMaster, but after the signing thereof they were written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of Frank E. McMaster, and were so written in by the agent in order to secure to the agent a bonus which the company allowed to agents for business secured during the month of December, 1893; and it does not appear that Frank E. McMaster ever knew that these words had been written into the application, and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company, and was acted on by the company. (7) By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company, and Frank E. McMaster, when the application for insurance was signed it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies, and that the contract of insurance was not to take effect until the policies were delivered. (8) The defendant company, at its home office in New York City, upon receipt of the application, determined to grant the insurance applied for, and issued five policies, each for the sum of \$1,000, dated December 18, 1893, and reciting on the face thereof that the annual premium on each policy was \$21, and forwarded the same to its agent, F. W. Smith, at Sioux City, Iowa, for delivery to Frank E. McMaster. These five policies are in the form of the one attached to the petition in this case, which is hereby made part of this finding of fact, and each policy contains the recital: 'This contract is made in consideration of the written application for this policy, and of the agreements, statements, and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and ——— cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy.' (9) The five policies, inclosed in envelopes, on or about December 26, 1893, were taken by F. W. Smith, the agent of the defendant company, to the office of Frank E. McMaster, who asked the agent if the policies were as represented, and if they would insure him for the period of 13 months, to which the agent replied that they did so insure him; and thereupon McMaster paid the agent the full first annual premium, or the sum of \$21, on each policy, and, without reading the policies, he received them and placed them away. The agent did not in any way attempt to prevent McMaster from reading the policies, and he had the full opportunity for reading them, but in fact did not read them, and accepted them on the statement of the agent of the company, as hereinabove set forth. (10) That not later than November 17, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the state of New York. (11) The renewal receipts for the second annual premium on the five policies held by Frank E. McMaster in the defendant company were sent for collection to Mary A. Ball, at Sioux City, Iowa, who on the 11th or 12th day of December, 1894, called on said McMaster for payment of the premiums in question. At that time McMaster declined making payment thereon; saying that he had seen other policies which promised better results, and that he did not think he would renew the insurance in the defendant company. Miss Ball told him the New York contracts had some nice provisions, like thirty days of grace and loans, and, in reply to an inquiry from McMaster, stated that his policies entitled him to the month's grace in the payment of the premiums, and that, as she understood it, the grace on the second premium would expire January 11th; and McMaster said, if he concluded to keep any of the insurance, he would call

and pay for it before the grace expired. (12) That in November or December, 1894, Frank E. McMaster was examined for the purpose of obtaining life insurance by the agents of the Union Central Insurance Company; it being understood between the parties that the policies were not to issue until in January, 1895, and it being the purpose of McMaster to take one or two thousand dollars insurance in the Union Central Company at the expiration of his insurance in the defendant company, but also to continue part of the policies in the defendant company. (13) That on or about January 15, 1895, the agent of the Union Central Company, meeting McMaster on the street in Sioux City, told him the policies issued by the Union Central Company had been received, and in reply McMaster said: 'All right. Just hold them. There is no hurry about them.' And in the same conversation he stated that he had other insurance, referring to the policies in the defendant company. (14) That the action of Frank E. McMaster shows, and the court so finds the fact to be, that the said McMaster believed that the policies issued to him by the defendant company would continue in force for the period of thirteen months from the date of the policies, and his action with respect to the policies in the defendant company and the proposed insurance in the Union Central Company was based upon and governed by this belief on his part." The only error assigned is that upon these facts the judgment should have been for the plaintiff.

Henry J. Taylor and F. E. Gill, for plaintiff in error.

W. E. Odell, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

This is another attempt to cause prior and contemporaneous parol statements of the terms and legal effect of written agreements to prevail over the plain stipulations of the writings themselves. The argument of the counsel for the plaintiff in error, when reduced to its last analysis, is that because in the parol negotiations which preceded the delivery of the policies in suit the agent of the insurance company informed the deceased that his policies would insure his life for 13 months without the payment of the second annual premiums, and because when he delivered the policies to him he told him that they did so insure him, therefore this preliminary information and this contemporaneous statement must supersede the written contracts, which expressly provide that the policies shall cease to be binding if the second premiums are not paid by January 12, 1895, 12 months and 17 days after the policies were delivered. This proposition, as it affects the policies in this case, was considered, and our decision concerning it was rendered, in a suit in equity to reform these policies, which is reported under the title *Insurance Co. v. McMaster*, 57 U. S. App. 638, 30 C. C. A. 532, 87 Fed. 63; and the circuit court of appeals for the Sixth circuit has since rendered a like decision, upon a similar state of facts, in *McConnell v. Society*, 34 C. C. A. 663, 92 Fed. 769. The views expressed in our opinion in the former suit undoubtedly met the approval of the supreme court, for it denied an application to issue a writ of certiorari to review our decision. 171 U. S. 687, 18 Sup. Ct. 944. Our conclusion in the suit in equity was that upon the facts there presented the plaintiff could not recover upon these policies, either at law or in equity. The facts which the court below has found in this case

do not vary from those presented in the former suit so materially as to warrant a different conclusion here. The only notable difference is that it appears in this case, as it did not in that, that, at the time the policies were delivered, the insured "asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him, and thereupon McMaster paid the agent the full first annual premium or the sum of twenty-one dollars on each policy, and, without reading the policies, he received them and placed them away. The agent did not in any way attempt to prevent McMaster from reading the policies, and he had the full opportunity for reading them, but in fact did not read them, and accepted them on the statement of the agent of the company as hereinabove set forth,"—and that he believed that the policies would continue in force until 13 months from their date, which was December 18, 1893, although they plainly stated that the second annual premiums would be due on December 12, 1894; that there was only one month's grace thereafter; that the policies would cease to insure his life if those premiums were not paid within that time; and although on December 11 or December 12, 1894, the collector of the company called on the deceased for these premiums, he declined to pay them, and said he did not think he would renew the insurance; and she told him that he was entitled to one month's grace, and that, as she understood it, the grace on the second premiums would expire on January 11, 1895. It will be borne in mind that the policies provided that the annual premiums should be paid on December 12th; that they gave one month's grace; that they were dated on December 18, 1893; that they were delivered and the first premiums were paid on December 26, 1893; and that the insured died on January 18, 1895,—six days after the policies had expired according to their terms. It is also worthy of note that the statement made at the time the policies were delivered was not a representation of any words or terms which the contracts contained, but a mere statement of the legal effect of the policies.

The only question which this new fact that this statement was made when the policies were delivered presents is whether oral statements made by one of the parties to a written contract to the other at the time of its delivery, respecting its terms and their legal effect, or the written terms themselves, constitute the agreement, and that question has been repeatedly answered by the supreme court and by this court. In *Thompson v. Insurance Co.*, 104 U. S. 252, 259, 26 L. Ed. 765, the policy provided that it should be void on the nonpayment of the note taken for the premium; and the supreme court held that a plea that a parol agreement was made, at the time of the giving and accepting of the policy, that the policy should not become void for the nonpayment of the note, but should only be voidable at the election of the company, was bad. Mr. Justice Bradley said:

"An insurance company may waive a forfeiture, or may agree not to enforce a forfeiture; but a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement incon-

sistent with a written instrument made contemporary therewith, is void, and cannot be set up to contradict the writing."

In *Insurance Co. v. Henderson*, 32 U. S. App. 536, 543, 547, 16 C. C. A. 390, 393, 395, 69 Fed. 762, 766, 768, the agent of the company told the insured when he delivered the policy that, "if any one killed him while he was going to and from the city, the policy would cover him," but the policy expressly excepted "intentional injuries inflicted by the insured or any other person." The insured was shot from ambush, and this court held, in a suit in equity to reform the policy, that the bill must be dismissed, and declared the law to be that:

"Where the class of risks intended to be insured against is clearly described in the policy, and the assured has a full and fair opportunity to read the instrument, the company will not be bound by representations made by its agent, in good faith, that the policy covers risks that are not in fact within its provisions."

In *Green v. Railway Co.*, 35 C. C. A. 68, 92 Fed. 873, 877, the plaintiff had signed a final receipt and release of all his claims under a certain contract, before that contract was completed, in reliance upon the statement of the engineer of the railroad company, which was made at the time he signed the release, that it covered nothing but the work already completed. When, however, he sued the company for damages for its refusal to permit him to complete his contract, this court held that the oral statement was incompetent evidence, and that the final release had discharged the corporation from all liability. We adhere to the conclusion which we reached upon this question after a review of these and many other authorities in the suit in equity. *Insurance Co. v. McMaster*, 87 Fed. 63, 69-72, 30 C. C. A. 532, 57 U. S. App. 638. We there said:

"This proposition is founded in reason, and sustained by the authorities, and it should be deemed to be the settled law of the land: No representation, promise, or agreement made, or opinion expressed, in the previous parol negotiations, as to the terms or legal effect of the resulting written agreement, can be permitted to prevail, either at law or in equity, over the plain provisions and just interpretation of the contract, in the absence of some artifice or fraud which concealed its terms, and prevented the complainant from reading it. *Laclede Fire-Brick Mfg. Co. v. Hartford Steam-Boiler Inspection & Ins. Co.*, 19 U. S. App. 510, 513, 520, 9 C. C. A. 1, 3, 8, 60 Fed. 351, 353, 358; *Insurance Co. v. Henderson*, 32 U. S. App. 536, 540, 543, 547, 16 C. C. A. 390, 391, 393, 395, and 69 Fed. 762, 764, 766; *Thompson v. Insurance Co.*, 104 U. S. 252, 259, 26 L. Ed. 765; *Insurance Co. v. Mowry*, 96 U. S. 544, 547, 24 L. Ed. 674; *Assurance Co. v. Norwood*, 57 Kan. 610, 611, 613, 47 Pac. 529-532; *Association v. Kryder*, 5 Ind. App. 430, 435, 31 N. E. 851; *Union Nat. Bank v. German Ins. Co.*, 18 C. C. A. 203, 71 Fed. 473; *Casualty Co. v. Teter*, 136 Ind. 672, 673, 676, 679, 36 N. E. 283; *Burt v. Bowles*, 69 Ind. 1; *Clodfelter v. Hulett*, 72 Ind. 137; *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, 290, 19 L. Ed. 349; *Insurance Co. v. Lyman*, 15 Wall. 664, 21 L. Ed. 246; *Pearson v. Carson*, 69 Mo. 550; *Insurance Co. v. Nelberger*, 74 Mo. 167; *Lewis v. Insurance Co.*, 39 Conn. 100."

Nor is it any excuse for a party who has an opportunity to read or to know the contents of his agreement, or any ground for an abrogation or modification of it, that he relied upon the statement or interpretation of it given by the other party to the contract, and failed to read it. The very purpose of a written agreement is to supersede testimony of its terms, and to shut out the uncertainties

that arise from the failing memories and changing interests of living witnesses. Under the law the writing is the highest evidence of the subject, the extent, and the manner of the contracting. If written agreements may be swept away and disregarded at will by the parties to them, upon simple proof that they did not read them, and that the other parties to them told them when they were made that they contained terms different, or had legal effects variant from their actual terms and effects, then the functions of written contracts are gone, and the salutary rule that they must prevail over prior and contemporaneous verbal negotiations, arrangements, and representations as to their contents and effects is subverted. The argument that a false statement of the contents or effect of a contract to one who has possession of it, and is about to accept or make it, constitutes a fraud which will avoid the written agreement, and estop the party who makes the statement from denying its truth, is conclusively answered by the unanimous opinion of the supreme court in *Insurance Co. v. Mowry*, 96 U. S. 544, 547, 24 L. Ed. 674. That court said:

"The doctrine of estoppel is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect if a party who, by his statements as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment. But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention or conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. The doctrine, carried to the extent for which the assured contends in this case, would subvert the salutary rule that the written contract must prevail over previous verbal agreements, and open the door to all the evils which that rule was intended to prevent. *White v. Ashton*, 51 N. Y. 280; *Bigelow, Estop.* 437-441; *White v. Walker*, 31 Ill. 422; *Faxon v. Faxon*, 28 Mich. 159."

The statement of the terms or effect of a written agreement which one has in his hands and is about to make, and which he may read at his will, is not calculated to deceive, and is not an artifice or a fraud that will excuse his ignorance of its contents, because he has the patent means to verify the averment at his command. It is the written contract itself, and not any one's statement of its contents or of its effect, which binds the parties, and the law charges every party to an agreement with knowledge of this fact. In view of it, it is the duty of every man to see to it that every writing he signs or receives fairly and fully expresses his contract. He owes this duty to the other party to the contract, who generally acts, and often changes his position, in reliance upon it; and he owes it to the public, which, as a matter of policy, treats the writing as proof of the terms of the agreement. If he fails to discharge this duty,—if he fails to read his contract,—his ignorance of its contents is the result of his own negligence; and, in the absence of fraud or mutual mistake, he is thereby estopped from showing that its terms



are other than those expressed by the writing. *Railway Co. v. Belliwith*, 55 U. S. App. 113, 119, 28 C. C. A. 358, 361, 83 Fed. 437, 440; *Green v. Railway Co.*, 35 C. C. A. 68, 92 Fed. 873, 876. Insurance policies do not constitute exceptions to this rule. *Insurance Co. v. Henderson*, 32 U. S. App. 536, 540, 18 C. C. A. 390, 393, 395, 69 Fed. 762, 766, 768; *Morrison v. Insurance Co.*, 69 Tex. 353, 359, 6 S. W. 605; *Quinlan v. Insurance Co.*, 133 N. Y. 356, 365, 31 N. E. 31; *Wilcox v. Insurance Co.*, 85 Wis. 193, 55 N. W. 188; *Fuller v. Insurance Co.*, 36 Wis. 599, 604; *Herbst v. Lowe*, 65 Wis. 316, 26 N. W. 751; *Hankins v. Insurance Co.*, 70 Wis. 1, 2, 35 N. W. 34; *Herdon v. Triple Alliance*, 45 Mo. App. 426, 432; *Palmer v. Insurance Co.*, 31 Mo. App. 467, 472; *Insurance Co. v. Yates*, 28 Grat. 535, 593; *Ryan v. Insurance Co.*, 41 Conn. 168, 172; *Barrett v. Insurance Co.*, 7 Cush. 175, 181; *Holmes v. Insurance Co.*, 10 Metc. (Mass.) 211, 216; *Insurance Co. v. Swank*, 12 Ins. Law J. 625, 627; *Insurance Co. v. Hodgkins*, 66 Me. 109, 112; *Insurance Co. v. Neiberger*, 74 Mo. 167, 173; *Beach, Ins.* (1895) § 414, and cases cited. The statement of the legal effect of the policies made by the agent of the insurance company when they were delivered does not abrogate or modify the terms or the meaning of the contracts. Nor can his prior statement to the same effect, made 14 days before, when the applications were signed, or his interlineation in the applications of the request to date the policies the same as the applications, after McMaster had signed them, and without his knowledge, have any greater effect. The reasons for this decision are stated in our opinion in the equity suit. The findings in the case at bar make still clearer the conclusion at which we arrived in that case, that prior to the delivery and acceptance of the policies there was no contract, and no intention to contract, to insure McMaster otherwise than by policies made and delivered upon the simultaneous payment of the premiums; for one of the findings of the court below is that when the application was made "it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies, and that the contract of insurance was not to take effect until the policies were delivered."

An ingenious argument for the modification of the policies has been constructed by counsel for the plaintiff in error on the assumption that when the applications were made there was an agreement to insure on the part of the company, and a contract to pay the first premiums on the part of the insured. The assumption is unsupported by the facts of the case. The only finding upon the subject is that which we have quoted. But this finding must be read in connection with the application, which was made a part of the findings, and in the light of the custom of life insurance companies to make no contracts to insure except by means of written policies, and upon the actual payment of premiums. The application contains this provision: "I do hereby agree as follows: \* \* \* (2) That inasmuch as only the officers at the home office of said company, in the city of New York, have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to,"

etc.,—from which it clearly appears that the delivery of the policies and the payment of the premiums were conditioned—First, upon the acceptance of the applications by the officers of the company at the home office, and the issue of the policies; and, second, upon the acceptance of those policies by the applicant when they were written. Moreover, there is no finding that the insurance company ever agreed to issue any policies or to insure the life of McMaster in any way when the applications were signed, or at any time before the policies were delivered. There was therefore no consideration for any agreement by McMaster to pay the premiums, and no binding contract on his part to do so, or on the part of the company to issue any policies or to insure his life until the policies were actually delivered and the first premiums were paid. Prior to that time the company was free to reject the applications, the insured was free to reject the policies, and the whole subject and the entire extent of the agreement found by the court is limited to the time when the premiums should be paid, and when the insurance should take effect, if the company should subsequently conclude to accept the applications and to issue the policies, and if McMaster should decide to accept them when written. This agreement is in accord with the customary course of the conduct of life insurance. The almost universal custom of that business is for the companies to make no contract and to incur no liability to insure the life of any man until a premium has been paid and a policy has been delivered. *Society v. McElroy*, 49 U. S. App. 548, 561, 28 C. C. A. 365, 372, 83 Fed. 631, 638; *Kendall's Adm'r v. Insurance Co.*, 10 U. S. App. 256, 263, 2 C. C. A. 459, 461, 51 Fed. 689, 691; *Heiman v. Insurance Co.*, 17 Minn. 153, 157 (Gil. 127); *Markey v. Insurance Co.*, 103 Mass. 78; *Hoyt v. Insurance Co.*, 98 Mass. 539, 543; *Markey v. Insurance Co.*, 118 Mass. 178, 194; 1 May, Ins. (3d Ed.) § 56.

There was therefore no contract of insurance until the policies were delivered to and accepted by McMaster. The applications were nothing but a proposition to take insurance. They were not contracts, but mere requests for, or a proposition to take, policies. The company was not bound to grant these requests or to accept the proposition. It had the right to reject them in toto, or to reject some parts of them and to make a counter proposition. It took the latter course. It rejected some parts of the applicant's proposition, and made a counter proposition. It proposed, by the five policies it sent to the deceased, to insure him on the terms written therein. But these policies were nothing but a proposition to insure, up to the time when McMaster accepted them and paid the first annual premiums. The proposition which these policies contained was clearly expressed, and its meaning was plain. The law, as we have seen, charged McMaster with knowledge of their terms, and, when he accepted them, estopped him from disputing these terms on the ground that he had not read them, because the policies were placed in his hands, and his failure to read them was his own negligence. On December 26, 1893, he accepted the policies and paid the first annual premiums. Then, for the first time, contracts to insure his life were made, and they were that the company would

insure it as long as he paid his annual premiums within one month of December 12th in each year. This brief review of the course and effect of the negotiations which preceded the acceptance of the policies shows how baseless is the claim that the statement of the agent when the policies were made, and his interlineation of the request to date the policies the same as the application, can either contradict or modify the written agreements. It is true that there is a rule of law that a company may be estopped from defeating a policy, when its agent has written into the application of the insured, without his knowledge, a false statement of a material fact which conditions the insurance. *Laclede Fire-Brick Mfg. Co. v. Hartford Steam-Boiler Inspection & Ins. Co.*, 19 U. S. App. 510, 521, 9 C. C. A. 1, 8, 60 Fed. 351, 358, 359; *Insurance Co. v. Robison*, 19 U. S. App. 266, 7 C. C. A. 444, 58 Fed. 723, 22 L. R. A. 325; *Insurance Co. v. Russell*, 40 U. S. App. 530, 553, 23 C. C. A. 43, 54, 77 Fed. 94, 106; *Insurance Co. v. Wilkinson*, 13 Wall. 222, 225, 20 L. Ed. 617; *Insurance Co. v. Mahone*, 21 Wall. 152, 22 L. Ed. 593; *Insurance Co. v. Snowden*, 12 U. S. App. 704, 7 C. C. A. 264, 58 Fed. 342; *Kausal v. Association*, 31 Minn. 17, 21, 16 N. W. 430; *Deitz v. Insurance Co.*, 31 W. Va. 851, 8 S. E. 616. But this rule has no application to the interlineation made by the agent in this case, because the request he wrote into the application misstated no fact which conditioned the insurance, but related solely to one of the terms of the contract, which was still the subject of negotiation, and concerning which each party had every opportunity after the interlineation was made to protect himself when the policies were presented for acceptance. The interlined request was immaterial, because it was not complied with by the company, and the policies do not rest upon it, because it did not relate to a fact which conditioned the insurance, but to a term of the policies which then was, and continued to be, the subject of negotiations, and because the company had the right, regardless of the request, to date the policies, which it tendered in its counter proposition, when, and to write them on such terms as, it saw fit, and the deceased had an equal right to reject them when they were offered to him. The statement of the agent to McMaster when the applications were signed that the policies would insure him for 13 months for only one premium, his interlineation of the request in the applications, and all the acts and negotiations before the policies were accepted, were alike immaterial, because they were merged in the written policies. The amount of the insurance, the amount of the premiums, the times when they should be paid, the time the insurance should continue, were all expressed there for the very purpose of avoiding any question respecting them, and the previous negotiations were incompetent to contradict or modify the terms of the policies. "The writing must, on familiar principles, be held to embody the entire contract obligations of the parties, and all negotiations and colloquies of the parties preceding the execution of the writing were immaterial." *Hotel Co. v. Wharton*, 49 U. S. App. 108, 112, 24 C. C. A. 441, 443, 79 Fed. 43, 45; *Insurance Co. v. Lyman*, 15 Wall. 664, 669, 21 L. Ed. 246; *Insurance Co. v. Mowry*, 96 U. S. 544, 547, 24

L. Ed. 674; *Insurance Co. v. McMaster*, 30 C. C. A. 532, 539, 540, 87 Fed. 63, 69, 71, and cases there cited.

It is earnestly contended, however, that, if the previous parol negotiations and the representation of the legal effect of the policies do not modify them, still they are ambiguous, and the familiar rules of construction, that contracts of doubtful meaning should be construed more strongly against their framers, and that the interpretation given them by the parties should prevail, are invoked to extend the life of these policies beyond the limit fixed by their terms. Rules of construction are valuable aids in the interpretation of ambiguous expressions, inconsistent provisions, and terms of doubtful meaning, in agreements; but they serve only to befog and mislead the judgment, to defeat the intentions of the parties, to destroy the contracts they actually make, and to make those for them to which they never consented, when they are applied to agreements whose terms are plain and whose meaning is clear. They aid in the interpretation of ambiguous contracts, but they must not be permitted to abrogate or modify those that are clear and certain. When the language of an agreement is plain, it must be held to mean what it expresses, and no room is left for construction. *Green v. Railway Co.*, 35 C. C. A. 68, 92 Fed. 873, 880; *Knox Co. v. Morton*, 32 U. S. App. 513, 516, 15 C. C. A. 671, 673, 68 Fed. 787, 789; *U. S. v. Fisher*, 2 Cranch, 358, 399, 2 L. Ed. 304; *Railway Co. v. Phelps*, 137 U. S. 528, 536, 11 Sup. Ct. 168, 34 L. Ed. 767; *Bedsworth v. Bowman*, 104 Mo. 44, 49, 15 S. W. 990; *Warren v. Paving Co.*, 115 Mo. 572, 576, 22 S. W. 490; *Davenport v. City of Hannibal*, 120 Mo. 150, 25 S. W. 364. Before we resort to rules of construction, let us see if there is any real ambiguity in the expressions, or doubt of the meaning, of these policies. It is said that the applications are parts of the contracts; that they declare that the premiums are payable annually; that the first premiums were not paid, and the policies did not take effect, until December 26, 1893; that consequently the second annual premiums would not be due under the applications until December 26, 1894; and that this conclusion is inconsistent with the provision of the policies that the second premiums should become due on December 12th in each year. The argument seems to us more specious than sound. The applications did not become parts of the contracts until the contracts were made. They were not made until December 26, 1893, when McMaster accepted the policies and paid his first premiums. It is a custom so universal, that it is within the knowledge of all men who have the slightest acquaintance with the business of life insurance, to date the policies and to fix the day of the payment of the annual premiums earlier in the month than the day of the month upon which the policies happen to be accepted and the first premiums happen to be paid, because the policies are issued and dated at the home office of the company, and some days usually intervene between that time and the date of their delivery to, and acceptance by, the insured. There was therefore nothing unusual or extraordinary in the fact that the annual due date of the premiums was somewhat earlier in the month of December than the day in that month

in which the policies were delivered to McMaster. Nor was the difference between policies, the due date of whose annual premiums was on December 12th, and policies the due date of whose premiums was on December 26th, very striking or important when the contracts were made, and when both parties expected the premiums to be paid according to their terms. The policies offered an extension of time of payment for 1 month in consideration of interest at the rate of 5 per cent. per annum, and that interest on the premiums on these policies for the 18 days between December 12th and December 26th amounts to only 26 cents in each year. Thus, it will be seen that the difference between the due date of the premiums and the date of the delivery of the policies was not extraordinary, and the difference between an annual due date of December 12th and one of December 26th was not crucial when the contracts were made, although now, through the failure of the insured to comply with the terms of his contracts, it has become grave. Turn now to the contracts. They consist of the applications and the policies, and these must be read together. The applications provide that the premiums shall be paid annually, or once in each year; but they do not provide on what day in each year they shall be paid, and they are dated on December 12, 1893. The policies are dated on December 18, 1893, and they read that they are made in consideration of the applications, "and in further consideration of the sum of twenty-one dollars, to be paid in advance, and of the payment of a like sum on the twelfth day of December in each year thereafter during the continuance of this policy," and that if the premiums are not paid within one month after December 12th in any year, the insurance shall cease. The words which we have quoted, which fix the dates when the premiums fall due, are not tucked away on the backs of the policies, but are written in plain terms upon their faces where a cursory reading would be certain to disclose them. The word "annually," which the applications contain, signifies once in a year, but it does not signify at what time in the year, and it is by no means inconsistent with a stipulation in the same instrument which fixes that time. Leases, promissory notes, mortgages, and many other contracts of like character, provide for the payment of interest and installments of various kinds annually, and also name the day in the years in which they shall be paid. One could not successfully maintain that these stipulations, or the mere fact that the first installments were not paid until some days after they were due by the terms of the agreements, could create any inconsistency or ambiguity in the terms, or any doubt of the meaning, of such agreements. The policies and applications, when read together, are of the same character. They provide simply that the premiums shall be paid annually on the 12th day of December in each year, and that, if they are not so paid within one month after they are due, the insurance shall cease. To our minds, these provisions present no inconsistency, no ambiguity, no doubt of their meaning, and no basis for the application of rules of construction. The terms of the policies are clear, and their meaning is certain.

Another position of counsel for the plaintiff in error is that this

judgment should be reversed because the service of the notice of the amount of the second annual premiums, of the date when they fell due, and of the effect of a failure to pay them, was not well pleaded, under the law of the state of New York upon this subject, which was made a part of the policies. But the question is not here for our consideration. The service of the notice was clearly averred, whether with such accuracy and particularity that the plea would have been impervious to a demurrer it is not necessary to inquire, because this pleading was not challenged below, and the court heard the evidence upon this subject without objection, and found that the notice was sent "in accordance with the requirements of the statutes of the state of New York." When a case is tried by a federal court without a jury, and the resulting judgment is brought by a writ of error to an appellate court for review, it is only "the rulings of the court in the progress of the trial of the case," and the sufficiency of the facts found to support the judgment, that can be reviewed. Rev. St. § 700. In such a case this is a court for the correction of the errors of the court below only. As the question of the sufficiency of this pleading was never brought to the attention of, or ruled upon by, the trial court, it certainly committed no error regarding it, and there is nothing in this point for us to review or correct. *Trust Co. v. Wood*, 19 U. S. App. 566, 571, 8 C. C. A. 658, 660, 60 Fed. 346, 348; *Bowden v. Burnham*, 19 U. S. App. 448, 8 C. C. A. 248, 59 Fed. 752; *Norris v. Jackson*, 9 Wall. 125, 127, 19 L. Ed. 608; *Insurance Co. v. Folsom*, 18 Wall. 237, 249, 21 L. Ed. 827; *Cooper v. Omohundro*, 19 Wall. 65, 69, 22 L. Ed. 47; *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373. The judgment below is affirmed.

THAYER, Circuit Judge. I concur in the order affirming the judgment below, for the following reasons: Until the premium was paid on the policy in suit, and the policy was delivered, no agreement had been entered into which was binding either upon the insurer or the insured. Up to that point either party had the right to retire from the negotiation, without liability to the other. When the policy was delivered, and the negotiation was thereby consummated, the policy became the best, and, except in case of its loss or destruction, the only, evidence of the agreement between the parties; and, in the absence of fraud or mistake, neither party can be permitted to say that he did not assent to it. The acceptance of the policy by the insured is the highest evidence of his assent. The policy, in terms, provided that the subsequent premiums thereon during its continuance should be payable on December 12th annually, but that a grace of one month would be allowed after the premium fell due, on condition that interest at the rate of 5 per cent. was paid for the time the premium might remain overdue. These provisions of the policy were definite and certain, and the insured, in view of his acceptance and retention of the policy, is presumed, in law, to have assented to them. It is true that he was privileged to avoid the provision of the policy fixing December 12th as the

annual premium day, by proof of fraud on the part of the insurance company or its agent; but I do not understand that the finding by the learned judge of the trial court establishes any such fraud as will, in law, serve to overturn the plain language of the contract. It is not claimed that the agent's request to the company to have the policy dated, when it should be issued, as of the same day as the application, was made with an intent to defraud the insured. Neither did the trial court find that the agent intended to deceive or mislead the insured when, in response to the inquiry whether the policy was as represented, and would insure him for 13 months, he answered in the affirmative. Bearing in mind that the policy contained a stipulation allowing 1 month after each subsequent premium became due within which it might be paid, the company's agent doubtless believed that the policy did secure insurance for 13 months, counting from the premium day named in the policy, and that it was in all respects such a contract as he had engaged to deliver. The findings, to my mind, do not create a suspicion of intentional deceit either on the part of the insurance company or its agent. Moreover, the finding shows that, even if the deceased had not before read his policy, he was distinctly advised at least a week before his death, which appears to have occurred on January 18, 1895, that by the terms of the policy the period of grace limited therein would expire on January 11, 1895, the premium having become due on the 12th day of the preceding month. The finding does not disclose that he made any objection at the time to this construction of the policy, which was clearly in accordance with its terms. It is a sound rule of law, founded on the highest considerations of public policy, which requires a person to read a contract before signing or accepting it, if he can read. Unless this rule is enforced, written agreements of all kinds will become valueless as instruments of evidence. The duty resting upon one to read a contract before signing or accepting it is not so imperative, however, that, if omitted, it will render one bound under all circumstances by an agreement which he has signed or accepted. If one party to an agreement resorts to any fraud, trickery, or artifice to prevent the opposite party from reading it before signing or accepting it, or knowingly makes any false representations concerning the terms of the agreement, or intentionally and with design to overreach the opposite party so drafts a contract that it does not express the terms of the previous oral understanding or agreement,—in all of these cases the negligence of one who signs or accepts a contract without reading it is more excusable than the fraud of the opposite contracting party. But when the evidence shows no fraud of the kind last indicated, nor mistake in drafting it, it is a wholesome rule which holds a party bound by a contract which he has signed, or accepted and retained in his possession for a considerable period, and which prohibits him from avoiding its provisions by pleading his own negligence. In the case at bar I am of opinion that no such fraud is disclosed by the findings as would justify a court in ignoring the plain language of the policy.

CALDWELL, Circuit Judge (dissenting). The right decision of this case does not depend upon any technicality of law. It is a case in which common sense and common honesty and legal sense and legal honesty are at one. It arises upon a contract of life insurance, which must be interpreted according to the settled canons for the construction of such instruments, and the determination of the rights of the parties thereunder. In every contract of insurance, the law prescribes to each party the observance of the strictest integrity and truthfulness. Insurance law, when rightly expounded, is always in harmony with honesty and sound morality. At the very beginning of insurance law in England there was infused into it, through the influence of the civil law, a different spirit from that which prevailed in other branches of the common law. Neither the maxim *caveat emptor* nor its spirit has found a lodgment in the law of insurance. If there is any part of our jurisprudence which produces exact justice in each individual case, it is the law of insurance. It is founded on truthfulness, honesty, and fair dealing. It never affords shelter or protection for fraud, falsehood, or deception. In no other branch of the law—not even the law merchant—have the courts shown such merited deference to the rules, usages, and customs that prevail in the conduct of business. Insurance contracts are uniformly interpreted and enforced in harmony with the usages, business methods, and common sense of honest business men, and the moral sense of all reputable men.

At the threshold of the case it would be well to call attention, once for all, to certain fundamental and indisputable propositions: (1) That the facts found by the lower court must be accepted by this court as absolute verity; (2) that the failure to find any fact, or the insufficient or imperfect finding of any fact, essential to maintain the judgment of the lower court, is fatal to it; (3) that a statement of the legal effect of a document or paper which is not in the record, nor made part of the findings, nor its contents anywhere disclosed, is not a finding of fact, but a mere conclusion of law upon the legal effect of an undisclosed document, and hence of no effect; (4) that Smith, who was soliciting these policies for the company, is, under the Iowa law, the agent of the company, "anything in the application or policy to the contrary notwithstanding," and his statements and agreements, in the course of his business, in soliciting and delivering the policies and receiving the premiums, are, in law, the statements and agreements of the company itself. *Society v. Clements*, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497; *Indemnity Co. v. Berry*, 1 C. C. A. 561, 50 Fed. 511; *Cook v. Association*, 74 Iowa, 746, 35 N. W. 500; *Insurance Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87, 33 L. Ed. 341; *Insurance Co. v. Russell*, 23 C. C. A. 43, 77 Fed. 94.

Contracts of life insurance are *sui generis*. A policy consists of a printed form which the company has framed and adopted for its use, and uses in all cases without change or variation. All that is necessary to be done to make one of these policies a completed instrument is to insert in the blanks left for that purpose the name of the insured, the term of insurance, the amount and time of pay-



ment of the premium, the date of the policy, and the signature of the company. The insured never sees the policy during its preparation, and never signs it. What he does see and sign is an application for the policy. This application is also on a printed form, which the company has framed and adopted for its use, and which it uses in all cases, and which is made part of the policy, and is as obligatory on the parties as any other part of the policy. This application contains numerous questions which the insured must answer, and warrant his answers "to be full, complete, and true." The insured did this, and it is not claimed that his answers were not "full, complete, and true." But the contention is that this duty to answer questions truthfully is not reciprocal; that, while the applicant for insurance must answer the company's questions truthfully, the company has the privilege of knowingly returning false answers to the applicant's questions, and profiting by such false answers at the expense of the beneficiary in the policy. From the beginning to the end of the majority opinion, a policy of insurance is treated as though it were a contract for which there was no precedent, and related to a subject about which neither of the parties ever before contracted, and in the preparation of which each party participated and had an equal voice, and the provisions of which were as well known to one party as to the other, and which was signed by both; and the court applies to a contract of insurance rules as harsh and technical as any that would be applied, under the rule of caveat emptor, to a trade between two horse jockeys.

What are the facts established by the findings? The seventh finding of fact is:

"By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company, and Frank E. McMaster, when the application for insurance was signed it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies, and that the contract of insurance was not to take effect until the policies were delivered."

Here we have a definite, precise, and concluded contract as to when the policies were to take effect. They were "not to take effect until the policies were delivered." This oral agreement as to when the policies should take effect was in complete accord with the express stipulation of the application, which is:

"That any policy which may be issued under this application shall not be in force until the actual payment to and acceptance of the premium by said company."

The premiums were paid and the policies delivered on the 26th day of December, 1893, and from that date, and not before, the policies were "in force," by the explicit provisions of the policies themselves, as well as by the terms of the oral agreement. The date when the policies took effect being settled beyond all cavil, the term or period of their duration is the next question. Each policy provided that:

"After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of 5 per cent. per annum for the number of days during which the

premium remains due and unpaid. During the said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company; and, in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance."

When had the policies "been in force three months"? As we have seen, by the terms of the oral agreement the policies were not to take effect until they were delivered, and the policies themselves stipulated that they should not be in force until the actual payment to and acceptance of the premiums by the company, which was coincident with the delivery of the policies. It is clear, then, that the policies went into effect and were "in force" on the 26th day of December, 1893, and that 3 months from that date, the policies having remained in force, the insured became entitled to the grace of 1 month in the payment of subsequent premiums, which extended the time of the payment of the next annual premiums to the 26th of January, 1895. The insured died on the 18th of January, 1895,—8 days before the policies could be declared forfeited for the nonpayment of the second annual premium. There was never any thought or suggestion that the policies would not insure the life of the applicant for 13 months from the date of the payment of the premiums. Confessedly, the period of 12 months and 17 days was never in the mind of either party, or ever thought of by either party. From the very inception of the business, it had been represented and understood that the policies would insure the life of the applicant for 13 months from the time of the payment of the premiums and the delivery of the policies. This is conclusively shown by the third and fourth findings of fact, which are:

"(3) That in December, 1893, F. W. Smith, an agent for the New York Life Insurance Company, residing at Sioux City, Iowa, solicited Frank E. McMaster to insure his life in that company, and, as an inducement to taking the insurance, pressed upon McMaster the provision adopted by the company, and set forth in the circulars issued by the company, and printed on the back of the policies issued by the company, under the heading 'Benefits and Provisions Referred to in This Policy,' in the following words: 'After this policy shall have been in force three months, a grace of one month will be allowed in payment of subsequent premiums, subject to an interest charge of five per cent. per annum for the number of days during which the premium remains due and unpaid. During said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company; and, in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance.' (4) Relying on the benefits of this provision, and in the belief that if he accepted a policy of insurance upon his life from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on, and attached to the petition; the same being made part of this finding of facts."

The insured wanted the full benefit of the 13-months insurance, reckoning from the date of the payment of the first annual premiums. Upon this subject he had been exacting and tenacious from the beginning, and to that end had required the agent to agree that the contract of insurance should "not take effect until the policies were delivered." And, as we have seen, this condition was carried

into and repeated in his application, which declares the policy "shall not be in force until the actual payment of the premium." But this was not all the insured did to make it sure that he would be insured for 13 months from the payment of the premiums and the delivery of the policies. The ninth finding of fact is:

"The five policies, inclosed in envelopes, on or about December 26, 1893, were taken by F. W. Smith, the agent of the defendant company, to the office of Frank E. McMaster, who asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him; and thereupon McMaster paid the agent the full first annual premium, or the sum of twenty-one dollars, on each policy, and, without reading the policies, he received them and placed them away. The agent did not in any way attempt to prevent McMaster from reading the policies, and he had the full opportunity for reading them, but in fact did not read them, and accepted them on the statement of the agent of the company, as hereinabove set forth."

The question propounded by the applicant to the insurance agent was not an idle inquiry, and the answer to it not a mere casual statement. Nor was the answer, as is claimed, "preliminary information," or a mere "opinion" as to the legal effect of the policies. There was nothing preliminary about it, and it was not a mere expression of opinion, but a clear, positive, and distinct statement of a material, existing fact. The answer given by the agent can only appear on paper in words, but it was doubtless accompanied by "the story of looks and message of voices," common with soliciting agents, which cannot be put on paper, but which add force and emphasis to one's utterances, and induce confidence in his assurances. The most persuasive and effective falsehoods are told in acts, not in words. But it is immaterial whether the answer of the agent was inspired by a fraudulent purpose, or was the result of an honest mistake. Confessedly, the minds of the parties never met and agreed upon a contract of insurance for twelve months and seventeen days. A mistake, no more than a fraud of the company or its agent, can bind the insured to a contract he never made.

No claim is made that the policy conforms to the terms of the application. The contention of the majority is that after receiving the application the insurance company "made a counter proposition," and it is upon this alleged counter proposition, differing, as is confessed, in a material respect from the terms of the application, that it is sought to uphold the clause of the policies over which this controversy arises. This claim is thus stated in the majority opinion:

"The applications were nothing but a proposition to take insurance. They were not contracts, but mere requests for, or a proposition to take, policies. The company was not bound to grant these requests or to accept the proposition. It had the right to reject them in toto, or to reject some parts of them and to make a counter proposition. It took the latter course. It rejected some parts of the applicant's proposition, and made a counter proposition."

When, where, and how did the company make "a counter proposition" to that contained in the application? There is no finding of fact to that effect, and for the facts in this case this court cannot look beyond the facts found by the lower court. It can add nothing to and take nothing from the facts so found. The application was on the company's standard form; and the propositions and con-

ditions contained therein were the propositions and conditions the company itself had framed, and to which it required the assent of the applicant for insurance, as a condition of issuing the policies. And when the applicant subscribed to the application and delivered it to the company, so far as related to the conditions and stipulations therein contained, the minds of the parties had met and were at one. It is not true that the company ever advised the insured that it had changed the propositions and conditions which it had itself inserted in his application, or that it would not insure the applicant on the basis of the propositions and conditions contained in the application. Nor did the company, at any time or place, offer or propose any other terms for the insurance. On the contrary, upon the receipt of the application, it made out, signed, and transmitted to its agent policies of insurance, which, the agent assured the applicant, conformed to their agreement and the requirements of the application. But in violation of the agreement that the policies would insure the applicant for 13 months from the date of their delivery and the payment of the premiums, and in violation of the terms and conditions of the application, which guaranteed policies for the same period, the insurance company had secretly, and without the knowledge of the insured, inserted a clause in the policies which reduced the term of insurance to 12 months and 17 days, and when it delivered the policies this fact was not only concealed from the insured, but he was told by the agent that the policies insured him for 13 months; and this is what the majority of the court call making "a counter proposition." What the court is pleased to call "a counter proposition" was a fraudulent concealment of the fact that the policies varied in a material respect from the agreement made with the agent, and the requirements and conditions of the application. A counter proposition is an offer, openly made by one of the parties, of something for consideration and acceptance as a substitute for, or a modification of, a proposition previously made by the other party.

It is further said in the opinion of the court that "the word 'annually,' which the application contains, signifies once in a year, but it does not signify what time in a year." But the application provided that the policies should not be in force until the first annual premiums were paid, and they were paid on the 26th of December, 1893. That this was the payment of annual premiums is conclusively established by the finding of the court that it was the payment in full of the "first annual premium." Obviously, then, the next annual premium would be due one year from that date. "Annual," in this connection, means on the recurrence of the same day in each year thereafter, and not at some other or uncertain time during the year. Therefore, when the company inserted in the policy a clause making the premiums payable at a different time, it inserted a provision in direct conflict with the terms of the application and the agreements of the parties. It is a fact found by the court that:

"There now appears on the face of the application, interlined in ink, the words, 'Please date policy same as application.' These words were not in the

application when it was signed by McMaster, but after the signing thereof they were written into the application by F. W. Smith, the agent of the New York Life Insurance Company, without the knowledge or assent of Frank E. McMaster, and were so written by the agent in order to secure to the agent a bonus which the company allowed to agents for business secured during the month of December, 1893; and it does not appear that Frank E. McMaster ever knew that these words had been written into the application, and it affirmatively appears that he had no knowledge thereof when the application was forwarded to the home office of the company, and was acted on by the company."

When the insured signed the application and delivered it to the agent, it was a completed document. It was the insured's application, and neither the company nor its agent could lawfully add to or take from it. The company could accept or reject the application as made, but it could not alter it. The insertion of this clause by the insurance agent after the insured had signed and delivered the application, and without his knowledge and consent, was an illegal act, if not a plain and palpable forgery. It was an act which cannot prejudice the insured or benefit the company. No one can profit by his unauthorized alteration of an instrument after the discovery of the fact. The company evidently understood by this clause interpolated into the application by the agent that he wanted the 12th day of December fixed as the date for the payment of the annual premiums, and the company accordingly fixed that date in the policies as the time for the payment of the annual premiums, and dated the policies their true date, namely, the 18th of December. By this extraordinary and unheard-of action the insured is made to pay a premium on the policies from the 12th of December, whereas the policies were not signed or executed by the company until the 18th of December, and by their terms did not take effect until the payment of the first annual premiums, on the 26th of December. Beyond all doubt, the applicant was not insured from the 12th of December, and yet from that day it claimed the 13 months must be reckoned, and we are told that they are policies, not for 13 months, but for 12 months and 17 days,—a most uncommon term for life policies, which are rarely or never issued for a fraction of a month.

In *Society v. McElroy*, 28 C. C. A. 365, 83 Fed. 631, the jury found there was a valid verbal agreement of life insurance, and that time was given for the payment of the premium, but a majority of the court in that case said:

"The almost invariable custom is for the companies to make no contract and to incur no liability to insure the life of any man until a premium has been paid. Accordingly, where no policy of life insurance has been issued, and no premium has been paid, there is a strong presumption that there was no contract, and no intention to contract otherwise than by a policy made and delivered upon the simultaneous payment of a premium."

—And the verdict of the jury was set aside, and a recovery denied. But when, in this case, the insured claims and proves by an express provision of his application, now a part of the policies, that the policies were not to be in force for any purpose until the premiums were paid and the policies delivered, the court holds that as against the insured, and for the purpose of shortening the term of insur-

ance and defeating a recovery on the policies, the policies were in force 6 days before they were signed, and 14 days before they were delivered and the premiums paid. It is not pretended, however, that the applicant's life was insured during this time. The policies were only in force to shorten the term of his insurance, and, to that extent, relieve the company from liability. As applied by the court in this case, there is a want of reciprocity in the rule laid down in *Society v. McElroy*, supra, which does not commend it to our sense of right and justice. Judge Shiras, in his opinion, forcibly points out the injustice and unreasonableness of this claim. He says:

"If the theory contended for on behalf of the company is correct, it follows that by the device of making the second and subsequent payments due on the 12th day of December, instead of the 18th, the date of the policies, the insured and his estate are deprived of the benefit of the month's grace which McMaster was assured he would be entitled to, when he applied for the insurance. Furthermore, if this construction of the policy is sustained, it makes it possible for the company, after using the month's grace as an arrangement to secure insurance, then to escape the obligation by the simple device of so writing the policies as to make the second payments come due a month in advance of the date of the policies." *McMaster v. Insurance Co. (C. C.)* 78 Fed. 83.

And again:

"Can there be any doubt that when McMaster received the policies dated December 18, 1893, and paid one year's premiums thereon, he was justified in assuming that, if he died within one year from the date of the policies, his estate would receive the indemnity which it was his purpose to secure, even though the policies did not contain the provision giving one month's grace on subsequent payments. Suppose McMaster had died on the 1st of December, 1894,—less than one year from the date of the policies; would it be open to the company to deny liability on the policies on the ground that it had put in the policies a provision that the second premiums were payable on October 1, 1894? That is exactly the claim now made by the defendant company. If the company, after accepting a proposition to insure McMaster on the basis of annual premiums, can make the second premiums payable in six days less than a full year, which is its claim in the present case, it could have made the second premiums payable in three or six months, and would thus change the policy from one wherein the premiums were payable annually into one wherein the premiums were payable quarterly or semiannually." *McMaster v. Insurance Co. (C. C.)* 80 Fed. 40.

The interpolated clause in the policies contradicts and is inconsistent with the stipulations and conditions of the application, which are a part of the policies, and the only part which the assured ever saw and assented to. It is a settled canon for the construction of policies of insurance that when they contain contradictory, conflicting, or inconsistent provisions, effect will be given to the provisions most favorable to the insured, and, in cases where their construction is doubtful, the construction most favorable to the insured will be adopted. *First Nat. Bank v. Hartford Fire Ins. Co.*, 95 U. S. 673, 24 L. Ed. 563; *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; *Moulor v. Insurance Co.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447; *Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; *Insurance Co. v. McConkey*, 127 U. S. 661, 666, 8 Sup. Ct. 1360, 32 L. Ed. 308; *Thompson v. Insurance Co.*, 136 U. S. 287, 297, 10 Sup. Ct. 1019, 34 L. Ed. 408; *Insurance Co. v. Coos Co.*, 151 U. S. 452, 462, 14 Sup. Ct. 379, 38

L. Ed. 231. No notice is taken of this rule by the majority of the court, although it is exactly applicable to this case, and decisive of it. In *McGlother v. Accident Co.*, 32 C. C. A. 318, 89 Fed. 685, the majority of this court characterized this fundamental rule of construction, which has been repeated, affirmed, applied, and enforced by the supreme court of the United States in scores of cases, as a "much-abused rule." As the rule has been more frequently and effectively applied by the supreme court of the United States than any other court, it may be inferred from the remark quoted that the doctrine of the supreme court does not meet the approval of the majority of this court, and will not be applied by them in any case. Certain it is that they have done more than ignore the rule in this case,—they have inverted it; and, where the provisions of the policy are inconsistent or conflicting, they have given effect to the provisions most favorable to the insurance company, and, wherever the meaning of the policies is doubtful, they have resolved the doubt in favor of the insurance company.

The company made no objection to the stipulations and conditions of the application, or to the agreement made with its agent, and made no counter proposition, but proceeded to issue and tender its policies upon the application as made. When the policies were tendered under these circumstances, the insured would have been entirely justified in paying the premiums and accepting the policies without reading them. He had a right to presume that the period of insurance named in the policies conformed to the agreement and to the stipulations and conditions of his application; and to that effect are the authorities, as we shall presently see. When the period of insurance has been agreed upon, it is the almost universal usage for business men to pay the premium and accept their policies without reading them. Under the doctrine laid down by the majority, if a man were to make a written application for a policy of insurance on his house for 1 year, and the company should write the policy for 1 month only, and tender that, and receive a year's premium, and the insured, going on the reasonable assumption that the policy conformed to his application, should accept the policy and put it away in his safe without reading it, his policy would be effective for 1 month only. But the insured in this case did not, as he might well have done, rest on the reasonable assumption that the policies insured him for the period of 13 months, as agreed upon, and called for by the stipulations and conditions of his application, but he applied to the company's agent to know if they did so insure him, and was answered that they did; and thereupon, in reliance upon the truth of this answer, and in the belief that the policies insured him for 13 months, as his application called for, he paid the first annual premiums, and laid the policies away without reading them. Upon this state of the case the court holds that, by the mere acceptance and retention of the policies without reading them, the insured is estopped to show the truth of the transaction. The question is not whether the finding of facts establishes the mistake or fraud, but whether, the mistake or fraud being conclusively established by the finding of facts, the court will declare that the

insured is estopped from availing himself of the truth by the mere receipt of the policies and putting them away without reading them, in reliance upon the truth of the agent's answer and the stipulations of his applications. It must not be forgotten that there is no claim or pretense that the policies in fact expressed the contract of the parties. The finding of facts precludes any such claim. The contention is that, by receiving the policies under the circumstances mentioned, the insured is "conclusively presumed" to have assented to all their provisions, and will not be heard to say to the contrary. The rule for the application of estoppels is thus inverted and applied in favor of the company, when it is obvious that it is the company that is estopped from setting up the defense relied on. Estoppels are invoked to prevent and relieve from fraud, not to shield and protect it. The most frequent occasion for invoking the doctrine is where one party makes a representation upon the faith of which the other party acts and pays money, or changes his position, or refrains from doing something he otherwise would do. In all such cases the party making the representation is estopped from contesting its truth. It will be perceived at a glance that the estoppel in this case applies to the insurance company, and not to the insured. The insured made no representation to the company, and the company parted with no money or other valuable thing on the faith of any false statement that he made. Nor did it do or omit to do anything on account of the insured putting away the policies without reading them. But, on the faith of the solemn assurance of the company's agent that the policies insured him for 13 months, the insured parted with his money, and refrained from reading his policies and from taking out policies in other companies. Upon the faith of the truth of the agent's representations, the insured rested confidently in the belief that he had made provision for his family in the event that he died at any time within 13 months from that date. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. *Dickerson v. Colgrove*, 100 U. S. 578, 580, 25 L. Ed. 619. It is said that the insured was guilty of culpable negligence in placing any reliance on the truth of the agent's statement. But the law will not hear any man complain that another has too implicitly relied on the truth of things he has himself stated. He will not be heard to say:

"It is true, I misrepresented the facts to the insured, and by so doing induced him to pay for and accept, without reading, policies which insured him for a less period than that agreed upon. But he ought not to have trusted to my word. He ought to have known I was unworthy of belief."

The rule of the court obliterates all distinction between truth and falsehood in the dealings of men. It establishes the doctrine that the law has no partiality for truth, and no prejudice against falsehood. It applauds and approves an end obtained by falsehood and fraud, as a high exhibition of business tact and skill, and reserves



its censures for the innocent and trusting victim of the fraud, because, forsooth, he accepted as true the word of the man he was dealing with; and it permits the party who made the false representation to avail himself of his own falsehood, to the prejudice of the man who trusted him. It makes confidence and bunco games respectable, and elevates the sharper who practices them to a plane of equality with honest and reputable business men. It is a rule at which all rascaldom will rejoice, and all honest and trustful men take alarm. It stimulates falsehood and deceit by the grant of impunity, and destroys confidence among men. It converts written contracts, which were designed to prevent fraud, into the most powerful agencies for the perpetration and protection of fraud. In this case the insurance company, in effect, receives a reward of \$5,000 for its falsehood and fraud, and a penalty of \$5,000 is imposed upon the beneficiary named in the policy, because the insured trusted in the truth of the company's representations.

It is undoubtedly true that a written contract is presumed to express the agreement of the parties, but this is not a conclusive presumption, and the exceptions to the rule are as well understood and clearly defined as the rule itself. No writing, however solemn, can be made a vehicle for fraud, or convert a mistake into verity. The case at bar, upon the facts found, falls within the well-defined exception to the rule, as shown by all the authorities. No apology is made for demonstrating the truth of this assertion by somewhat extended quotations from controlling authorities.

In *Insurance Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617, the insured had signed and delivered to the insurance company an application for a life policy, in which the agent of the company had written down a false answer to a question which the insured had declined to answer. The insured, without knowing that the agent had written down an answer to this question, signed the application without reading it, and it was made the basis of the policy which was issued. The company made the same contention in that case that the company makes in the case at bar, namely, that parol evidence could not be admitted to prove the facts, and that the insured was conclusively bound by the contents of his written application. But the supreme court held that the act of the agent in writing down the answer was to be imputed to the company, and that it could not estop the insured from showing the facts by parol evidence by its own fraudulent act, though he had signed the application without reading it. In delivering the unanimous judgment of the court, Mr. Justice Miller said:

"Passing then to the second branch of the case: The defendant excepted to the introduction of oral testimony regarding the action of the agent, and to the instructions of the court on that subject, and assigns the ruling of the court as error, on the ground that it permitted the written contract to be contradicted and varied by parol testimony. The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate, and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconception, the rule merits the eulogies it has re-

ceived. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and, where this has been the result of accident or mistake or fraud, the principle has been long recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing, would, as was said in regard to the analogous rule known as the 'Statute of Frauds,' become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. \* \* \* It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, 'estoppels in pais.' The principle is that, where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not, in a court of justice, be permitted to avail himself of that advantage. And, although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood, and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim. It has been applied to the precise class of cases of the one before us in numerous well-considered judgments by the courts of this country."

In *Insurance Co. v. Hearne*, 20 Wall. 494, 22 L. Ed. 398, the terms of the policy were agreed upon by letter. The policy issued varied from the agreement. The insured accepted and retained it without reading it, and the company contended that, having done so, he was bound by its provisions, although they differed from the terms of the agreement; but the court said:

"The policy was intended to put the contract in a more full and formal shape. The assured was bound to read the letters of the company in reply to his own with care. It is to be presumed he did so. He had a right to assume that the policy would accurately conform to the agreement thus made, and to rest confidently in that belief."

The company in that case seems not to have thought of the expedient of calling the policy, which varied from the terms of the agreement, a "counter proposition."

In *Palmer v. Insurance Co.*, 54 Conn. 488, 509, 510, 9 Atl. 248, the court say:

"But if the underwriter solicits a person to purchase of him indemnity against loss by fire; and if they unite in making a written contract of all the terms, conditions, and stipulations which are to become a part of, or in any way affect, the contract; and if the underwriter promises to make and sign a copy thereof, and deliver it, as the evidence of the terms of his undertaking; and if a material and variant condition is by mistake inserted, and the variant contract is delivered, and the stipulated premium is received and retained,—the court will not hear the claim that he is entitled to the benefit of the variant condition, when the other party had neither actual nor imputed knowledge of the change. In his promise to make and deliver an accurate copy, there is justification before the law for the omission of the other party to examine the paper delivered, and for his assumption that there is no designed variance. A man is not, for his pecuniary advantage, to impute it to another, as gross negligence, that the other trusted to his fidelity to a promise of that character. The rule of law that no person shall be permitted to deliver himself from contract obligations by saying that he did not read what he signed or accepted is subject to this limitation, namely, that it is not to be applied in behalf of any person who by word or act has induced the omission to read."

In *Hay v. Insurance Co.*, 77 N. Y. 235, Chief Justice Church, speaking for the court of appeals, said:

"It was bad faith on the part of the defendant to change so radically the terms of the policy, and deliver it as a policy simply renewing the old one, without notice of the change. A party whose duty it is to prepare a written contract, in pursuance of a previous agreement to prepare one materially changing the terms of such previous agreement, and deliver it as in accordance therewith, commits a fraud which entitles the other party to relief, according to the circumstances presented. \* \* \* Policies of fire insurance are rarely examined by the insured. The same degree of vigilance and critical examination would not be expected or demanded as in the case of some other instruments. It is found that the plaintiff did not in fact examine the policy until after the fire, when, for the first time, he was informed of the peculiar terms of the provision."

In *Bidwell v. Insurance Co.*, 16 N. Y. 266, the court said:

"That the contract of insurance agreed to be made by the defendants was such in its terms as the plaintiffs have alleged in their complaint, has been found by the judge, and is conclusive upon us. The fact on which the appellants rely—that the policy actually made out was in the plaintiffs' hands for a considerable time, and until after the loss had occurred—was a circumstance to be weighed by the judge, as bearing upon the truth of the plaintiffs' allegation that the policy did not pursue the contract. It has undoubtedly been considered by the judge, and his judgment has been given, notwithstanding that circumstance, in favor of the plaintiffs. There is no rule of law which fixes the period within which a man may discover that a writing does not express the contract which he supposed it to contain, and which bars him of relief for delay in asserting his rights, short of the period fixed by the statute of limitations."

In *Institution v. Burdick*, 87 N. Y. 40, the court of appeals said:

"It has certainly never been announced as the law in this state that the mere omission to read or know the contents of a written instrument should bar any relief by way of a reformation of the instrument on account of mistake or fraud. It is the general rule that where a written instrument fails to conform to the agreement between the parties, in consequence of the mutual mistake of the parties, however induced, or the mistake of one party and fraud of the other, a court will reform the instrument so as to make it conform to the actual agreement between the parties."

The court then cites the case of *Botsford v. McLean*, 45 Barb. 478, where, in a transaction, one of the parties was to execute four notes, bearing interest. He executed and delivered four notes, but only two of them bore interest. The payee, without reading the notes, accepted them and put them away. The court proceeds:

"The vendor, seeing that two of the notes were on interest, assumed that the other two were also on interest, and accepted the same, believing that all were properly drawn. The purchasers, knowing that two of the notes were so drawn as not to bear interest, purposely abstained from calling the vendor's attention to the fact. It was held that there was a mistake on one side, and fraud upon the other, and that the two notes should be reformed so as to conform to the actual agreement between the parties; and the decision was affirmed in this court in 1870. In that case there was a certain degree of negligence in not reading the two notes. It is said by the learned counsel for the plaintiff, in the argument before us, that there was artifice used in that case to induce the plaintiff to believe that the two notes were drawn with interest,—that artifice being in drawing and placing before the plaintiff the first two notes, payable with interest, by which the payee was thrown off his guard; but that circumstance was not the basis of that decision, and does not distinguish that case from this. There was nothing there to prevent the payee from reading the notes, and he had abundant opportunity to do so. If he had

read them, the mistake and fraud would have been discovered. There was at most, in substance, the representation that the two notes were drawn with interest; and, if that was false, the means were at hand for its easy and ready detection. So in this case. Mrs. Burdick intrusted Martin to draw the deed, and he was bound to have it drawn so as to express the agreement between the parties; and, when he brought and delivered the deed to her, it was, in effect, a representation to her that the deed had been so drawn. She was not bound to assume that he might be practicing a fraud upon her or representing a falsehood, and she cannot be charged with negligence in believing confidently that he was acting in good faith and telling the truth. In omitting to read the deed, she was no more in fault than the plaintiff was, in the case above cited, in omitting to read the two notes. It is certainly not just that one who has perpetrated a fraud should be permitted to say to the party defrauded, when he demands relief, that he ought not to have trusted or believed him. \* \* \* If the rule were otherwise, the unwary and confiding, who need the protection of the law the most, would be left a prey to the fraudulent and artful practices of evil doers."

In *Kister v. Insurance Co.*, 128 Pa. St. 553, 18 Atl. 447, the supreme court of Pennsylvania say:

"We cannot say that the law, in anticipation of a fraud upon the part of a company, imposed any absolute duty upon Kister to read his policy when he received it, although it would certainly have been an act of prudence on his part to do so. *Insurance Co. v. Bruner*, 23 Pa. St. 50; *Insurance Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617. One thing is certain, however: The company cannot repudiate the fraud of its agent, and thus escape the obligations of a contract consummated thereby, merely because Kister accepted in good faith the act of the agent, without examination."

In *Gristock v. Insurance Co.*, 87 Mich. 428, 49 N. W. 634, the supreme court of Michigan say:

"Plaintiff had a right to rely upon the assumption that his policy would be in accordance with the terms of his oral application. If the defendant desired to make it anything different, it should, in order to make it binding upon plaintiff, under the authorities in this state, have called his attention to those clauses which differed from the oral application."

In *Strohn v. Railway Co.*, 21 Wis. 562, the plaintiffs had a verbal agreement with the defendant railway company as to the terms of shipment of a quantity of freight. The freight was delivered to the railway company, and afterwards, upon demand, the company delivered to the plaintiffs bills of lading therefor. These bills of lading contained conditions of shipment inconsistent with the verbal agreement of the parties. The plaintiffs having received and retained these bills of lading without reading them or knowing their contents, the railway company insisted that they were bound by the conditions contained in the bills of lading, which had been received without objection. In answer to this contention, the court said:

"Having previously entered into a special verbal agreement, he may rightfully assume, in the absence of notice to that effect, that it is embodied in the paper or receipt, or at least that the receipt contains nothing contrary to it. It is in the nature of a direct fraud or cheat for the company or its agents, after having entered into a verbal agreement, thus wrongfully to insert a contract of an entirely different character, and present it to the party without directing his attention expressly to it and procuring his assent. It is no answer for the company in such a case to say that the other party should have been more diligent and watchful, and should have detected the fraud. So long as he is ignorant of the new conditions, and does not assent to them, the contract in writing is not consummated, and parol evidence may be received."

And to the same effect is *Boorman v. Express Co.*, 21 Wis. 154.

In *McElroy v. Assurance Co.*, 36 C. C. A. 615, 94 Fed. 990, 1000, the circuit court of appeals for the Ninth circuit say:

"It would certainly have been an act of prudence on his part to read the entire policy, but his neglect to do so cannot excuse the company for the default of the agent in not writing the contract in accordance with the representations made by the insured. The insured had a right to rely upon the agent's performing his duty of making the contract in conformity with the information given, and the agent's failure to do so, whether the result of a mistake or of a deliberate fraud, cannot operate to the prejudice of the insured. The contract of insurance is pre-eminently one that should be characterized by the utmost good faith on both sides."

In *Fitchner v. Association*, 103 Iowa, 276, 72 N. W. 530, the supreme court of that state say:

"The insured ordinarily rely upon the agent to properly set out the facts in the applications, and Laub did as men usually do, in assuming that the defendant's agent had done his duty. *Stone v. Insurance Co.*, 68 Iowa, 737, 28 N. W. 47; *McComb v. Insurance Co.*, 88 Iowa, 247, 48 N. W. 1038. The mere failure of the assured to read his application, or the copy of it in the policy, does not establish negligence. *Hagan v. Insurance Co.*, 81 Iowa, 321, 46 N. W. 1114; *Donnelly v. Insurance Co.*, 70 Iowa, 693, 28 N. W. 607; *Boetcher v. Insurance Co.*, 47 Iowa, 253. Nor is the mere omission to read the policy negligence. *Barnes v. Insurance Co.*, 75 Iowa, 11, 39 N. W. 122; *Jamison v. Insurance Co.*, 85 Iowa, 229, 52 N. W. 185; *Boetcher v. Insurance Co.*, supra. Laub had no reason to suppose the policy and application were drawn differently than understood."

Citations to the effect of the foregoing might be multiplied indefinitely, but the excerpts quoted are enough to establish beyond all controversy that the doctrine of the majority is not the law. No verbal dexterity can weaken or evade the overwhelming force of these decisions. They conclude the question. Not one case cited by the majority is an authority on the facts of this case. Even the decision of this court when this case was here on a bill to reform the policy is not in point in this case, because some of the material facts found by the circuit court in this case, and which are conclusive upon this court now, were disputed and denied by this court in the equity case. In *Insurance Co. v. Norwood*, 16 C. C. A. 136, 69 Fed. 71, the question under discussion was decided by this court after full argument and consideration. The opinion in that case is exactly opposed to the opinion of the majority in this case, and yet the majority opinion nowhere refers to the *Norwood Case*. If the court intends to overrule the *Norwood Case*, it should have the courage and candor to say so. It is extremely unfair to the profession and the public for an appellate court to put forth two opinions, diametrically opposed to each other, without noticing the fact, and advising the profession which opinion they are to regard as the law of the court. The *Norwood Case* was cited and its doctrine approved by the circuit court of appeals for the Ninth circuit in *McElroy v. Assurance Co.*, supra, and also in the Sixth circuit in the case of *Insurance Co. v. Fischer*, 34 C. C. A. 503, 92 Fed. 500.

There is another ground upon which the case should be reversed, and the plaintiff in error awarded a new trial. The defendant in error is a New York corporation. A statute of that state in force at the time these policies were issued declares:

"No Forfeiture of Policy without Notice. No life corporation doing business in this state shall declare forfeited or lapsed any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment, when due, of any premium, interest, or installment or any portion thereof, required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion due thereof on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen, and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to a duly-appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy, and all payments thereon, will become forfeited and void, except as to the right to a surrender value, or paid-up policy, as in this chapter provided. If the payment demanded by such notice shall be made within the time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given." Laws 1892, c. 690, art. 2, § 92.

In *Baxter v. Insurance Co.*, 119 N. Y. 454, 23 N. E. 1048, 7 L. R. A. 293, the court of appeals of that state, speaking of this statute and its effect upon the policy of life insurance issued under it, said:

"This statute was part of the contract in question, and governed the rights and liabilities of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

In that case the defendant was claiming a forfeiture of a policy for nonpayment of the premium when due. It was not shown by the insurance company that the notice required by this statute had been given. The court continues as follows:

"There was no proof given at the trial by either party to show whether this notice had been served or not. It is obvious that this statute, when imported into the contract, modified its conditions in very material respects. The duration and validity of the policy are not then dependent upon the payment of the premium on the day named therein, but upon the payment within thirty days after the notice has been given. \* \* \* The statute prescribes this notice as a necessary condition of forfeiture, and, unless it was served, the assured was not in default, because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of the premiums. \* \* \* Before defendant could raise any question in regard to the nonpayment of the August premium, it was necessary to show that it had complied with the statute by serving a notice, as this step was essential in order to put the insured in default, or to raise any point based on his omission to pay the last quarterly premium."

See, also, *De Frece v. Insurance Co.*, 136 N. Y. 151, 32 N. E. 556; *Phelan v. Insurance Co.*, 113 N. Y. 147, 20 N. E. 827.

In *Griffith v. Insurance Co.*, 101 Cal. 627, 36 Pac. 113; *Johnson v.*

Insurance Co. (Iowa) 78 N. W. 905; Insurance Co. v. Dingley, 35 O. C. A. 245, 93 Fed. 153; Rosenplanter v. Society, 37 O. C. A. 566, 96 Fed. 721,—the same statute is considered, and the interpretation given it by the New York courts adopted.

The burden of proof to show that this notice was given rests upon the insurance company. It must show a strict compliance with the terms of the statute before it can assert a forfeiture. This is conceded by the defendant in error, and, in its answer claiming a forfeiture of the policies, it is alleged that notice was duly mailed to the insured at least 15 days, and not more than 45 days, before the premiums were due on the policies, in the form required by the statute. But there is no finding of fact to support this allegation. The only finding of fact on the subject reads as follows:

"(10) That not later than November 17, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the state of New York."

It will be observed that there is a total failure to find the facts showing a compliance with the statute by the company. One requirement of the statute is that the notice shall be sent "at least fifteen and not more than forty-five days prior to the day when the same is payable." The only finding on the subject is "that not later than November 17, 1894, notice was sent." But how much earlier than November 17, 1894, was it sent? It might have been sent the 1st of July, and this finding would be true. It is not upon such a finding that a court can declare a forfeiture. The rule is absolute and without an exception that the special findings of fact of the lower court must distinctly and specifically find every fact essential to support its judgment. Nothing can be supplied by intendment. The next clause of this finding, namely, that the "notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company in accordance with the requirements of the statute of the state of New York," is fatally defective for the reason that it states a mere conclusion of law, and finds no fact whatever. The contents of the notice are not given, and the notice is nowhere set out. It was the duty of the lower court either to make the notice a part of its finding, or set out its contents specifically, so that this court could determine whether it was "in accordance with the requirements of the statute of the state of New York." Under the New York statutes the forfeiture of a policy for the nonpayment of premiums does not depend, as we have seen, upon the nonpayment of the premiums according to the terms of the policy, but upon their nonpayment after the notice prescribed by the statute has been given. What that notice must contain to make it effectual will be seen by reference to the statute copied above, and its requirements need not be repeated here. See cases *supra*. The inadequacy of the finding on this point is forcibly illustrated by the facts disclosed in the record in the equity suit, now a part of the records of this court. A reference to that record discloses the fact that the notice which was given was fatally defective in at least two particulars. *Rosenplanter v. Society*, 37 O. C. A. 566, 96 Fed. 721; *Insurance Co. v.*

Dingley, 35 C. C. A. 245, 93 Fed. 153. It is to be regretted that the majority of the court have deemed silence the best method of disposing of the question of the sufficiency of this finding. The judgment of the circuit court should be reversed, and the case remanded, with instructions to grant a new trial.

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CARTER-CRUME CO. v. PEURRUNG.

(Circuit Court of Appeals, Sixth Circuit. February 12, 1900.)

No. 704.

1. CONTRACTS—ACTION FOR BREACH—PLEADING.

An amended petition, differing from the original petition only in containing additional jurisdictional averments, and in omitting one of the parties defendant, relates back to the time when the original petition was filed; and, when the action is one to recover installments due on a continuing contract, the plaintiff is not required to include in the amended petition a claim for installments which have become due since the commencement of the suit, but may maintain a second suit therefor.

2. SAME—BREACH—RIGHT OF OTHER PARTY TO CONTINUE PERFORMANCE.

Where defendant contracted to pay plaintiff a certain sum in installments, in consideration of plaintiff's releasing his rights under another contract, which he did, and of his further agreement not to purchase a certain line of goods from others than defendant during the term of the contract, on defendant's refusal to make further payments plaintiff was not obliged to treat the contract as terminated, or limited to a single action for the breach, but was entitled to continue performance on his own part, and to maintain actions for the recovery of the several installments as they became due.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This is a writ of error to review a judgment in favor of Joseph P. Peurrung, as the assignee of a contract of the firm of Peurrung Bros. & Co., against the Carter-Crume Company for \$4,977.50. By the contract, the Carter-Crume Company agreed to pay Peurrung Bros. & Co. \$3,000 per annum for the term of 3 years and 6½ months, in monthly installments of \$250, on the 15th day of each month, in consideration of the release by Peurrung Bros. & Co. of all their rights under a contract previously made by them with Tower & Matthews, of Indiana, by which Tower & Matthews had bound themselves to sell, at a certain price, their entire output of wooden wire-end dishes for a period of two years or more. The contract in suit provided that it might be annulled by 90 days' written notice, on the 1st day of March of any year. By other clauses of the contract, it was stipulated that Peurrung Bros. & Co. might buy dishes from the Carter-Crume Company at certain prices, but there was no stipulation binding Peurrung Bros. & Co. to buy any dishes whatever. By the last clause of the contract, it was agreed that Peurrung Bros. & Co. should not purchase wire-end dishes from anybody but the Carter-Crume Company, and should not allow a customer any part of the discount received from it. In a prior suit upon the same contract, by the same plaintiff against the same defendant, a recovery was had for \$3,151.50, which included all the installments due on the contract, down to and including the installment due on September 14, 1896. 30 C. C. A. 174, 86 Fed. 489. The present suit was for the installments due thereafter, beginning with that of October 15, 1896. The answer denied that the plaintiff was the bona fide assignee of the contract or the owner of the rights arising under it. For a second defense, the defendant set up that it had annulled the contract on the 20th of September, 1895, in accordance with the right reserved to it under the contract. The third defense of the defendant was as follows:



"(8) Further answering, this defendant says that said contract of August 14, 1894, was an entire and indivisible contract; that the consideration to the defendant was an entire and indivisible consideration; and that on September 20, 1896, this defendant notified said Peurrung Brothers & Co., in writing, of the refusal by said defendant to further perform said contract, and the covenant on the part of defendant to pay said Peurrung Brothers & Co., or said plaintiff, any sum or sums under said contract was thereby broken, and said notice was then and there given to said Peurrung Brothers & Co. of the breach by said defendant of said covenant, which was an entire and indivisible covenant; and thereafter, on the 29th day of September, 1896, said plaintiff, Joseph P. Peurrung, brought suit against this defendant in the United States circuit court for the Southern district of Ohio, Western division, being cause numbered 4,954 upon the docket of said court, asking judgment for damages against this defendant for the breach by defendant of said covenant, and in said cause such proceedings were had as that on April 3, 1897, a judgment was rendered in favor of said plaintiff, Joseph P. Peurrung, who was plaintiff in said cause No. 4,954, and is the plaintiff in the above-entitled cause, which judgment has been paid and satisfied by this defendant; and this defendant says that said judgment in said cause No. 4,954 was for damages for the breach of the same covenant and contract alleged in the petition in this cause, and was a merger of any and all claim for damages under said contract, including the claim for damages alleged in the plaintiff's petition herein, and that thereby said plaintiff is estopped to claim against this defendant any further damages for the breach of said entire and indivisible covenant contained in said contract of August 14, 1894, it being the same contract which was set forth and sued upon in said cause No. 4,954; and defendant says that the fifteen hundred dollars (\$1,500) sought to be recovered in this cause was, if due at all, due and properly and by law recoverable and included in the judgment in said prior cause between the same parties, No. 4,954, on April 3, 1897, the date of said judgment in said prior cause; that in law the entire damages and claim sued for in this action were included and merged in the damages and judgment in said prior cause, for the breach of the said contract and covenant, which is sued upon in said cause No. 4,954, which is the same entire and indivisible covenant and contract sued upon in this cause." For the fourth defense, the defendant charged that the contract sued on was a part of a plan to which Peurrung Bros. & Co. were parties, and by which the Carter-Crume Company sought to obtain a monopoly of the wire-end wooden butter-dish trade, and to raise the prices therefor; that the contract was therefore illegal, contrary to public policy, and void, as in restraint of trade, preventing competition, fixing and enhancing prices, and tending to create a monopoly. To the second defense the plaintiff replied that the same defense had been pleaded in the prior suit, and had been adjudged against the defendant. The reply to the third defense was as follows: "Plaintiff denies that the said contract was an entire and indivisible contract, and he denies that in said cause No. 4,954 he sued for damages for breach of covenant and contract. Plaintiff avers that under said contract the defendant was to make to plaintiff certain monthly payments that became due and were made payable monthly, and in said cause the plaintiff sued for such monthly payments as were then due and unpaid, and he recovered a judgment only for the same, with interest calculated monthly on such monthly payments so becoming due, as the record of said cause will show; therefore the plaintiff denies the allegations contained in the third defense set out by the defendant." In their reply to the fourth defense, the plaintiff denied that Peurrung Bros. & Co. had any knowledge of the illegal purpose which was to be furthered by the contract in suit. In the former suit the original petition was filed on the 25th day of September, 1896. The petition then made both the Carter-Crume Company and the Crume & Sefton Manufacturing Company defendants. On the 2d of April, 1897, the plaintiff filed an amended petition, by leave of court, in which he set up exactly the same cause of action as in his original petition, with a little fuller averments as to the citizenship of the defendant the Carter-Crume Company, and omitted as defendants altogether the Crume & Sefton Manufacturing Company. The court below submitted the case to the jury on the issues

made—First, as to plaintiff's ownership of the contract sued on; and, second, as to the knowledge which the plaintiff and his partners had of the illegal purpose of the defendant in making the contract. The court declined to submit the second and third defenses to the jury. The jury returned a verdict for the plaintiff on both issues submitted to them. Thereupon the defendant made a motion for judgment non obstante veredicto on the third defense. This the court overruled, and judgment was entered on the verdict.

Joseph Wilby, for plaintiff in error.

Charles W. Baker, for defendant in error.

Before TAFT, LURTON, and DAY, Circuit Judges.

TAFT, Circuit Judge (after stating the facts as above). It is insisted on the part of the plaintiff in error that, at the time of the commencement of the first suit upon which recovery has been had, there was due upon the installments, under the contract, \$1,500, which was not included in the recovery in that suit, and which is included in the recovery in this; that the plaintiff below was not entitled to split up his causes of action after the installments became due; that all the installments due were indivisible; and that the recovery for any of them was a bar to a recovery of all the others due at the commencement of the suit. The premise for this argument is unfounded. It is that the former suit was begun when the amended petition was filed in April, 1897. It is conceded that the original petition in the former suit asked judgment for all the installments then due; but it is argued that a new suit was begun by the filing of the amended petition, and that in the amended petition all the installments which have fallen due in the meantime should have been included. We cannot yield to this proposition. It may be that, upon leave of court, the plaintiff, by supplemental petition, might have included in the former suit all the installments which had fallen due after the filing of the original petition, but he was under no obligation to do so. In his amended petition, he stated exactly the same cause of action which had been stated in the original petition, merely elaborating somewhat the averments relating to jurisdiction and dismissing one of the parties defendant. As the petition was an amended petition, and not a supplemental petition, it related back to the time of the filing of the original petition, and cannot be construed to be the beginning of a new suit as of the date of its filing. In *Railroad Co. v. McLaughlin*, 43 U. S. App. 181, 19 C. C. A. 551, 73 Fed. 519, it was held by this court that an amended petition in every respect like the original petition, except as to the jurisdictional averments, was to be regarded as filed and construed as of the date of the original petition; and two decisions in the court of appeals in the Eighth circuit were cited to sustain this view. *Carnegie v. Hulbert*, 36 U. S. App. 51, 16 C. C. A. 498, 70 Fed. 209; *Bowden v. Burnham*, 19 U. S. App. 448, 452, 8 C. C. A. 248, 59 Fed. 752. We are clearly of opinion, therefore, that the former suit must be regarded as having been begun at the date of the filing of the original petition.

This brings us to the second contention of plaintiff in error and its more radical claim. It is insisted that upon the refusal of the

Carter-Crume Company, in September, 1895, further to pay the installments due under the contract, the only remedy which the plaintiff or his assignors had was to sue upon the contract as an indivisible one for damages for its entire breach; that the suit begun in September, 1896, must be regarded, therefore, as a suit of that character; that the recovery must be treated as the amount due for the total breach, and the judgment must be a bar to a further recovery upon the contract. The contention cannot be sustained. The cases which the plaintiff in error relies upon are cases involving contracts entirely different from the one at bar. They are *James v. Allen Co.*, 44 Ohio St. 226, 6 N. E. 246, and *Steinau v. Gas Co.*, 48 Ohio St. 324, 27 N. E. 545. *James v. Allen Co.* was a case of a contract for services. The employé was dismissed before the termination of the contract. At the end of two months after his dismissal, he brought suit to recover the amount which would have been due him under the contract, had he continued at work, and recovered a judgment therefor. At the end of two more months he brought a second suit, and in the second the judgment in the first suit was pleaded as a bar. The plea was sustained. It was held that the only remedy of the plaintiff had been to bring a suit to recover damages for the entire breach; that as he had not rendered the services under the contract, even though prevented from doing so by the defendant, he could not properly aver that he had rendered the services, and he could not treat the contract as still subsisting. The same rule was laid down in the case of *Steinau v. Gas Co.*, *supra*, where the contract was one in which Steinau agreed to take gas from the gas company for 10 years, and the gas company agreed to furnish the gas. Several years before the termination of the contract Steinau refused to take the gas, and the gas company did not furnish it, but brought suit to enjoin his use of any other means of lighting. The supreme court denied the relief prayed, on the ground that the gas company had a full and adequate remedy at law in bringing a suit for the breach of the contract, in which the gas company might recover as for an entire breach. The court said that the case was quite like that in principle of *James v. Allen Co.* Without discussing the correctness of these decisions, it is sufficient to say that they have no bearing upon the present case. Here, all that the other contracting parties were required to do was of a negative character. They have performed all that they agreed to perform under the contract. The defendant has received all the benefit from the contract which it was agreed it should receive. It is possible that the plaintiff's assignors might have treated the defendant's repudiation of the contract in September, 1895, as an anticipatory breach, and have sued for the entire damages, though we do not so decide; but, if it be so, it was at their option thus to treat it or not, and they did not see fit to do so, but continued to comply with their contract, and, by doing nothing in violation thereof, furnished to the defendant all the consideration it would have received had it continued to comply with the contract on its behalf. As the contract was not, therefore, put an end to by acceptance of the anticipatory breach, it remained in force, and the

plaintiff was entitled to recover in suits which should include all the installments due up to the time of the suit brought. The court below was right in denying the motion for a judgment made by the defendant. The defendant in error concedes that there was an error in the judgment below to the extent of \$250, and consents to the remittitur of that amount in this judgment. Such remittitur, with interest, will be entered and included in the mandate, and, as entered, the judgment will be affirmed, at the costs of the plaintiff in error.

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KIMBLE v. WESTERN UNION TEL. CO.

(Circuit Court, E. D. Pennsylvania. February 21, 1900.)

No. 51.

**COSTS—ENFORCING PAYMENT—STAY OF SUBSEQUENT ACTION.**

A suit to recover for a tort will be stayed until the plaintiff pays the costs of a former action between the same parties on the same cause of action in another federal court, in which he submitted to a voluntary nonsuit.

On Petition by Defendant for an Order Staying Further Proceedings.

W. S. Harris, for plaintiff.

Wm. B. Linn and Wm. H. Addicks, for defendant.

DALLAS, Circuit Judge. In October, 1899, when this case was upon the then current list for trial, the defendant filed, and brought to the attention of the court, a petition for an order staying proceedings until the costs of a former suit between the same parties, for the same cause of action, pending in the United States circuit court for the district of Maryland, should be paid. The plaintiff claimed that this application came too late, and ought not to be entertained, because, as he alleged, it would be unfair to subject him, by reason thereof, to a continuance of his cause, when he was actually in court and ready for trial. He insisted that, if sufficient notice had been given, he would have been able to show by evidence that the petition was not well founded; and, in view of this insistence, leave was given him to then take depositions, and pending that proceeding the case was retained upon the calendar for trial (if entitled) at that term. The plaintiff, however, did not avail himself of the opportunity thus afforded him. He has offered no testimony. He let the matter rest until about the 13th inst., when he himself set it down for hearing upon petition, answer, and replication. Upon that hearing his counsel directed attention to certain documents on file in this court, but upon carefully examining them I do not find that they contain anything which strengthens his position. I am of opinion that he should not be allowed to proceed further in the present action until he shall have paid the costs of the former one. *Kimble v. Telegraph Co.* (C. C.) 70 Fed. 888. An order granting the prayer of the defendant's petition will be entered.

**MANHATTAN LIFE INS. CO. v. O'NEIL (two cases).**

(Circuit Court of Appeals, Third Circuit. February 9, 1900.)

Nos. 37, 38.

**APPEAL—REVIEW—HARMLESS ERROR.**

Where the principles of law stated in a request to charge are correct, the mere fact that they are not applicable to the case made by the evidence does not render the affirmance of such request reversible error.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion on former appeal, see 90 Fed. 463.

M. A. Woodward, for plaintiff in error.

Thomas Patterson, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and KIRKPATRICK, District Judge.

KIRKPATRICK, District Judge. The above-entitled actions were tried together. They are suits in ejectment to determine the title to two pieces of property, and the questions involved are the same in each. It is not the duty or intention of this court to review the testimony brought up by the record in these causes for the purpose of determining whether the conclusion reached by the jury was in accordance with the weight of evidence produced. The writs of error do not bring before us any such question. Upon them we are to determine whether the learned trial judge erred in his statement of the law, and whether in his charge to the jury he presented the facts to them in a manner unfairly favorable to the defendant, and prejudicial to the cause of the plaintiff. To this latter branch of the case, the 1st, 2d, 3d, 4th, 5th, 6th, 7th, 8th, and 11th assignments of error are directed. We have carefully examined the record of evidence and the charge of the court, and, while we concede the correctness of the propositions of law laid down by the learned judges of the supreme court of Pennsylvania in the cases cited by the plaintiff in error regarding the duty of a judge in respect to the matters complained of, we fail to perceive that the learned trial judge in this case failed to perform his full duty to both the parties to these writs. The necessary questions of fact to be determined by the jury were so clearly presented to them that they could not have failed to understand, and the evidence relating to those facts was fairly submitted. It is no cause of complaint that a judge does not repeat the argument of counsel, nor call the attention of the jury to the testimony of every witness bearing upon every phase of the case. We find no trace of bias in the charge of the learned judge, tending to prejudice the jury, as charged in the errors assigned. The 9th and 10th assignments of error, relating to the affirmance by the court of the defendant's requests to charge, are not seriously pressed by the plaintiff in error. The position of counsel seems to be that, while the learned judge was abstractly right in affirming said requests, yet the principles of law contained therein had no applicability to the

facts of the case as viewed from their standpoint. This, if true, affords no ground for reversal. The judgment of the circuit court will be affirmed, with costs.

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WATERS v. CENTRAL TRUST CO. OF NEW YORK.

(Circuit Court, S. D. New York. March 1, 1900.)

PLEADING—COMPLAINT—IMPROPER JOINDER OF CAUSES OF ACTION.

A complaint alleging the rendition by a court of another state of a judgment against the defendant and in favor of third parties, that plaintiff was appointed receiver to collect such judgment and distribute the proceeds, and that subsequently the owners thereof assigned such judgment to plaintiff, states a cause of action in favor of plaintiff as an individual, and as the legal owner of the judgment, and is not subject to demurrer as also joining a cause of action in his favor as receiver.

Action at Law. On demurrer to complaint.

David Willcox, for plaintiff.

Arthur H. Van Brunt, for defendant.

COXE, District Judge. The complaint alleges that in April, 1898, in an action in which Lumin A. Andrews and others were plaintiffs and the Pittsburgh, Akron & Western Railroad Company and the Central Trust Company of New York and others were defendants, the court of common pleas of Summit county, Ohio, duly adjudged that the said railroad company was indebted to the Carnegie Steel Company and others in the sum of \$100,379, which sum the defendant, the Central Trust Company, which was a stockholder in said railroad company, was directed to pay to the plaintiff herein, Frank H. Waters, who was, by said judgment, appointed receiver to collect and disburse the same. The complaint alleges further that prior to the commencement of this action the Carnegie Steel Company and the other creditors of the said railroad company mentioned in the Ohio judgment duly assigned their claims against the railroad company and trust company to the plaintiff. The complaint is demurred to upon the ground that two causes of action are improperly united, namely a cause of action in favor of the plaintiff as receiver and a cause of action in favor of the plaintiff individually as assignee of the claims against the defendant.

The plaintiff does not sue as receiver, but as an individual. The action is on the Ohio judgment. When this is proved the plaintiff's right of action is established. *Newberry v. Robinson* (C. C.) 36 Fed. 841, and cases cited. It is thought that the pleader might have stopped at this point with safety, but he has seen fit to allege that he holds assignments of the other claims against the railroad and is now its sole creditor. Conceding this allegation to be unnecessary it does not state a separate and distinct cause of action. It may be true that the defendant is not interested in knowing what becomes of the money after it is paid to the plaintiff, but it is also true that the defendant is not injured or misled by the information. One holding the legal title to a chose in action is not precluded from maintaining

an action at law because he happens to hold the equitable title also. By no possibility can the cause of action be misunderstood and it is thought that the court is not justified in permitting further delay. The demurrer is overruled. The defendant may answer within 20 days.

UNITED STATES ex rel. ANDERSEN v. BURKE, Collector.

(Circuit Court, S. D. Alabama. December 18, 1899.)

No. 222.

1. ALIENS—CONSTRUCTION OF IMMIGRATION LAWS—WHO ARE IMMIGRANTS.

The immigration laws of the United States, like all other statutes, must be given a sensible construction having reference to their purpose, and, as so construed, they apply only to such aliens as enter or are brought to this country with the intention that they shall become residents thereof.

2. SAME—ALIEN SEAMEN—LIABILITY OF VESSEL FOR BRINGING INTO UNITED STATES.

The immigration laws have no application to alien seamen who constitute the bona fide crew of a vessel trading in the ports of the United States, and who enter such ports with their ship in the discharge of the duties of their employment, and without any intention of becoming residents of this country; and the master of a vessel cannot be subjected to the fine or refusal of his clearance papers, provided by the act of March 3, 1891, as a penalty for refusing to return upon his vessel immigrants of the prohibited classes brought into this country, because an alien seaman, who is one of the crew, escapes from his ship while in port, before the expiration of his term of service, without having been discharged or paid, and without the consent or knowledge of the master, and the master is unable to secure his arrest and return to the ship.

3. SAME—JURISDICTION OF COURTS—CONCLUSIVENESS OF DECISION OF IMMIGRATION OFFICER.

The provisions of Act Aug. 18, 1894, making the decision of the appropriate immigration or customs officer excluding an alien from admission to the United States under any law or treaty conclusive upon the courts, does not preclude a court from entertaining jurisdiction to determine the question whether such alien was in fact an immigrant within the meaning of such laws.

4. SAME—ENFORCEMENT OF PENALTY AGAINST SHIP.

The right to enforce a penalty against a foreign ship for an alleged violation of the immigration laws is essentially a judicial right, and when it is attempted by an executive officer to constrain the shipmaster to pay a penalty, or when clearance is refused his ship for failure to pay such penalty, the courts are not excluded from consideration of the question by the act of August 18, 1894, which makes the decision of such officer conclusive only as to the status of immigrants.

This was a petition for a writ of mandamus to compel the collector of the port of Mobile to grant clearance to the Norwegian bark Norma.

Pillans, Hanaw & Pillans, for complainant.

M. D. Wickersham, U. S. Atty., for defendant.

TOULMIN, District Judge. The case made upon this application for mandamus as appears upon the petition and return to the alternative writ is that the Norwegian vessel Norma, lawfully trading to the United States, entered the port of Mobile about a month ago,

to perform a charter under which she was to load and carry therefrom a cargo of timber to Europe. Having laden such cargo aboard, her master duly applied for clearance to the collector of customs at the port, who declined to grant clearance to the vessel upon this state of facts, that is to say: The said vessel came to Mobile with a crew articulated for a voyage not to end in the United States, but to the United States and outward to Europe again. In that crew was an alien seaman, who, on arrival of the vessel at Mobile, had endeavored to obtain his discharge from the ship on the claim that he was too ill to remain with her. He was thereupon examined by a reputable physician at this port, whom the master called in for the purpose, and found by the physician to be sound. The master therefore refused to discharge him. Thereafter this seaman remained on board, doing duty, until about a week before the ship was ready to sail, when he went ashore without special leave, and continued to remain ashore for an unusual time, whereupon the master appealed to the Norwegian consul for process for his arrest and return to the ship. While at the consul's office pending such application, the seaman came to the office, having been sent to the consul by the collector of customs as an alien pauper immigrant, with instructions that he be returned to the master of the ship, to be carried by the ship out of the country. Thereupon the said consul, in the presence of the master and the man, stated to the man that he would be imprisoned if he did not return to duty on the vessel, which he at once declared his willingness to do, and thereupon the master did not insist on his application for his arrest. The seaman did return to duty on the vessel, where he was found that evening by the master, apparently docile, and willing to perform his duties. The next day said seaman was again absent from the vessel, without leave from the master, having left on the vessel his bag, baggage, and belongings. He had not been discharged, and had received none of his pay. This last absenting of himself was two days before the master applied for clearance at the custom house. When he so applied, he was informed by the collector that the latter could not and would not clear him, because he had not this seaman on board, and that he must have him arrested, and brought on board. This the master attempted to do by getting a warrant of arrest for the man, and by using all diligence in his power to have him found, but the officers, being unable to find him, failed to execute the warrant. The collector thereupon declared that the said master had violated the immigration statutes by not holding the seaman on his return after his first absence, and was subject to a fine of \$300, which the collector required that the master should pay before he would grant a clearance of the ship; whereupon the master applied to this court for a writ of mandamus to the collector to require him to clear the vessel without imposing such fine.

The legislation contained in the various statutes that have been passed relating to immigration is clearly directed against the immigration into this country of certain classes of persons who come in with the intent to enter into and become a part of the mass of its citizenship or population. Immigration is defined to be the entering into a country with the intention of residing in it. The earlier stat-



utes merely prohibit contract laborers being brought in. The later ones prohibit the bringing in of immigrants,—persons who come into this country with the intention of remaining, of fixing a residence here,—and who are calculated to become a charge upon the country, or who are unfit, on account of moral character, previous conviction of crime, or disease, to be admitted as citizens. Nothing in the scope of the statutes seems to contemplate, or can be rationally held to contemplate, the prohibition of the bringing within the country by vessels of their crews engaged under contracts made out of the country, to labor on the vessels while approaching and while in the ports of this country, and to sail again with the vessels from this country. By sections 1, 2, and 3 of the act of February 26, 1885 (1 Supp. Rev. St. U. S. p. 479), it is provided that it is illegal for any person to in any way assist or encourage the migration of any alien or foreigner into the United States under previous contract with said alien or foreigner to perform labor or service of any kind in the United States, its territories, or the District of Columbia. Such contracts are avoided, and a penalty of \$1,000 is imposed for every such offense as to each alien or foreigner. Thus it is made illegal to assist or encourage the migration of any alien into the United States under previous contract with him to perform labor in the United States; that is to say, it is illegal to assist or encourage any alien to remove or change his residence into the United States under previous contract with him to perform labor in the United States. Now, every foreign seaman on a vessel of this or a foreign country, signed on the articles abroad, is an alien contracted with to perform duty in the United States while the vessel lies in the United States, loading; but he is not contracted with to remove to the United States, or assisted or encouraged to migrate—to change his residence—to the United States, to perform labor there. It is to be assumed that congress uses language employed by it in its enactments in its ordinary meaning and acceptation. The particular statute invoked on behalf of the respondent, being that of March 3, 1891, clearly relates to immigration, and is leveled only against immigrants,—that is, those who are coming to the United States to make it a home,—for in the first section it is declared that certain classes of aliens shall be excluded from admission into the United States “in accordance with the existing acts regulating immigration.” The third section excludes the encouragement of immigration to this country of aliens by promise of employment, advertisement, and the like. The fourth makes it unlawful for steamships or transportation companies or vessel owners, by writing or otherwise, to solicit or encourage immigration of aliens into the United States, other than by stating the sailings of their vessels and their facilities. The sixth section forbids the bringing into the United States of any aliens not lawfully entitled to enter, and punishes the offense; and the eighth section provides that upon the arrival by water of alien immigrants at any port it shall be the duty of the master to report the name, nationality, etc., of the alien to the proper officers, and provides for an inspection of these persons before they can be lawfully landed. The tenth section then declares that all aliens who may unlawfully come into the United States shall be sent

back on the vessel by which they were brought in at the cost of the master or owner, and, if the said master shall refuse to receive back such aliens as he unlawfully brought to the United States and as were sent back to the vessel, or shall refuse or neglect to return them to the port from which they came, he shall be punished in a fine of not less than \$300, and shall not have clearance of his ship until it is paid. Here we see a definite purpose to exclude the immigration, and the bringing of persons intending to immigrate, into the United States, if they belong to the excluded classes, with definite specific provisions for their deportation by the medium through which they entered the country. If this law applied to the crews of ships generally, by section 6 of this last act, as well as by the section of the previous act cited in the earlier part of this opinion, no vessel, foreign or domestic, could lawfully enter the ports of the United States with an alien seaman on board. I cannot so interpret the law. If it be said that the mere bringing into the United States of these alien seamen may not be an offense, but that landing them would be, notwithstanding the law forbids in the disjunctive,—the bringing into “or” landing,—then we have presented by this contention the duty, as one imposed by congress, that the masters of all ships, American or otherwise, shall either imprison, put under hatches, put in irons, or guard every alien seaman in their crews during their entire stay in port, however protracted by the exigencies to commerce and the ship’s loading, lest one of these aliens should set foot at some time on shore for recreation or health, or for supplying his limited needs in the shops of the country. This cannot be the just interpretation of the laws of congress upon the subject of immigration, and such interpretation is not justified by the terms of those statutes, upon a general survey of them in all their parts. These immigration statutes are to be construed as a whole, and not by singling out particular words or sections, and interpreting them according to their strict letter. A thing may be within the letter of the statute, and yet not within the statute, because not within its spirit, nor within the intention of its makers. “All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence.” *Holy Trinity Church v. U. S.*, 143 U. S. 461, 12 Sup. Ct. 512, 36 L. Ed. 228. “Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.” *Lau Ow Bew v. U. S.*, 144 U. S. 59, 12 Sup. Ct. 520, 36 L. Ed. 344. A consideration of the whole legislation on the subject of alien immigration, of the circumstances surrounding its enactment, and of the unjust results which would follow from giving such meaning to it as is here claimed for it, makes it unreasonable to believe that congress intended to include a case like the present one. My opinion is that these statutes do not contemplate the exclusion of the crews of vessels which lawfully trade to our ports, and that they do not, in spirit or in letter, apply to seamen engaged in their calling, whose home is the sea; who are here to-day and gone to-morrow; who come on a vessel into the United States with no purpose to reside

therein, but with the intention, when they come, of leaving again, on that or some other vessel, for the port of shipment or some other foreign port in the course of her trade. To hold that these statutes apply to aliens comprising the bona fide crews of vessels engaged in commerce between the United States and foreign countries would lead to great injustice to such vessels, oppression to their crews, and serious consequences to commerce.

I have carefully considered the ruling of the assistant secretary of the treasury in the case of the crew of the Lancashire, which may be justified by the facts in that particular case, as they existed, and as they were doubtless made known to him. In that case, the vessel, which had been partly wrecked on the coast of Jamaica, and partially restored there, and had changed flags, came to Mobile for docking and more complete repair; then to load out a cargo for foreign lands. She had shipped at Kingston, besides the ordinary crew usually required on vessels of her class, a large number of additional men, who desired to come to the United States, and who were engaged at Jamaica to come to Mobile at a wage of one shilling per month each, to work chiefly at pumping the leaking vessel, and to be here discharged,—an absurdly small wage unless the men were working their passage to the United States; as they manifestly were doing. Under such facts as existed in that case, these men, so working their passage at the equivalent of 25 cents for the month, but who were actually paid \$5 each for the month's service (where the ordinary wages were \$15 per month), and who stipulated for discharge here in the United States, were plainly immigrants, and properly treated as such, and therefore properly deported under the ruling of the secretary; and this, not because bona fide crews of ships fall under the immigration laws, but because they were not a bona fide crew of the ship. Were the court to adopt all the views contained in the letter of instruction of the secretary of the treasury referred to in the Lancashire case, it would not aid the respondent in this case, as it is sufficient to say that the secretary there applied his ruling exclusively to discharged seamen, who came into the United States under the circumstances above stated, on the evident theory that, after they were discharged, they became a part of the mass of the people of the country, and were indistinguishable from any other immigrants. Such is not the case here. I am satisfied that the master of this vessel has committed no offense against the immigration laws, and is entitled to his clearance without paying any fine imposed by such laws.

I am not unmindful of the provision of the act of August 18, 1894, that "in every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final unless reversed on appeal to the secretary of the treasury" (2 Supp. Rev. St. U. S. p. 253), and of the rulings made thereon. *Lem Moon Sing v. U. S.*, 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082; *Wong Wing v. U. S.*, 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140; *In re Moses* (C. C.) 83 Fed. 995, and other cases. Under these decisions the status of any alien, and the question of his right to enter the United States, is ex-

clusively vested in the executive department of the government; and, where it has been legitimately exercised, the courts cannot interfere in behalf of the alien. But no question arises in this case upon that clause of the law, for the reason that, as I have interpreted it, the alien seamen using the ports of the country in their ships are not alien immigrants, and are, therefore, not aliens coming into the country, within the meaning of the statute, and whose right to remain here can be definitely and finally determined by the executive officers of the government. But, besides this, whatever may be the right of any officer to determine the status of a particular alien as between the government and the alien, the right to enforce a penalty against the ship that brings him is essentially a judicial right, and when, therefore, it is attempted on the part of the executive officer to constrain a ship master to pay a penalty, or when clearance is refused to his ship for failure to pay such penalty, the courts are not excluded from a consideration of the question whether a case is made for the imposition of the penalty or the restraint of the ship. Let a peremptory writ of mandamus issue.

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**McNULTA v. WEST CHICAGO PARK COM'RS.**

**WEST CHICAGO PARK COM'RS v. McNULTA.**

(Circuit Court of Appeals, Seventh Circuit. March 2, 1900.)

Nos. 580, 603.

**1. BANKS—DEPOSIT OF PUBLIC FUNDS—LIABILITY FOR MISAPPROPRIATION BY OFFICER.**

A private banking firm transacted practically its entire business through a national bank. It cleared through such bank, and kept an account therein, in which it deposited all checks and cash items received, and against which checks drawn upon it and coming through the clearing house were charged. At a time when the firm was largely indebted to the bank, and known by the bank officers to be insolvent, one of the partners was appointed treasurer of a city park board, the president of the bank becoming surety on his bond. A portion of the park funds was at once used in paying a large overdraft of the firm in its bank account, the remainder being for a time carried in a separate account in the bank to the credit of the treasurer, but from which he from time to time checked amounts in payment of further overdrafts of the firm. Subsequently the entire account was transferred and merged in that of the firm, the treasurer from that time nominally making the private firm his depository, and the firm depositing the park funds in its own bank account, as was known by the bank officers. Both the bank and the firm suspended through insolvency. *Held*, that the bank was a party to the misappropriation of the park funds by the treasurer, and was liable for the amount so misappropriated, and of which it received to some extent the benefit.

**2. SAME—SUIT TO RECOVER—PLEADING.**

Under a bill filed by the park board against the bank, evidence of the insolvency of the firm of which the treasurer was a member at the time the park funds were appropriated to its use, and that such fact was known to defendant, was competent in support of the charge of misappropriation, although not directly alleged.

**3. APPEAL—ASSIGNMENT OF ERRORS.**

An assignment of errors that the court erred in finding the defendant indebted in the sum it did, or any other sum, is not sufficient to present the question whether the inclusion of an item of interest was erroneous.

**4. BANKS—INSOLVENCY—CLAIM OF PREFERENCE.**

A deposit of public funds on which, under the law, interest must be paid, cannot be special or in trust, and, in case of insolvency of the depository, stands on the same footing with other deposits.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Thomas A. Moran and John P. Wilson, for appellant.

John S. Miller, E. O. Brown, and Francis Riddle, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge. These appeals are from a decree by which the West Chicago Park Commissioners, a quasi municipal corporation, was adjudged entitled to recover of the National Bank of Illinois, at Chicago, the sum of \$316,013.40, and the receiver of the bank was directed to pay the complainant as a creditor for that amount ratably with other creditors of the bank. The receiver, who is the principal appellant, challenges the liability of the bank. The contention on the cross appeal is that the sum due the park commissioners should have been declared a preferred claim. The theory of the bill, in brief, is that Edward S. Dreyer, who was the senior member of the banking firm of E. S. Dreyer & Co., and from March 13, 1894, until December 21, 1896, was the treasurer of the West Chicago Park Commissioners, misapplied the moneys of that body to the discharge of the liabilities of E. S. Dreyer & Co. to the National Bank of Illinois, at Chicago; the officers of the bank participating in the wrong.

The facts and circumstances in evidence are set out in great detail in the report of the special master, but only a summary statement here is deemed necessary. E. S. Dreyer & Co. was a partnership, composed of Edward S. Dreyer and Robert Berger, a son-in-law of George Schneider, who from August, 1871, to the end, in December, 1896, was the president of the National Bank of Illinois. The business of the partnership, commencing about 1879, was at first confined to dealings in real estate and mortgage loans, but later was extended to private banking. This was done at the instance of Schneider, the president, and W. A. Hammond, the second vice president, of the National Bank of Illinois, who promised that the bank would see the firm "through." The subsequent transactions of the bank which have been brought into question in this suit seem to have been efforts to make good that promise. The firm was not a member of the Chicago Clearing House, but "cleared" through the National Bank of Illinois. It is substantially true, as stated in the brief for the appellant, that, from the inception of the business until the failure of the bank, the firm kept a deposit account in the bank, "to the credit of which were placed all checks deposited with E. S. Dreyer & Co., and all moneys received by them and paid out over their counter, and to which account all checks upon E. S. Dreyer & Co. coming through the clearing house were charged, and also all cash paid by said bank to the firm of E. S. Dreyer & Co. This method

of doing business continued through the entire period covered by E. S. Dreyer's treasurership of the West Chicago Park Commissioners. For a short time after his appointment as treasurer, Dreyer kept an account in the National Bank of Illinois as treasurer of the West Chicago Park Commissioners. The last deposit to the credit of this account was made in November, 1894. On April 29, 1895, there stood to the credit of this account only the sum of \$908.20, which was subsequently transferred to the credit of the account of E. S. Dreyer & Co. in the National Bank of Illinois. After November, 1894, all park funds coming into Dreyer's hands were deposited by him to his credit as treasurer with E. S. Dreyer & Co., and were deposited by said firm to their credit with the National Bank of Illinois, the same as all other checks and deposits received by them as bankers, and all warrants drawn on E. S. Dreyer as treasurer were paid by E. S. Dreyer & Co. through the National Bank of Illinois precisely the same as all other checks drawn on them by their depositors."

But while, as an outline of the method of business pursued, this statement is not especially objectionable, its full significance will be more evident when it is added that at the time of Dreyer's appointment as treasurer of the West Chicago Park Commissioners, E. S. Dreyer & Co., though possessed of large interests in real estate, were practically insolvent, and without the aid of the National Bank of Illinois would have been forced to suspend. The bank held their obligations for large amounts, and, besides, their deposit account almost constantly was heavily overdrawn. In this situation Schneider, the president of the bank, became surety upon Dreyer's first official bond, and upon each successive bond required upon his reappointment at the end of each year. Dreyer's first deposit was \$249,024.75, made on April 13, 1894, to the credit of E. S. Dreyer & Co.'s account, which was then overdrawn to the amount of \$49,054.06. On the next day E. S. Dreyer & Co. drew against their account so replenished a check in favor of E. S. Dreyer, treasurer, for \$199,024, which was deposited in the bank to the credit of Dreyer as treasurer, and was the beginning of the account kept as before stated. This was done upon an understanding with the officers of the bank that the account should be so opened, and that, of the money coming into Dreyer's hands as treasurer, E. S. Dreyer & Co. should be allowed to use in their business \$50,000 (extinguishing the existing overdraft), and that all other park money should be deposited in Dreyer's account as treasurer, and should be drawn out only on checks approved by Carl Moll, the cashier of the bank; and so the business was done while that account was kept open, and large sums were checked therefrom and transferred to the credit of E. S. Dreyer & Co. for the purpose of paying further overdrafts in their account. But this method of operation was so palpably awkward—each transaction carrying on its face the proof of a misappropriation of public money to private use—that it was necessarily abandoned. The change, however, was one of bookkeeping, more than of essential fact. It was so arranged that all park funds went directly to the credit of E. S. Dreyer & Co. in the bank, constantly augmenting their deposit, or diminishing their overdraft, instead of being transferred from time to time for the purpose

of reducing overdrafts; but the bank officers, the proof is convincing, all the time knew whence the money came, and were no less responsible than before for the misapplication. Accounts were kept by E. S. Dreyer & Co. from the beginning, charging themselves and crediting the West Chicago Park Commissioners with all park funds which came to Dreyer's hands as treasurer; but that was bookkeeping merely. At first the funds went actually into the National Bank to the credit of Dreyer's account as treasurer, and, after that account was closed, into the account of E. S. Dreyer & Co. in that bank. The misapplication of the money, whether by one mode of bookkeeping or the other, was essentially the same, and necessarily was so understood by all concerned. Only as a matter of book entries was it true, as quoted from the brief, that "all park funds coming into Dreyer's hands were deposited by him to his credit with E. S. Dreyer & Co., and were deposited by said firm to their credit with the National Bank of Illinois," etc.; and if it be true, as stated, that "all other checks and deposits received by them as bankers" were treated in the same way, it only emphasizes the conclusion of the court below that in legal effect "the defendant bank absorbed the banking house of E. S. Dreyer & Co., and thereby became, as to the complainant and its treasurer, the direct depository of complainant's money." Among the items of the account were the proceeds of bonds of the West Chicago Park Commissioners to the amount of \$600,000 face value, which in May or June, 1896, came to the hands of Dreyer for sale. The sales were effected by the National Bank, and the proceeds received by it and placed directly to the credit of Dreyer & Co., on whose books entries of the transaction were not made until the next day after receipt by the National Bank, and neither the bonds nor proceeds were ever in the actual possession of Dreyer & Co. The same is true of other items of the account.

We do not dissent from the proposition of counsel for the appellant, in their original brief, that:

"In order to render the National Bank of Illinois liable to the park commissioners, it must appear either that the bank received some benefit from the misappropriation of the park funds by Dreyer, or else that the bank was guilty of such participation in the misappropriation of said funds as to render it liable, even although it received no benefit therefrom."

This concedes the misappropriation. The fact was undeniable; and it is apparent, on the facts already stated, both that the bank received benefit from, and actually and knowingly participated in, the misappropriation. The charge that the officers of the bank induced the deposit of the park funds in the bank to the credit of E. S. Dreyer & Co. for the purpose of thereby reducing the indebtedness of that firm to the bank, it is urged, cannot be true, because that indebtedness greatly increased during the period of Dreyer's treasurer'ship. The fallacy of this is plain. Each misappropriation, when made, operated to reduce the amount of the existing indebtedness. So Dreyer and the officers of the bank well understood and presumably intended. Each deposit made lighter the constantly growing burden of keeping the promise to see Dreyer & Berger through their embarrassments.

Equally unavailing is the argument that the insolvency of E. S. Dreyer & Co. was not alleged in the bill, and was not known to the officers of the bank; that they did not anticipate loss to the park commissioners by reason of the use made by Dreyer of the park funds; and that the loss arose from the unforeseen and unexpected insolvency of the bank itself, which theretofore "had honored all the checks of E. S. Dreyer & Co." While the bill contains no direct averment of the insolvency, proof on the subject was pertinent to the charge of misappropriation of the park funds by Dreyer and the bank. That the officers of the bank were fully cognizant of the embarrassed condition of Dreyer & Co., and consciously participated in the purpose, if they did not require, that the funds be appropriated as they were for the mutual benefit of Dreyer & Co. and the bank, the evidence leaves no room to doubt; and responsibility cannot be escaped on the ground that the insolvency of the bank and its inability to pay the demands of the park commissioners from time to time when called for by the checks of E. S. Dreyer & Co. was an unforeseen and unexpected event. It was the known inability of Dreyer & Co. to meet their liabilities which constituted the evident impropriety and wrong of turning over the park funds to their use; and it was participation in the misappropriation so effected that made the bank liable. The subsequent inability of the bank to meet the checks of Dreyer & Co. in favor of the park commissioners, as it had been accustomed and doubtless intended to continue to do, has no relation to the question. The bank confessedly was carrying Dreyer & Co., knowing their present inability to meet the demands of their depositors, so called, in the usual course of business from day to day; and even if, as contended, they believed that, by reason of the hoped-for advance in the values of real estate, Dreyer & Co. would become solvent, the wrong involved in applying the park funds to the present discharge of the obligations of the helpless debtor to itself was none the less obvious and inexcusable. The risk it was constantly and voluntarily assuming in the attempt to carry Dreyer & Co. it had no right to shift upon the park commissioners or others who had deposited with them, presumably in the belief that they were an independent, self-controlled, and responsible concern. If it be true that the park officers knew that their funds were being deposited with Dreyer & Co., it is of no significance, because they had no power or right to interfere; and it does not appear that they had any reason to suspect the insolvency or embarrassed condition of the firm. The rules of the park board required that park funds be deposited in the name of the park board; but the treasurer alone determined the place of deposit. Indeed, by the act of July 1, 1893 (Laws Ill. 1893, p. 136), he was required "at the end of each year to account for interest on the daily balances of the funds from time to time in his custody, at a rate of not less than two per cent. per annum, and as much higher as solvent banks that are reasonably accessible pay on daily balances of accounts that are subject to sight draft or check." This statute, it was held in *Dreyer v. People*, 176 Ill. 590, 52 N. E. 372, did not affect the fiduciary or public character of funds, by converting the officer who had the custody thereof into an owner, responsible only as a debtor



for the repayment of them. The accruing interest, under the statute, becomes a part of the fund to be accounted for. The bank which receives the deposit, promising to pay interest on daily balances, of course may treat the money as an ordinary deposit, allowing it to be checked out by the depositor for any proper public use. Dreyer's first account with the bank, instead of being in his own name as treasurer, should have been in the name of the park board; but the difference was perhaps not material. In one form or the other, its character would have been sufficiently indicated, and so long as checks against it were honored only when drawn by Dreyer as treasurer, and apparently for a proper public use,—and perhaps when they were not known by the bank to be for an improper use,—the bank clearly was not responsible for a resulting misappropriation of the fund; but when knowingly, and for its own advantage, it permitted and participated in a diversion of the fund to the discharge of the liabilities of an insolvent or embarrassed debtor to itself, it ought in good conscience to make restitution, and the decree to that effect is not erroneous.

The contention that the amount of the recovery is too large by reason of interest with which Dreyer & Co. charged themselves from month to month, under the statute, does not arise upon the assignment of errors. The second, third, and fifth specifications of error are to the effect that the court erred in finding the bank indebted to the complainant in the sum of \$316,013.40, or any other sum, but there is in no specification a suggestion of the particular error now insisted upon. See *Stewart v. Morris*, 37 C. C. A. 562, 96 Fed. 703; *Columbus Construction Co. v. Crane Co.* (C. C. A.; Jan. Sess. 1900) 98 Fed. 946.

The cross appeal is without merit. A deposit upon which interest must be paid cannot be special or in trust, and, in case of the failure of the bank, must, for the purpose of payment, be on the same footing with other deposits or unsecured demands.

The decree below is affirmed.

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### EDWARDS V. BATES COUNTY.

(Circuit Court of Appeals, Eighth Circuit. February 13, 1900.)

No. 1,103.

#### 1. MUNICIPAL BONDS—PROOF OF OWNERSHIP—POSSESSION.

Possession of municipal bonds payable to bearer is evidence of ownership, and their production by the plaintiff on the trial of an action based thereon is sufficient, *prima facie*, to establish his ownership at the time the action was commenced.

#### 2. EVIDENCE—STATEMENTS OF THIRD PARTIES—RECORD OF FORMER SUIT.

In an action on negotiable municipal bonds, the record of a prior action, brought against the defendant by a third person on the same bonds, and dismissed before the present action was commenced, is not admissible in evidence to impeach the plaintiff's ownership of such bonds. Even if the former suit had not been so dismissed, the allegation of ownership by the plaintiff therein in his petition was merely a statement by a stranger to the second action, not admissible to affect the rights of the parties thereto.

In Error to the Circuit Court of the United States for the Western District of Missouri.

The plaintiff in error, James C. Edwards, brought an action against the defendant in error, the county of Bates, upon two bonds and certain coupons issued by the county, and the court rendered a judgment in favor of the county on the ground that the plaintiff was not the owner of the bonds. The writ of error was sued out to reverse this judgment.

T. K. Skinker, for plaintiff in error.

T. B. Wallace (William H. Wallace, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. There is no principle of law or of equity more essential to the protection of the life, liberty, and property of the citizen than the established rule which prohibits the receipt of evidence of the statements of strangers, whether verbal or written, to determine the issues between, and to establish the rights of, the parties to an action. It is vital to the security of person and of property that the repetition of the statements of third parties shall not be taken as evidence to sustain or impeach the rights of litigants, and that only after due notice and opportunity for cross-examination of the very parties whose statements are sought, and then only under the solemnity of an oath or affirmation, shall their averments become evidence. The crucial issue in this case was whether or not, on October 5, 1891, when he commenced this action, the plaintiff in error, James C. Edwards, was the owner of two bonds for the sum of \$1,000 each, and certain coupons attached thereto, which had been issued by the defendant in error, the county of Bates, in the state of Missouri. The bonds and coupons were payable to bearer, and at the trial the plaintiff produced and read them in evidence. Possession of commercial securities is evidence of ownership, and the production of these bonds and coupons by the plaintiff at the trial was sufficient proof, in the absence of countervailing evidence, to determine this issue in his favor. To overcome this proof the defendant in error offered in evidence, over the objection of the plaintiff that it was incompetent, and did not tend to prove that he was not the owner of the bonds and coupons, the record of an action in the court below brought by one Norman De V. Howard, through Mr. T. K. Skinker, the attorney for the plaintiff in this case, against this defendant, on November 13, 1889, on the same bonds and on some of the coupons involved in this action. That record disclosed the fact that this action brought by Howard had never been tried, and that it was dismissed on March 2, 1891. The objection to this record was well taken. The statement or claim of Howard in his petition in that record that he owned the bonds and some of the coupons was hearsay. It was made when he was not a witness, without notice to the plaintiff in this case, without opportunity for cross-examination, and it was not under oath or affirmation. The facts that he made this statement to an attorney at

law, that his attorney wrote it out and filed it in the court below in the form of a petition, and that the clerk of the court produced it at the trial, add nothing to its competency as evidence in this case. In the last analysis the record amounts to nothing more than this: that the clerk of the court says that Mr. Skinker said in the petition he filed for Howard that Howard said in 1889 that he owned the bonds and some of the coupons. Numerous repetitions of hearsay do not give it competency as evidence, and the fact that a third party has brought an action against a defendant, in which he avers that he owns the same property, and is entitled to recover on the same claim or demand, on account of which the plaintiff sues, is no evidence against the latter either that he does not own the property or that his claim is not well founded. As to him, such an averment is mere hearsay.

There is another reason why the record in Howard's case was improperly received, and that is that it was irrelevant. Bonds and coupons payable to bearer pass from hand to hand rapidly, and with much facility. The question in the case was not the ownership of the plaintiff in 1889, but in October, 1891, when he commenced this action. He established his ownership by the possession and production of the bonds and coupons. Now, even if it were conceded that Howard owned them on November 13, 1889, when he commenced his action, that fact would not be inconsistent with the plaintiff's ownership in 1891, and it would be irrelevant to the issue in this case, because the presumption arising from the plaintiff's possession would be that the title had been transferred from Howard to him before he brought his action, especially in view of the fact that Howard dismissed his action six months before this action was brought. This record in Howard's action seems to have been the only evidence received at the trial which tended to refute the plaintiff's proof of ownership, and its receipt was a fatal error. The judgment is accordingly reversed, and the case is remanded to the court below, with directions to grant a new trial.

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AERHEART V. ST. LOUIS, I. M. & S. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. February 19, 1900.)

No. 1,178.

**1. TRIAL—INSTRUCTIONS—COMMENTING UPON EVIDENCE.**

It is a well-settled rule in the federal courts that a trial judge may make comments upon the evidence in his charge, and express his opinion as to what the evidence does or does not conduce to prove, provided the jury are ultimately left at full liberty to determine all issues of fact.

**2. SAME—INSTRUCTION IN ABSENCE OF COUNSEL.**

While a trial court should refrain from instructing a jury in the absence of counsel, when it can do so conveniently, it is not reversible error for a court to give further instructions in explanation of its previous charge, in compliance with a request from the jury, although counsel for neither of the parties is present, where such instruction is given in open court, during a regular session, when counsel might reasonably have been expected to be in attendance.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Sterling P. Bond, for plaintiff in error.

Henry G. Herbel (Martin L. Clardy, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

**THAYER, Circuit Judge.** This case comes on a writ of error from the circuit court of the United States for the Eastern district of Missouri, in which court Loney Aerheart, the plaintiff in error, by his next friend, brought an action against the St. Louis, Iron Mountain & Southern Railway Company, the defendant in error, charging, in substance, that one of its employes unlawfully assaulted him with a revolver, and threatened to shoot him, as he was attempting to steal a ride on one of the freight trains of the defendant company, and that by reason of such unlawful assault the plaintiff, who was about 16 years old, was greatly frightened, and took refuge under said freight train, where his foot was caught and crushed in such a manner that it had to be amputated. The plaintiff's own testimony, as given at the trial, did not conform in some respects to the allegations of his complaint, but tended to show substantially the following facts: That while one of the defendant's trains was lying at a station the plaintiff crept up a ladder on the side of one of the cars, intending to secure a place to ride on the top of the train; that, as his head appeared above the roof of the car, one of the defendant's brakemen moved towards him with a revolver in his hand, and threatened to shoot; that out of sheer fright the plaintiff fell from the ladder between the cars; and that one of his feet was run over by a wheel of the car, and crushed. The trial court, however, in its charge ignored the variance between the proof and the pleadings, and instructed the jury, in substance, that, if they credited the boy's statement as to the manner in which the injuries complained of were sustained, they should render a verdict in his favor. It further instructed the jury, in substance, that, while persons who attempt to steal rides on railroad trains may be put off from the same by the exercise of sufficient force, yet that a railroad company cannot in such cases use unreasonable force, or act in such a way as will necessarily occasion bodily injury to one who is thus ejected from a train.

The testimony offered by the defendant was to the following effect: That the plaintiff was injured by attempting to go underneath a freight car with a view of stealing a ride, and concealing himself from the persons in charge of the train, while the train was moving slowly along a siding waiting for the passage of another train; that a few moments before the accident occurred, as the plaintiff and some other boys were running along the side of the train with the evident purpose of boarding it and stealing a ride, they were warned by one of the brakemen to desist from such efforts; that no pistol was drawn on the occasion in question, or threats made to use one, if they persisted in their efforts to board the train; and that immediately after the accident the plaintiff himself admitted to several persons that he had

attempted to run under the train while it was in motion, and that the injuries which he had sustained were due to his own fault. The jury found in favor of the defendant, believing, no doubt, that the defendant's witnesses had described the circumstances under which the injuries were sustained with substantial accuracy.

The record, as presented to this court, fails to disclose any error in the proceedings of the trial court. The plaintiff was allowed to submit his case to the jury on the facts which he testified to at the trial, although they differed in some material respects from the facts stated in his complaint, and the jury were instructed to find in his favor on the case made by his own evidence, if they believed his statements to be true. It is obvious, we think, that the plaintiff ought not to complain of such action, since it afforded him an opportunity to have his rights determined by the jury on the case as he made it on the witness stand, and under instructions from the court which were as favorable as he could either expect or desire.

The only incident of the trial which affords any reasonable ground for complaint is the action of the trial court in giving a supplementary instruction to the jury in the absence of counsel for the respective parties. This action forms the basis for one of the assignments of error. The bill of exceptions recites, in substance, that after the jury had had the case under consideration for some time, and had not reached an agreement, they returned to the court room, and advised the court, through their foreman, that some of the jurors did not understand what was meant by the phrase, "a preponderance of proof," that had been employed in the charge as originally given; that thereupon the court explained what was meant by the phrase, and referred to the evidence in the case by way of illustration, and commented upon the same substantially as it had done in the original charge, and finally expressed the opinion that the plaintiff had not made out his case by that measure of proof which the law required. The bill of exceptions further recites that the court at the same time clearly informed the jury that, notwithstanding the opinion which it had expressed, the jury were the sole judges of the facts, and had the right to disregard the opinion of the court on questions of fact, if it did not accord with their own. The bill of exceptions further discloses that this supplemental charge was given to the jury during a regular session of the court, in the presence of the plaintiff, who was in attendance, but in the absence of counsel for the respective parties, who had absented themselves from the court room at a time when they might reasonably have been expected to be in attendance.

In the assignment of errors it is alleged that "the parts of the charge of the court to the jury given in the absence of counsel for plaintiff were improper and illegal." If this assignment be understood as relating to the substance of the supplemental charge, it is untenable, because it is a well-settled rule in the federal courts that a trial judge may make comments upon the evidence, and express his opinion as to what the evidence does or does not conduce to prove, provided the jury are ultimately left at full liberty to dispose of all issues of fact as they may deem best. *Rucker v. Wheeler*, 127 U. S.

85, 93, 8 Sup. Ct. 1142; 32 L. Ed. 102; *Railroad Co. v. Putnam*, 118 U. S. 545, 553, 7 Sup. Ct. 1, 30 L. Ed. 257; *Van Gunden v. Iron Co.*, 8 U. S. App. 229, 273, 3 C. C. A. 294, 52 Fed. 838; *Doyle v. Railway Co.*, 147 U. S. 413, 13 Sup. Ct. 333, 37 L. Ed. 223. We apprehend, however, that the assignment in question was intended to allege error because the supplementary instruction, although correct in substance, was given in the absence of the plaintiff's attorney, and that point will be noticed, although it is not specifically assigned.

The practice of sending written instructions to the jury room, or holding other written communication with the jury, after they have retired to consider their verdict, without the knowledge of counsel for the respective parties, has been condemned in numerous well-considered cases, and has only been upheld in a few instances. *Chouteau v. Iron Works*, 94 Mo. 388, 7 S. W. 467; *State v. Patterson*, 45 Vt. 308; *Bank v. Mix*, 51 N. Y. 558; *O'Connor v. Guthrie*, 11 Iowa, 80; *Campbell v. Beckett*, 8 Ohio St. 210; *Hoberg v. State*, 3 Minn. 262 (Gil. 181). See, contra, *Bassett v. Manufacturing Co.*, 28 N. H. 457; *Goldsmith v. Solomons*, 2 Strob. 296. It will accordingly be conceded that such practice is erroneous, and ought not to be sanctioned. In the present instance, however, the trial judge did not hold written communication with the jury, or send instructions to their room, but called the jury into court while it was in session, and gave them such further advice as they requested with reference to a phrase used in its original charge. Moreover, the record shows that the comments made concerning the evidence, while explaining the meaning of the phrase "a preponderance of proof," were substantially the same as those that had been made in the course of the original charge, and it does not appear that the supplementary instruction was erroneous, so far as it dealt with matters of law, or that the court exceeded its powers in expressing its opinion as to the weight of proof. Under these circumstances, it is manifest that the action of the court was not of such a character as to warrant a reversal of the judgment. A trial court should refrain from instructing juries in the absence of counsel for the respective parties, when it can do so conveniently, particularly when the supplemental charge covers propositions of law not dealt with by the original charge. But, if counsel interested in a cause which is on trial and undetermined see fit to absent themselves from the court room when their presence may be required at any moment, the court is not thereby required to suspend its proceedings until they return. *Stewart v. Rancho Co.*, 128 U. S. 383, 390, 9 Sup. Ct. 101, 32 L. Ed. 439. In the present case we think that it was within the discretion of the trial judge to act as he did in the matter of answering the inquiry of the jury, and that the action taken does not constitute a reversible error.

No other errors have been assigned which are of sufficient moment to require special notice. Under the charge given by the trial court, the jury must have found that the plaintiff was not assaulted, either in the manner alleged in his complaint or in the manner described in his testimony, but that the injuries were occasioned by his attempting to run under a moving freight car, either with a view of getting on the other side of the train, or of secreting himself at some place underneath the car. The judgment below is accordingly affirmed.

## BAKER v. CLARK et al.

(Circuit Court of Appeals, Eighth Circuit. February 19, 1900.)

No. 1,102.

## CARRIERS—ACTION FOR INJURY TO PASSENGER—QUESTIONS FOR JURY.

Plaintiff's evidence tended to show that as he stepped from defendant's train at a station in the night, where it was too dark for him to see well, he was tripped by a hose that was being drawn along the platform by employes of defendant, close to the steps of the car, and fell, and was injured. Defendant's evidence was to the effect that the hose was lying still on the platform, not less than 2½ feet from the car steps, and that the place was well lighted. *Held* that, in view of such conflict in the evidence as to material facts, it was error to direct a verdict for defendant.

In Error to the Circuit Court of the United States for the District of Colorado.

John S. Mosby, Jr. (John G. Taylor, on the brief), for plaintiff in error.

Willard Teller (H. M. Orahood, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This is an action by Allen Baker, the plaintiff in error, who was also the plaintiff below, to recover damages for injuries which he claims to have sustained as he was in the act of alighting from a railway train of the Union Pacific Railway Company, which was at the time being operated by the defendants in error as receivers of that road. The trial court withdrew the case from the consideration of the jury at the conclusion of all the testimony, and the question which the record presents for our determination is whether such action was erroneous.

The evidence offered in behalf of the plaintiff was to the following effect: He testified, in substance, in his own favor, that he took passage on the night of November 15, 1896, on a train of the Union Pacific Railway Company, which was being operated by the defendants in error in their capacity as receivers, for the purpose of going from Denver, Colo., to Cheyenne, Wyo.; that he purchased a ticket for the trip, and was accompanied on the journey by his wife and some friends; that the train drew into the station at Cheyenne about 10 minutes past 10 o'clock p. m. of that night; that he was not familiar with the surroundings, never having had occasion to alight from a train at that station; that he rode in a chair car, which was next to the sleeper, and that he descended to the platform at the rear end of the car; that the lowest step of the car was about a foot above the depot platform; that, owing to the darkness, he could not in his position see any small object lying on the platform; that in attempting to alight from the car, the same being at rest, he was thrown down very violently by stepping on, or by coming in contact with, a hose which was used at that station for watering cars. He further testified that the hose was at the time being dragged along the platform from the front towards the rear end of the train,

and was close to the edge of the platform, being not more than 15 or 18 inches from the car step; that he was tripped up by the moving hose; that he did not see it before he came in contact with it and fell, but that he knew that the hose was in motion at the time, and being drawn along the platform, because he felt it move under his feet when he fell; and that, in consequence of being thus tripped up, his ankle was broken or badly strained, and that he was disabled from using his leg for several months. Another witness and friend of the plaintiff, who accompanied him on the journey from Denver to Cheyenne, testified, in substance, that he was immediately behind the plaintiff as the latter stepped down from the chair car on the occasion of the accident; that the plaintiff had a grip in his hand, and that as he stepped on the platform, or was in the act of doing so, one of his feet came in contact with a hose, and that he immediately pitched forward and fell. This witness further testified, in substance, that immediately after the plaintiff fell he saw two men at the rear end of the sleeping car, and that these men had hold of the hose, and were standing on the steps of the sleeping car, with the hose in their hands. The defendants, on the other hand, introduced testimony which tended to show that when the plaintiff sustained the injuries of which he complains the depot platform was well lighted; that the hose complained of was lying on the depot platform, and could be plainly seen; that it was not being dragged along the platform at that time, as the plaintiff's testimony tended to show; that it was not even attached to the hydrant, but was lying lengthwise on the platform, at least 2½ feet from the steps of the car from which the plaintiff alighted; and that no occasion existed for using the hose that night to supply the sleeping car with water, because the car in question did not need water.

It is apparent, therefore, that there was a conflict in the testimony concerning the following issues, namely: Whether the plaintiff came in contact with, and was tripped up by, the hose; whether it was at the time being dragged along the platform in close proximity to the steps of the car by persons in the employ of the receivers; whether there was adequate light at the place where the plaintiff fell to render all objects on the platform plainly visible; and whether the plaintiff himself, on the occasion of the accident, exercised ordinary care. These were severally and collectively issues of fact, which should have been submitted to the jury for their determination, since it is impossible to say that all reasonable persons who listened to the evidence must have concluded that the defendants were wholly right in their contention, and that the plaintiff was wholly wrong. We are satisfied by an inspection of the record that many persons might, with good reason, conclude that the plaintiff's fall, and consequent injuries, were occasioned by the dragging of the hose in too close proximity to the cars as passengers were alighting from the train. The fact that the plaintiff's injuries were not so occasioned, but were due to sheer accident or to a want of ordinary care on his part, was not so conclusively established, either by uncontradicted circumstances or evidence, as to justify the court in withdrawing the issues from the jury. The case was one which was peculiarly appropriate for a jury, in view of the conflicting evidence concerning the position of the



hose and where it was lying, and what was being done with it, at the time the injuries were sustained. Moreover, if the jury had been satisfied by the evidence, and had so found, that the hose in question was being dragged along the platform, or that it lay on the platform in close proximity to the train, and in such a position as to obstruct passengers who were in the act of alighting from the cars, and render their exit more difficult, and that the injuries complained of were due to that fact, the plaintiff himself being in the exercise of ordinary care, then we have no doubt that the defendants did not exercise that high degree of care which a carrier owes to its passengers, and that the plaintiff was entitled to recover. The judgment below is accordingly reversed, and the case is remanded for a new trial.

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In re LESSER et al.

(Circuit Court of Appeals, Second Circuit. January 30, 1900.)

No. 120.

**1. BANKRUPTCY—STAY OF PENDING SUITS—DISCRETION OF DISTRICT COURT.**

Under Bankr. Act 1898, § 11a, providing that suits pending against a bankrupt, founded on claims from which his discharge would be a release, "may be stayed until twelve months after the date of the adjudication," or until the question of the bankrupt's discharge is determined, the granting of an order staying such an action rests in the discretion of the district court; and its action in the matter will not be interfered with by the appellate court, on petition for review, unless such discretion has been abused.

**2. SAME.**

A judgment creditor brought suit to set aside certain alleged fraudulent transfers of property by the debtors, and to vacate a receivership procured by them in an action for the dissolution of their partnership, and subsequently obtained an order for the examination of one of the debtors on proceedings supplementary to execution, which was pending at the time the debtors were adjudged bankrupt. The court of bankruptcy made an order restraining the creditor from taking any further proceedings on his judgment until 12 months after the adjudication in bankruptcy, or until the question of discharge should be decided. *Held* that, since the restraining order applied only to the supplementary proceedings, not to the creditors' bill, and since the creditor, by an examination of the bankrupts, could obtain the same information sought in those proceedings, there was no abuse of discretion by the district court, and the stay was rightly granted.

On Petition to Review an Order of the District Court of the United States for the Southern District of New York.

The petition for review is filed on behalf of the Ninth National Bank of the City of New York, a creditor of the bankrupts.

Nelson Spencer, for petitioner.

Alexander Blumenstiel, for respondents.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The bankrupts are co-partners formerly doing business under the name of Lesser Bros. In October, 1896, they transferred their property and executed certain confessions of judgment in the state court, upon which judgments levies were made.

They further instituted an action in the state court for dissolution of co-partnership, in which a receiver was appointed. The petitioner charges that all these proceedings were fraudulent and collusive. In November and December, 1896, the petitioner, the Ninth National Bank, obtained two judgments against the Lessers in the supreme court of the state, and on March 31, 1898, commenced an action in the same court to set aside the various transfers, as well as the receivership, as void as to it. This action is still pending. On April 18, 1899, upon the judgment procured by the petitioner in November, 1896, an order was made by a justice of the supreme court directing Tobias Lesser to appear for examination in proceedings supplementary to execution on April 28, 1899, which order was duly served on the judgment debtor. Such proceedings were still pending, and, by stipulation, May 12, 1899, had been set for the beginning of the examination, when petition in bankruptcy was filed. The petition in bankruptcy of the firm and the individual partners was filed in the district court May 12, 1899, and they were adjudicated bankrupts. On the same day the district court made an order enjoining and restraining the Ninth National Bank "from taking any further proceedings whatever upon the judgment obtained by it against the said Lesser Bros. \* \* \* on November 20, 1896, until twelve months after the date of the adjudication of the said firm as bankrupts herein, or sooner if the said bankrupts shall apply for a discharge before that time." Thereafter the bank moved to vacate such restraining order. Such motion was denied, and petitioner now seeks to review that denial.

The authority for the restraining order is found in the bankrupt act of 1898:

"Sec. 11a. A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined."

It will be observed that the order in this cause was made under the second clause of the paragraph. The making of such an order is discretionary with the district court,—the language being, "such action may be stayed,"—and that discretion should not be interfered with, unless it has been abused. Certainly it has not been abused in this instance, and we are at a loss to see in what particular its entry or continuance has operated or will operate to the prejudice of the petitioner. From certain passages in the brief, it may be inferred that petitioner is apprehensive that it will in some way hinder or delay the adjudication it is seeking in the state court upon its creditors' bill to set aside the transfers and state receivership, or that it may impair the lien created by the commencement of such suit. But upon the oral argument counsel apparently conceded that no rights under the equity suit to set aside the transfers are affected, or sought to be affected, by the restraining order. This must be conceded, in view of the language of the order, which restrains only "from taking any further proceedings whatever upon the judgment of \* \* \* No-

vember 20, 1896." The creditors' bill is not a "further proceeding upon the judgment," and the order is manifestly directed against the supplementary proceedings only. If there were any doubt as to the meaning of the order, it might be made more specific, but its language seems too clear to need amendment; and, indeed, none was suggested upon the argument, although counsel for the bankrupts offered to consent to the insertion of whatever words might be thought necessary to restrict the stay to the supplementary proceedings. There is, of course, no contention that the initiation of the proceedings supplementary to execution less than a month before the Lessers were adjudicated bankrupts gave the petitioning bank any superior lien. The only interference to which the order will subject it is that it will not be able to examine Tobias Lesser in supplementary proceedings as to what disposition was made of the property of the firm and its individual members, thus obtaining information which might be material or useful in the prosecution of the equity suit. Since the petitioner, however, may subject the bankrupts to a most searching examination in the district court, and thereby obtain the same information, it is not easy to see in what way petitioner is prejudiced. There is no occasion to review the exercise of its discretion by the district court. The order is affirmed.

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In re ENDL.

(District Court, S. D. California. February 19, 1900.)

No. 1,285.

**BANKRUPTCY—POSSESSION OF PROPERTY—UNLAWFUL INTERFERENCE BY STATE OFFICER.**

Where a trustee in bankruptcy has peaceably acquired possession of personal property, claiming it as assets of the estate, it is in the custody of the court of bankruptcy; and if such property is subsequently seized by a constable under process from a state court, he will be ordered, on petition of the trustee, forthwith to restore the property to the possession of the latter.

In Bankruptcy. On petition of Gregory Perkins, Jr., as trustee of the bankrupt's estate, against J. W. Kelley, for an order to show cause why the defendant should not restore to the petitioner certain personal property taken from his possession.

E. T. Dunning, for petitioner.

N. Newby, for defendant.

WELLBORN, District Judge. The question to be determined on the present hearing is this: Will a court of bankruptcy, on the petition of the trustee of a bankrupt's estate, who peaceably acquired possession of personal property as property belonging to said estate, which property was subsequently seized by a constable under proceedings had in an action brought in a justice's court of the state, order redelivery of the property to the trustee? Both in reason and on authority, said question must be answered affirmatively. A court of bankruptcy certainly has power to protect its possession of property,

and property held by a trustee under the circumstances above stated—that is, peaceably obtained as a part of the bankrupt's estate—must be deemed to be in the possession of the court. These propositions are not only reasonable, but essential to the administration of the bankrupt law, and have been plainly and repeatedly enunciated by the courts. In *re Cobb*, 1 Nat. Bankr. N. 557, 96 Fed. 821; *Keegan v. King* (D. C.) 96 Fed. 758. In the latter case, the court says:

"The property in controversy being in the actual custody and possession of an officer of this court at the time the suit was brought in the state court, neither that court, nor any person acting under any process issued from that court, can, without permission of this court, interfere with it; and to so interfere would be a contempt of the authority of this court. This principle is thoroughly settled by the supreme court of the United States in the cases of *Peck v. Jenness*, 7 How. 612, 625, 12 L. Ed. 841; *Williams v. Benedict*, 8 How. 107, 112, 12 L. Ed. 1007; *Wiswall v. Sampson*, 14 How. 52, 14 L. Ed. 322; *Peale v. Phipps*, 14 How. 368, 374, 14 L. Ed. 459; *Taylor v. Carryl*, 20 How. 583, 594, 597, 15 L. Ed. 1028; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257."

In the former case—i. e. In *re Cobb*, supra—the court says:

"The trustee is vested by law with the estate, and could, by a proper action, recover possession of the securities in possession of any one as collateral, subject to any valid lien such person might have on the proceeds of such securities. The vesting of titles gives him constructive possession of the property the instant the title passes. Such property is then brought into the bankruptcy court in its entirety, and under its protection as fully as if actually brought into the visible presence of the court. No other court, and no person acting under process, can, without permission of the bankruptcy court, interfere with it; and to so interfere is a contempt. The trustee is an officer of the court, and his possession, actual or legal, is the possession of the court. *Taylor v. Carryl*, 20 How. 583, 15 L. Ed. 1028; *Shields v. Coleman*, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660; *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Loveland, Bankr.* § 150."

Whether this court has jurisdiction to settle the question of title to the property in controversy need not now be determined, although the inclination of my mind is in favor of such jurisdiction. Section 23, subd. "b," of the bankrupt act of 1898 refers expressly to suits by a trustee, and not to claims by other persons for property of which the trustee holds possession. An order will be entered directing said Kelley to forthwith redeliver said property to said Perkins.

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#### BOTTS v. HAMMOND et al.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1900.)

No. 315.

#### BANKRUPTCY—DISSOLUTION OF LIENS—COMPOSITION AGREEMENT.

Creditors of an insolvent debtor attached his property, and caused the same to be sold as perishable, and the proceeds paid into court. The debtor then made an assignment, and a composition was arranged, of which all creditors had notice, by which the proceeds of the attachment sale, the property in the hands of the assignee, and certain property of the debtor's wife was made into a fund, to be divided pro rata, and without preferences, among all the creditors. Judgment was suffered in the attachment suits, and the fund was distributed to creditors, all of

whom, except two, accepted their dividends as in full satisfaction of their claims, a proportionate amount being reserved for the two dissenting creditors. Thereafter, and within four months after the attachments, these latter filed a petition in bankruptcy against the debtor, on which an adjudication was made, and a trustee appointed, who applied for an order requiring the attaching creditors to pay over to him the net proceeds of the attachment sale. *Held*, that the court of bankruptcy committed no error in dismissing the trustee's petition, with a proviso that the dissenting creditors should receive their proportionate share of the fund.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the District of Maryland, in Bankruptcy.

George Whitelock and Frank Gosnell, for petitioner.

Charles W. Heuissler, for respondents.

Before SIMONTON, Circuit Judge, and PAUL and BRAWLEY, District Judges.

SIMONTON, Circuit Judge. This case comes up upon a petition to superintend and revise, in matter of law, proceedings of the district court of the United States for the district of Maryland, in the matter of the estate of Henry J. Clark, a bankrupt. Clark was a merchant doing business in Baltimore under the name and firm of Henry J. Clark & Co. On the 2d of August, 1898, he notified the firm of Hammond & Snyder, who were his creditors in the sum of \$1,643.84, that he was in failing circumstances. According to his statement, he owed \$11,463.21, and he had assets amounting to \$4,923.99. He proposed to make an assignment for the benefit of his creditors, and to make John W. Snyder, one of that firm, his assignee. On the morning of the next day, Snyder had a conference with a number of the creditors, and notified them that the assignment would be made. On the afternoon of that day, however, having received information which induced the belief that Clark did not intend to assign all of his assets, Snyder's firm issued an attachment out of the superior court of Baltimore city, in Baltimore, and under it attached and appraised, as by schedules in the record, the property therein mentioned. Subsequently, the same goods were attached in a suit instituted by John C. Legg & Co. On the 4th of August, 1898, upon the petition of Hammond & Snyder, setting forth the attachment and the property attached, and that the greater part of the property was perishable in its character, and the custody thereof expensive, the superior court of Baltimore city ordered the sale thereof by the sheriff. On the 10th of August the sale took place, and realized, after deducting costs and expenses, \$2,138.80, which was deposited in court to the credit of the cause.

A few days after the attachment was issued, Clark made an assignment for the benefit of his creditors to Charles S. Hayden, and in this included all of his property, including that which it was charged was omitted from the schedules shown to his creditors. On the 20th of August both Clark and his assignee, Hayden, made separate motions to quash the attachment, both of which were refused. Thereupon the attaching creditors, ascertaining that they could se-

cure no preference, and Clark and his assignee consenting, a composition was entered into whereby it was agreed, in the language of the day, to "pool their interests." All the proceeds of the attachment case and the property in the hands of the trustee, with an equity of redemption which Clark's wife had in certain leasehold property in Baltimore, made up a fund, which was to be paid to the creditors of Clark pro rata, equally. At first it was supposed that a dividend of 19 cents could be paid, and at that rate a few of the creditors signed. It was then ascertained that 19 cents was too much, and that the correct dividend was  $17\frac{1}{2}$  cents. All the creditors of Clark had this offer made to them. On the 1st November, 1898, creditors whose names appear in a schedule in the record accepted the dividend of  $17\frac{1}{2}$  per cent. as in full, as a full settlement of their claims. Two of the creditors, Botts & Levering and John C. Legg & Co., did not accept, but demanded a larger dividend. These dissenting creditors were cognizant of the negotiations leading up to the settlement. On the 5th of November, Clark withdrew his pleas to the attachment proceeding, and judgment was had. All the other creditors were paid their dividend thereupon, except these who dissented. Their respective dividends were retained for them in case they should reconsider and accept.

On the 29th of November, 1899, these two dissenting creditors filed their petition in bankruptcy against Clark. On the 27th of December, 1898, he was adjudicated a bankrupt, and on the 6th of February, 1899, Thomas H. Botts was appointed his trustee. On the 10th of March, 1899, Botts, trustee, filed his petition in the court of bankruptcy against Hammond & Snyder, praying a decree that the attachment proceedings instituted by them in August, 1898, be declared null and void, and instructing them to pay over the net proceeds to the trustee, so that it might be administered in bankruptcy. This petition recited, in substance, the facts stated above; charged that the attachment proceedings were instituted collusively with Clark; that they worked a preference, the attaching creditors knowing that Clark was then insolvent; that the withdrawal by Clark of his pleas was intended to precipitate a judgment, which, in the ordinary course, could not be had until January, 1899; and that all of these things were in fraud of the bankrupt act, invalid, and void. Hammond & Snyder answered the petition; denied any collusion with Clark; denied that any preference was sought or obtained; denied any intention to evade the provisions of the bankrupt act; and averred that all the property of the insolvent debtor was distributed equally and pro rata among his creditors. The district court heard the petition, and dismissed it, with costs, with a provision, however, that their dividends of  $17\frac{1}{2}$  per cent. be paid the petitioners. Thereupon the record has been transmitted to this court for its superintendence and revision.

The case, as it comes before us, is this: The attaching creditors pursued in the city court of Baltimore the proper remedy, in accordance with the law and practice of that court. The legality of the proceeding having been challenged, the matter was adjudicated, and the proceedings were sustained. The result was the crea-

tion of a fund in the charge of the court issuing the attachment. These proceedings went to judgment, and the fund was taken out of the control of the defendant. Then came a settlement. All the creditors were notified. The fund in the hands of the court, all the property in the control of the defendant and his trustee, and certain other property, over which no creditor had any claim, were put together. The proceeds were allotted among all the creditors, equally and ratably. With the consent of all but two of them, these proceeds were paid out to all but these two creditors. Each received his share, and each gave a full release to the debtor. So this is a fact accomplished. The accepting creditors have been satisfied, and have released their debtor. All this was done when there was in existence no proceedings whatever to make it unlawful. There is nothing in the record to induce the conclusion that any fraud on the bankrupt act was intended. An equal distribution of the estate of the debtor was made among all his creditors, without preference or priority, and the scope and purpose of the bankrupt act was accomplished. And the final consummation of the arrangement was effected five days after the involuntary feature of the bankrupt act went into effect. The lien which began with the attachment proceedings was perfected, foreclosed, and ended. The rights of purchasers under the order of sale are secured under section 67, subd. f, of the bankrupt act. The money in hand has been distributed, and the creditors who received it in full consideration cannot now be compelled to refund it.

The proceeding in bankruptcy was commenced on the 29th of November, 1898, 24 days after the distribution of the money. Upon what can the bankrupt court act? Subdivision "c" of section 67 of the bankrupt act declares that the lien created by, or obtained in or pursuant to, any suit or proceeding, in law or equity, including an attachment or mesne process, begun against a person within four months before the filing of the petition in bankruptcy by or against him, shall be dissolved upon a certain state of facts; or, if the dissolution should militate against the best interests of the estate, may be preserved for the benefit of the estate, the trustee in bankruptcy being subrogated to all rights thereunder. Subdivision "f" of the same section declares all such attachments void, and the property affected discharged from the lien, passing to the trustee, unless the court shall think proper to preserve the lien for the benefit of the estate, in which case the lien shall pass to the trustee. Both of these subdivisions deal with the lien as existing. But in the case before us the lien had been merged in the judgment; the property had been sold under lawful orders of the court, having full jurisdiction; the money has been distributed, and the lien gone. There is nothing upon which the subdivisions of this section can act or to which these provisions can apply. Were it possible for the district court, sitting in bankruptcy, to go back, and set aside every step taken, put the trustee in possession of the property, let him administer the same de novo, and pursue all the steps which have been taken, only with increased cost and expense, the petitioning creditors have lost all claim on the process of the court by their

delay, after full notice, in taking any steps until the money was distributed, and all the other creditors had committed themselves and had discharged their debtor. See *Simonson v. Sinsheimer*, 37 C. C. A. 344, 95 Fed., at page 954.

There is another consideration. As the case is presented to the court, all the creditors, except the petitioners, have released their claims. If the prayer of the petition be granted, and the money realized from the attachment proceedings be ordered to be paid to the trustee, these petitioning creditors will be paid in full, and the equality between the creditors destroyed. As was well said in *Blake, Moffitt & Towne v. Francis-Valentine Co.* (D. C.) 89 Fed. 691, the national bankruptcy act is remedial, and should be interpreted reasonably and according to the fair import of its terms, with a view to effect its objects and to promote justice. We concur in the views of the court below. The petition is dismissed.

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### BEAR et al. v. CHASE.

(Circuit Court of Appeals, Fourth Circuit. February 6, 1900.)

No. 317.

#### 1. BANKRUPTCY—JURISDICTION OF BANKRUPTCY COURT—INJUNCTION.

Where the act of bankruptcy alleged in an involuntary petition, on which an adjudication is made, is that the debtor suffered certain creditors to obtain a preference through the levy of attachments on his goods, and failed to discharge such levy before sale, the court of bankruptcy has jurisdiction, upon a rule to show cause, entered in the bankruptcy proceedings, to enjoin the attaching creditors from the further prosecution of their attachment suits.

#### 2. SAME—RIGHTS OF ATTACHING CREDITORS.

Attaching creditors of a bankrupt, whose levies constitute the preference on which the adjudication in bankruptcy is based, do not occupy the position of third persons in possession of property claimed to belong to the bankrupt, or adverse claimants dealing therewith, so as to render it necessary that proceedings against them should be by bill in equity or other plenary process.

#### 3. SAME—DISSOLUTION OF LIENS.

Under Bankr. Act 1898, § 67f, providing that "all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt," where creditors levy attachments on the property of an insolvent debtor, and within four months thereafter he is adjudged bankrupt on a petition alleging, as an act of bankruptcy, that he suffered such creditors to obtain a preference by means of their attachments, the liens of such attachments are thereby dissolved.

#### 4. SAME—TITLE OF PURCHASER—DISPOSITION OF PROCEEDS.

Where creditors sue out attachments against an insolvent debtor in a state court, and cause them to be levied on his property, and the same is sold by order of the court, being perishable, and the proceeds paid into court to await the determination of the suit, and within four months thereafter the debtor is adjudged bankrupt, the title of a bona fide purchaser at such sale will not be affected by the bankruptcy, but the proceeds of sale stand in lieu of the property sold, and may be claimed by the trustee in bankruptcy.



**& SAME—STAY OF PENDING SUITS.**

Bankr. Act 1898, § 11a, providing that suits pending against a bankrupt may be stayed when "founded upon a claim from which a discharge would be a release," does not prevent the court of bankruptcy from restraining attaching creditors of the bankrupt from the further prosecution of their attachment suits in a state court, when the preference created by the levy of such attachments was the act of bankruptcy on which the adjudication was based, and the petition was filed within four months after the levy, even though the creditors' causes of action were such as would not be affected by a discharge in bankruptcy.

**& SAME—JURISDICTION OF STATE COURT.**

Where creditors of an insolvent debtor sue out attachments on his property in a state court, and cause the same to be sold thereunder and the proceeds paid into court, and within four months thereafter he is adjudged bankrupt on a petition alleging such attachments to be preferential and to constitute acts of bankruptcy, an intervening petition filed by the trustee in bankruptcy in the state court should be limited to a demand for the proceeds of sale remaining in court; and an order of the bankruptcy court, permitting such intervention, but leaving the question of the effect and validity of the attachments to be determined in the state court, is erroneous.

**On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the District of South Carolina, in Bankruptcy.**

This is an application to superintend and revise, in matter of law, certain orders made by the district court of the United States for the Eastern district of South Carolina, entered, respectively, on the 28th of January and the 10th of June, 1899, in the above-entitled involuntary bankruptcy proceeding, then pending in said court. The case is briefly this: The petitioners for revision, J. M. Bear & Co. and others, some 17 creditors in number of the bankrupt, James H. Rhodes, in the month of October, 1898, instituted their suits and sued out certain attachments in the court of common pleas, Florence county, S. C., and caused the attachments to be levied on said Rhodes' stock of goods. The judge of the court, by orders of the 14th and 15th days of October, 1898, entered in chambers, directed the stock of goods, thus levied on, to be sold on the 20th of October, 1898, because of their perishable character, and the money arising from the sale to be paid to the clerk of the court to await the future order of the court in the suits. The sale was duly made, and \$6,300, the net proceeds arising therefrom, paid to the clerk of the said court. On the 1st day of November, 1898, certain creditors of the said Rhodes, to wit, George Pettigrew and others, some 20 in number, filed their petition in the district court of the United States for the district of South Carolina, praying that he be declared an involuntary bankrupt, alleging his insolvency, together with the necessary averments to give jurisdiction to the court, and particularly averring that the attachment creditors aforesaid had, in contravention of the bankrupt law, and within four months prior to the filing of their said petition, sought to procure a preference in the administration of the estate of the said bankrupt by reason of the issuance and levy of said attachments. Said petitioners further averred that the said Rhodes committed an act of bankruptcy by permitting the attachments to issue against him, and that his object was to give a preference among his creditors through legal proceedings, to wit, the said attachments, and that the same were not vacated or discharged within five days before the sale of said property. The petitioners further averred that the attachments were permitted, sought, and had, orders of sale procured, and sales made, in disregard of notice served upon said attaching creditors, advising them of the fact that a petition in bankruptcy would be filed against the said Rhodes on the 1st day of November, 1898, or as soon thereafter as counsel could be heard. Upon the filing of the petition of involuntary bankruptcy as aforesaid, an order to show cause was entered against the bankrupt, returnable on the 14th of January, 1899, and duly published in a newspaper in the city of Florence. On the 14th

of January, an order was entered in said cause, returnable on the 25th of January, requiring the attaching creditors aforesaid to show cause why they should not be restrained from prosecuting their suits in the state court aforesaid. To this latter rule the attaching creditors made answer, insisting, among other things, upon the validity of their attachments; averring that they were procured without any collusion with, and against the consent of, the said Rhodes; that they had no reason to believe at the time he was insolvent; and that said attachments did not constitute acts of bankruptcy on the part of said Rhodes. The cause thereupon came on to be heard on the 28th of January, 1899, in the said district court, when the said James H. Rhodes was duly adjudged an involuntary bankrupt; and upon considering the rule against said attaching creditors, and the answer thereto, an order was entered enjoining and restraining them from further prosecuting the actions commenced by them as aforesaid in the court of common pleas of Florence county, and by subsequent order, entered on the 10th of June, 1899, the order of the 28th of January was modified as follows: "It appearing that since the order of this court dated 28th January, 1899, a trustee, to wit, Robert C. Chase, has been elected trustee of the bankrupt estate of said Thomas D. Rhodes, and that such trustee has filed his petition in the court of common pleas for Florence county, praying that he be allowed to move to set aside certain attachments in said court in the causes therein (the further prosecution whereof was stayed by said order of 28th January, 1899), and to have the funds and property attached turned over to said trustee, it is, upon consideration thereof, counsel on both sides having been heard, ordered that all the attaching creditors enjoined by this court by its said order of 28th January, 1899, be, and they are hereby, permitted, in said court of common pleas for Florence county, to oppose and resist the petition and application of said trustee, and, upon the final determination thereof, to set up, urge, and prosecute any rights in the state court aforesaid to which he may be entitled; provided that, if the said court of common pleas for Florence county shall hold that it is without jurisdiction to pass upon the merits of the question raised by said trustees in said application, then the order of this court of 28th January, 1899, shall stand in all respects so that the fund now in controversy shall not be distributed until the final determination of the rights involved." It is to revise these two latter orders that the petition for revision is presented to the court.

Henry A. M. Smith and P. A. Willcox, for petitioners.

Lord & Burke and Asher D. Cohen, for respondent.

Before SIMONTON, Circuit Judge, and PAUL and WADDILL, District Judges.

WADDILL, District Judge, after stating the facts as above, delivered the opinion of the court.

The grounds of error assigned in the entry of the said two orders are, briefly, that the injunction should not have been awarded upon a rule to show cause issued in the bankruptcy proceedings, but only on a bill in equity, duly filed and process issued thereon, and also because the said attachments were issued in actions for fraud and obtaining property by false pretenses and false representations on the part of the bankrupt, and that the attachments having been obtained in the court of common pleas of the county of Florence, S. C., a court of general jurisdiction, prior to the adjudication in bankruptcy, that court, and not the district court of the United States, was the proper tribunal to determine the questions affecting the said attachments and the rights of the parties thereunder; that the trustee of the bankrupt should in that court assert his rights, and, having filed his petition therein, it was error in the district

court to in any manner restrain said attaching creditors in the prosecution of their claims in said court.

We will take up the several assignments of error specified, and incidentally touch upon the question, quite elaborately argued, as to the jurisdiction of the district court of the United States in dealing with the estate of bankrupts, where the rights of third parties or adverse claimants are involved, though it will not be necessary, in the view we take of this case, to pass upon that question or to discuss it at length.

Counsel insist with great earnestness that a bill in equity should have been filed in this case instead of proceeding by rule to show cause, as was done, and, while it is not said so in words, the inference is irresistible that it was necessary to institute such suit in the state court instead of the district court of the United States. While not admitting the correctness of the position, in any respect, that the bankrupt court is without power to bring before it all persons possessed of the bankrupt's estate, and to reduce such estate to possession and administer the same, but that, on the contrary, it is powerless to perform these simple functions and duties, and must rely upon a court of another sovereignty to hold up its hands and enforce its lawful orders and decrees, we think it quite clear in this case that there can be no doubt of the right of the bankrupt court to proceed as it did, and give full and complete relief in the premises. *Norton v. Switzer*, 93 U. S. 355, 23 L. Ed. 903; *Lathrop v. Drake*, 91 U. S. 516, 518, 23 L. Ed. 414; *In re Gutwillig* (D. C.) 90 Fed. 481; *In re Sievers* (D. C.) 91 Fed. 366; *In re Brooks* (D. C.) 91 Fed. 508; *In re Smith* (D. C.) 92 Fed. 137; *Carter v. Hobbs* (D. C.) 92 Fed. 594; *Murray v. Beal* (D. C.) 97 Fed. 567. It may be conceded that in ordinary proceedings affecting the bankrupt's estate, in which third parties or adverse claimants are interested, the better practice would be either to file a bill in equity or a separate petition in the bankruptcy proceedings, setting up the cause of action in question, on which process should be regularly issued or full opportunity otherwise given to appear. But that has no application in this case, where the alleged ground of bankruptcy is the procuring of and levying the attachments enjoined. In other words, the petition for involuntary bankruptcy is based upon the fact that the attaching creditors have procured liens in contravention of the bankrupt law by their attachments. Their names, the amount of their claims, and what they did are all fully set up in the petition for involuntary bankruptcy, and it is upon the legality or illegality of those acts, and what was subsequently done in and by virtue of said proceeding, that the question of bankruptcy is determined. When the district court, which alone has power, under the constitution and laws of the United States, to adjudicate bankrupts, once determines this question, it is a finality, and no other court, save a federal appellate tribunal, can review or call in question its acts. The adjudication having been thus made, the attaching creditors were properly enjoined by the court, upon a rule to show cause, entered in the bankruptcy proceedings, against the further prosecution of their attachment suits. Upon

the adjudication of the bankrupt, all creditors became parties to the bankruptcy proceedings by operation of law, and particularly these creditors by whose acts the bankruptcy was caused. No good reason would seem to exist why a court, as to any creditor before it in a bankruptcy proceeding, should not, after the service of a rule, enjoin such creditor from taking any step or doing any act affecting the bankrupt's estate, or interrupting the court in the due administration thereof. These attaching creditors do not occupy the relation of third persons in possession of, or adverse claimants dealing with, the property of the bankrupt. In *re Kenney* (D. C.) 97 Fed. 557, 558. They are but creditors of the bankrupt, who have, in their effort to collect their money, sought an advantage which the law does not give, and they cannot gain any favored position by reason of an act of theirs which the law condemns.

The ruling of the district court, as to the effect of the levy of the attachments under the circumstances of this case, seems to be clearly right. Subdivision "f" of section 67 of the bankruptcy law is too clear on this subject to admit of doubt or cavil. It is as follows:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such a conveyance as shall be necessary to carry the purposes of this section into effect."

Not only does this section make null and void the levy of the attachments under the circumstances of this case, but it expressly provides that the property affected by the levy shall be wholly discharged and released from the same, and that it shall pass to the trustee as a part of the bankrupt's estate, unless the court, upon due notice, shall order that the right under such lien be preserved for the benefit of such estate. This section is broad and comprehensive in its terms, and too clear to admit of serious controversy. Under it no preference can be acquired by the levy of attachments within four months of the filing of a petition in bankruptcy. It is true that, by a proviso to this section, the rights of a bona fide purchaser without notice at a sale under such lien are preserved and protected, but the proceeds arising from such sale must stand in lieu of the property sold; for it is expressly provided that such property shall pass to the trustee as a part of the estate, unless the lien be preserved for the benefit of the estate, and to that end the court may order such conveyances as may be necessary to carry the purposes of the section into effect. Authorities under the act of 1867 do not throw a great deal of light upon the correct interpretation of this section, and it is rather to those decided under the present law that reference will be made. This

section has several times been under review since the passage of the act, and the interpretation herein placed upon it may be said to be its generally accepted construction. In the case of *In re Kenney*, supra, also previously reported in 95 Fed. 427, Judge Brown, of the district court of the Southern district of New York, a judge of great learning and ability, fully considered this question, and in each decision held that liens acquired within four months of the filing of a petition in bankruptcy were annulled by the subsequent adjudication of the bankrupt. To the same effect are the decisions of several other of the district courts. In *re Reichman*, 91 Fed. 624; In *re Fellerath*, 95 Fed. 121; In *re Rome Planing Mill*, 96 Fed. 812; In *re Vaughan*, 97 Fed. 560; In *re Higgins*, Id. 775; In *re Burrus*, Id. 926.

This section has also been construed recently by the circuit court of appeals for the Seventh circuit (In *re Richards*, 37 C. C. A. 634, 96 Fed. 935), and there the lien was declared to become null and void by the subsequent adjudication of bankruptcy. In this decision, delivered by Jenkins, circuit judge, it is said, in discussing the apparent inconsistency between subdivisions "c" and "f" of section 67 of the bankrupt law:

"But subdivision 'f' is broader in its scope, and avoids all liens obtained through legal proceedings within the time stated against a person who is insolvent, within the meaning of the subdivision, irrespective of knowledge on the part of the creditor of the fact of insolvency, and irrespective of the question whether the obtaining of the lien was in any way suffered and permitted by the debtor. It avoids all liens obtained through legal proceedings against a person who is insolvent within four months before the filing of the petition." Page 939, 96 Fed., and page 637, 37 C. C. A.

In the further discussion of the effect of paragraph "f," Judge Jenkins gives something of the history of the passage of the bankrupt act (pages 939, 940, 96 Fed., and page 638, 37 C. C. A.):

"Two bills in bankruptcy were presented to congress,—one to the senate, and one to the house of representatives. They were broadly divergent in spirit. One was supposed to be largely in the interest of the creditor; the other, largely in the interest of the debtor. Subdivision 'c' of section 67 was contained in the house bill; subdivision 'f' was contained in the senate bill. The two houses were at disagreement respecting these bills, and the matter was referred to a conference committee of the two houses, near the end of the session, resulting in the incorporation into the house bill of subdivision 'f,' which was in the senate bill. Mr. Henderson, in presenting the conference report to the house, stated that subdivision 'f' was incorporated into the bill to strengthen the bill. 31 Cong. Rec. pt. 7, p. 6428, June 28, 1898. The confusion results from the omission of the conference committee to modify the language of subdivision 'c,' or to strike it out altogether; but the passage of the bill by the house with subdivision 'f' contained in it, after this report of the conference committee, must be taken as an indication of the will of the lawmaking power that the provisions of subdivision 'f' shall prevail, notwithstanding anything antagonistic to them previously found in the act."

In *re Richards*, 37 C. C. A. 637, 96 Fed. 939, 940; *Chapman v. Brewer*, 114 U. S. 158, 5 Sup. Ct. 799, 29 L. Ed. 83.

It may be stated, in passing, that this case was an involuntary bankruptcy proceeding, and the court held that the invalidity of the liens acquired within four months of the filing of a petition in bankruptcy was applicable alike to liens arising in voluntary

and involuntary cases. On the latter proposition, see, also, *In re Vaughan* (D. C.) 97 Fed. 560, and cases there cited.

Nothing stated herein is intended to imply that the court of common pleas of Florence county, S. C., did not have jurisdiction to entertain the attachment suits brought there at the time of their institution, or that said court is without concurrent jurisdiction with the United States district court to determine many matters affecting the estate of the bankrupt, when properly instituted by the trustee in bankruptcy, or in such proceedings as the trustee, by order of the bankrupt court, might appear in. As to many matters the two courts have concurrent jurisdiction, and can and should work in the utmost harmony; but as to others, among them the right to determine what are acts of bankruptcy and who are bankrupts, the United States district court's jurisdiction is superior to, and exclusive of, that of the state court, and, as to all questions necessarily involved in such exclusive jurisdiction, the federal, and not the state, courts should proceed and take charge of and administer the bankrupt's estate. Here, to illustrate, the district court declared the attachment proceedings in the state court to be acts of bankruptcy, and null and void, and by reason thereof adjudicated the bankruptcy. This ruling cannot be reviewed or called into question by the state court, and is absolutely conclusive as against all creditors of the bankrupt, until reviewed or reversed in the proper federal tribunal, i. e. this court, and its action is here approved and affirmed. Now, what follows as to the bankrupt's estate? Is it to be administered by the bankrupt court, or in proceedings in the state court declared, by the lower court and by this court, to be null and void? To ask this question is to answer it, for it cannot be possible that the act of bankruptcy itself can be made the basis of dispossessing the bankrupt court of its jurisdiction. The power of the United States district court to enjoin and restrain the parties from the further prosecution of the suits in the state court was plenary, and should have been exercised because necessary to the maintenance of its jurisdiction and the due administration of the bankrupt law. *Ex parte Christy*, 3 How. 292, 11 L. Ed. 603; *Chapman v. Brewer*, 114 U. S. 158, 173, 5 Sup. Ct. 799, 29 L. Ed. 83; *Moran v. Sturges*, 154 U. S. 256, 269, 270, 274, 14 Sup. Ct. 1019, 38 L. Ed. 981; *In re Bruss-Ritter Co.* (D. C.) 90 Fed. 651; *Lea v. Geo. M. West Co.* (D. C.) 91 Fed. 237; *In re Smith* (D. C.) 92 Fed. 135; *In re Kenney*, supra; *In re Clark*, 9 Blatchf. 372, Fed. Cas. No. 2,801; *Watson v. Bank*, 2 Hughes, 200, Fed. Cas. No. 17,279; *In re Whipple*, 6 Biss. 516, Fed. Cas. No. 17,512; *Black*, Bankr. pp. 10, 20.

On the kindred question of the duty of the bankrupt court, as to the possession of assets in the hands of voluntary assignees, reference may be had to the interesting opinion of Judge Thayer in the case of *Davis v. Bohle*, in the United States circuit court of appeals for the Eighth circuit (34 O. C. A. 372, 92 Fed. 325), and to that of Judge Wallace of the circuit court of appeals for the Second circuit (*In re Gutwillig*, 34 O. C. A. 377, 92 Fed. 337).

The contention that the action of the lower court is erroneous, because the attachments were issued in suits based upon causes of

action as to which it is claimed a discharge in bankruptcy would not be a release, is equally untenable. Whether the discharge would be a valid release against judgments obtained upon the said claims can alone be determined from a consideration of the law and facts applicable to the several causes of action, and not by a mere allegation in the pleadings as to the character of the claims; and, in this connection, it may be said that the trend of decisions of the federal courts, as well under the present as the former laws, are favorable to enlarging, rather than to limiting, the effect of the discharge in bankruptcy, and the character of cases to which the same is applicable. *Chapman v. Forsyth*, 2 How. 202, 11 L. Ed. 236; *Neal v. Clark*, 95 U. S. 704, 24 L. Ed. 586; *Hennequin v. Clews*, 111 U. S. 676, 4 Sup. Ct. 576, 28 L. Ed. 565; *Upshur v. Briscoe*, 138 U. S. 365, 11 Sup. Ct. 313, 34 L. Ed. 931; *Loveland, Bankr.* pp. 625, 627; *In re Basch* (D. C.) 97 Fed. 761.

Assuming, however, the plaintiffs' claim to be correct as to the cause of action in question, and of the effect of the discharge thereon, it by no means follows that there was any error in the lower court's action. *In re Rosenberg*, Fed. Cas. No. 12,054; *In re Schwartz*, Fed. Cas. No. 12,502; *In re Williams*, Fed. Cas. No. 17,700. The provision of section 11, subd. a, of the present bankrupt act, in reference to the stay of suits, cannot be construed to mean that in any proceeding, in which an adjudication in bankruptcy is had, the bankrupt court, instead of the tribunal in which the preference is given or sought, is to be stayed; and, moreover, such a conclusion would result in bankrupts and their creditors, as to these classes of claims, securing and giving preferences between creditors ad libitum. Under subdivision "f," § 67, of the bankrupt act, *supra*, all levies, judgments, attachments, or other liens obtained through legal proceedings against an insolvent person within four months of the filing of the petition in bankruptcy are annulled, and no exceptions from the sweeping provisions of the act are made as to the kind or character of claims sued on.

It follows from what we have stated that there is no error in the action of the lower court, as assigned, of which the petitioners for supervision and review here can complain. The only criticism we would make as to the proceedings is that the petition of the trustee in bankruptcy should not have been filed in the proceedings in the state court without the previous permission and order of the bankrupt court to do so, and that such petition should have been limited to a request to transfer the money to the bankrupt court, because the latter court had declared the proceedings in the state court to be in contravention of, and void under, the bankrupt law; and the decree of the 10th of June, 1899, in so far as it did more than this, and apparently left open to the state court the question of the effect and validity of the attachments issued at the suit of the bankrupt's creditors, and which it (the bankrupt court) had already declared void as to the bankrupt and his creditors, was erroneous. The decision of the lower court upon the assignments of error made is affirmed, and the district court is directed to proceed in said cause in accordance with the views herein expressed.

## In re KAVANAUGH.

(District Court, D. Kentucky. March 5, 1900.)

**1. BANKRUPTCY—DISSOLUTION OF LIENS—DECREE IN CREDITORS' SUIT.**

Bankr. Act 1898, § 671, providing that all levies, "judgments," attachments, or other liens obtained through legal proceedings against an insolvent debtor, within four months before the filing of a petition in bankruptcy against him, shall be deemed null and void, in case he is adjudged a bankrupt, applies only to such judgments as per se create a lien, not to a decree of a state court of competent jurisdiction, rendered in a suit by a judgment creditor, setting aside a fraudulent conveyance by the debtor, and adjudging that a preferential mortgage made by him in contemplation of insolvency should operate as an assignment for the equal benefit of his creditors, in accordance with the state laws in that behalf, and appointing a receiver.

**2. SAME—CONFLICT OF JURISDICTION—STATE COURT RECEIVER.**

Where a judgment creditor brought suit in a state court, before the passage of the bankruptcy act, to set aside a fraudulent conveyance by his debtor, and to have a mortgage given by the latter declared to operate as a general assignment for creditors, and obtained a decree to that effect, and the state court appointed a receiver, who took possession of the property of the debtor, and thereafter the debtor was adjudged bankrupt on his voluntary petition, the adjudication not being based upon the transfers impeached in the creditors' suit, *held* that, as to all property covered by the decree, the court of bankruptcy would not require its surrender by the receiver, nor otherwise interfere with its administration by the state court.

**3. SAME—PROPERTY AFFECTED—INTERVENTION BY TRUSTEE.**

The decree of the state court, relating back to the date of the preferential mortgage, would bind all property owned by the bankrupt at that time; but property not passing by the assignment, or which was acquired by the bankrupt thereafter, or remaining after the satisfaction of all debts existing at that date, should be delivered to the trustee in bankruptcy, to be administered for the benefit of subsequent creditors; and for the assertion of his rights in that behalf, and the ascertainment of his interest, if any, the trustee should be authorized to intervene in the proceedings in the state court.

**In Bankruptcy.** On review of decision of referee in bankruptcy.

Maurice Galvin, for trustee in bankruptcy.

William McD. Shaw, for receiver.

**EVANS, District Judge.** On July 15, 1898, Robert Howe, a judgment creditor of the bankrupt, instituted an action in equity in the Kenton circuit court, wherein he sought to have a bill of sale from the bankrupt to his wife, dated August 25, 1897, set aside as fraudulent and void; and, second, to have the mortgage from the bankrupt to Kloak Bros., dated May 31, 1898, adjudged to come within the provisions of what was formerly well known in Kentucky as the "Act of 1856," and now embraced in sections 1910 to 1917, inclusive, of the Kentucky Statutes, so that it would operate as a general assignment of all the debtor's property for the equal benefit of all his then existing creditors, upon the ground that the mortgage was made in contemplation of insolvency, and with the design to prefer Kloak Bros., to the exclusion, in whole or in part, of his other creditors. This litigation progressed until, on the 10th and 13th days of January and the 2d day of February, 1900, such judgments and amended judgments were rendered by the Kenton circuit court as completely



gave the relief prayed for in the suit as to both the bill of sale and the mortgage. In order to carry this judgment into effect, George M. Kiefer was appointed the court's receiver to take possession of the property involved in the litigation, with a view to its distribution, and he did so. On the 16th day of January, 1900, Kavanaugh, on his own voluntary petition, was adjudged a bankrupt by this court, and on February 7, 1900, W. H. Miller was elected his trustee, and qualified as such. Claiming that the action of the Kenton circuit court was void upon the one hand, or had been superseded by the proceedings in bankruptcy upon the other, the trustee filed a petition asking this court to direct the receiver (Kiefer) to deliver to him, as trustee herein, all the property now in the receiver's possession belonging to, or which had belonged to, the bankrupt, including all money and book accounts made and created while the receiver was conducting the business described in the petition. The referee entered orders accordingly, and the court is asked to review his action.

We can perceive no ground for supposing that the judgment of the state court was void other than as it might be affected by section 67 of the bankrupt act of July 1, 1898. The bill of sale and the mortgage attacked in the suit of Howe were both executed before the bankrupt law went into operation, and the adjudication in this case was in no wise based upon either of these writings. Had such been the case, different considerations would then apply; for there is a very plain and manifest distinction between the case before us and one where the transfers were themselves the basis of the adjudication in bankruptcy. In that event, if this court, when those transfers were held to be void under the law, did not secure possession of the assets involved, the whole bankruptcy proceeding would be futile, and instead of the bankruptcy act being the supreme law of the land, as the constitution provides, and by which all courts, both state and federal, are equally bound, it would be a farce. Here, however, different principles apply. Long before the adjudication the state court had been appealed to for certain relief, which it was entirely competent to give, and, after protracted or long-delayed litigation, that court granted that relief, and based it upon acts done by the bankrupt before the bankrupt law was passed, and long before its benefits were availed of by the debtor.

Section 67f of the bankrupt act contains the following provision:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid."

This does, indeed, make certain liens and judgments void if obtained within four months of the adjudication; but it appears to us to be evident that the language, properly construed, was intended

only to apply to such judgments as of themselves created liens. Liens thus created were intended to be overthrown and made ineffectual by the adjudication in bankruptcy, unless preserved for the benefit of the estate.

Probably in most of the states of the Union—certainly in many of them—a judgment for debt, particularly if docketed and indexed, creates a lien upon the debtor's property; and we apprehend, from the connection in which the word "judgment" is used in the paragraph quoted, that it was meant to confine its meaning to that class of judgments. The section in the main relates to liens, although subsection "e" provides that certain mortgages or transfers made after the passage of the bankrupt act shall also be void upon certain conditions therein provided.

It seems to us that a clear distinction should be drawn between a judgment, in this sense, upon a debt,—a mere personal liability,—and a decree of the chancellor declaring the property rights of parties in a case like the one before us, but which in no way created a lien. Particularly is this true, as the action in the state court was brought upon a judgment in personam obtained long before, and upon which there had first been an execution and return of nulla bona. This was therefore an ancillary proceeding in equity for the enforcement of a judgment at law. In Kentucky there is no statute which creates a lien by mere virtue of the judgment at law. In this state liens are secured by means of the levy of the *fi. fa.* issued upon the judgment. So that we think that section 67f does not apply to the sort of judgment rendered by the state court in the Howe suit.

The state court having acquired jurisdiction of the subject-matter of the Howe suit long before the adjudication, and before the bankrupt act was passed, and the adjudication in this case not being in any wise based upon the transfers assailed in the state court proceeding, it seems to us that this court should by no means interfere, unless to the extent presently to be indicated. The subject-matter of the litigation in the state court was entirely within its jurisdiction, the transfers there assailed were not made subsequent to the passage of the bankrupt act, as contemplated by section 67e, and those transfers were in no sense the basis of the adjudication in bankruptcy in these proceedings. These considerations, combined, make it peculiarly improper to interrupt the progress of the case in the state court.

It seems to us, also, that the judgment of the state court related back at least to May 31, 1898, when the preferential mortgage was made, and the result of that is that the property which the bankrupt owned at that time should be administered through the proceedings in the state court. But if the bankrupt acquired any of the property after that date, or if, upon any just principle, any part of the property which came to the hands of the receiver belonged, not to him, but to the bankrupt, because it did not pass by the previous assignment, even if it had been indirectly acquired by means of the mortgaged property and its avails, that property belongs to the bankrupt, and should probably go to those creditors whose debts were created subsequent to May 31, 1898, at least until they are made equal

with the others, and should, when obtained, be distributed in these proceedings. Particularly will this be so if the property on hand at that date, or its avails, is more than sufficient to pay the bankrupt's then existing liabilities in full. In that event, the surplus would be available for the trustee in these proceedings.

If sufficient assets have come to his hands, or if creditors will guaranty the expenses and costs of the trustee in the effort, he should be authorized, if so advised by counsel, to intervene in the state court proceedings for the purposes indicated, and in order to have the amount he is entitled to, if any, ascertained. It follows from what has been said that the ruling of the referee upon the petition of the trustee is disapproved and reversed.

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• In re NOWELL.

(District Court, D. Massachusetts. March 2, 1900.)

No. 2,355.

**1. BANKRUPTCY—PROVABLE DEBTS—ALIMONY.**

Under the laws and judicial decisions of Massachusetts concerning the nature of alimony awarded to a divorced wife, the mode of its collection, and the power of the court to modify its amount, arrears of such alimony, due at the time of the filing of a petition in bankruptcy against the husband, but on which no execution has yet been issued, do not constitute a debt provable against his estate in bankruptcy, and the court of bankruptcy will not enjoin the wife from prosecuting appropriate proceedings for their collection in the state court.

**2. SAME—AFTER-ACCRUING ALIMONY.**

A claim of the divorced wife of a bankrupt for alimony awarded to her by the court granting the divorce, in so far as the same is to accrue after the adjudication in bankruptcy, is not susceptible of valuation, so as to become a provable debt against the bankrupt's estate.

**In Bankruptcy. On petition for injunction.**

Elihu G. Loomis, for petitioner.

Felix Rackemann and H. M. Davis, for respondent.

**LOWELL, District Judge.** The bankrupt here seeks an injunction to restrain his wife from prosecuting in the state court contempt proceedings against him to obtain alimony granted her by a decree of that court. This court has therefore to determine the effect of bankruptcy upon alimony. If a discharge in bankruptcy will bar the wife's claim for alimony, she may be enjoined from seeking to collect it by contempt proceedings or otherwise.

Section 17 of the bankrupt act provides that a discharge in bankruptcy shall release the bankrupt from all his provable debts, with certain inapplicable exceptions. This court has here to consider, therefore, if alimony be a provable debt. Section 63 defines those debts which may be proved. The only clause in the section supposed to be applicable to alimony is the first: "A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition." The nature of alimony is not precisely the same in all jurisdictions, and this case is

concerned only with alimony allowed by virtue of the laws of Massachusetts. I have to determine, therefore, if the alimony decreed by a Massachusetts court is a fixed liability, absolutely owing at the time of the filing of the petition.

In this commonwealth, the law of alimony has developed considerably during the past century and a half. According to the decisions and to the existing statutes, alimony appears now to be an allowance made by the decree of a competent court for the benefit of a wife. In a sense, this decree fixes the amount to be paid during the joint lives of husband and wife; but not only is the decree always open to modification in respect of future alimony by reason of a change in the situation of husband or wife, but also, if the wife seeks legal process to collect the arrears which have not been paid to her according to the decree, that process will not issue as of right or without notice to the husband. Upon an order of notice to the husband to show cause why process should not issue, he may, without modification of the original decree, move that the amount to be collected by the process be reduced, by reason of a change in his circumstances or in those of his wife. The process granted may be execution, scire facias, or an attachment for contempt. When any process is once issued, it is ordinarily governed by the rules applicable to the same process when issued in other cases. Alimony may be secured by attachment, and this attachment will extend to secure future installments, as these become due. It may be allowed in a lump sum, instead of by way of monthly, quarterly, or yearly payments. A domestic decree for alimony cannot be enforced in Massachusetts by an independent action of contract, but only by the court which decreed the alimony. Arrears due at the husband's death can be recovered from his estate, but are not an absolute debt, and may be modified on motion of the executor. Alimony is sometimes called a debt, and is sometimes said not to be a debt. Plainly, it has some analogy to a debt, yet differs therefrom in important respects. Pub. St. c. 146, especially sections 11-18, 36-40; *Orrok v. Orrok*, 1 Mass. 340; *West v. West*, 2 Mass. 223; *French v. French*, 4 Mass. 587; *Bursler v. Bursler*, 5 Pick. 427; *Morton v. Morton*, 4 Cush. 518; *Shannon v. Shannon*, 2 Gray, 285; *Livermore v. Boutelle*, 11 Gray, 217; *Chase v. Ingalls*, 97 Mass. 524; *Allen v. Allen*, 100 Mass. 373; *Slade v. Slade*, 106 Mass. 499; *Burrows v. Purple*, 107 Mass. 428; *Foster v. Foster*, 130 Mass. 189; *Knapp v. Knapp*, 134 Mass. 353; *Downs v. Flanders*, 150 Mass. 92, 22 N. E. 585; *Southworth v. Treadwell*, 168 Mass. 511, 47 N. E. 93. In the development of the law, the court and the legislature have not been disposed to abolish the anomalies connected with alimony, but rather the reverse. For instance, it was at one time held that debt would lie to collect alimony (*Howard v. Howard*, 15 Mass. 196); but this case was overruled long afterwards (*Allen v. Allen*, 100 Mass. 373). When, however, a particular remedy has been granted to recover alimony, there is a tendency to permit its operation as when granted in other cases. No reported decision in Massachusetts has been found by counsel or by the court concerning the effect of insolvency and a discharge therein upon alimony, past or

future; but I am informed that by some judges of the state courts of insolvency arrears of alimony have been held not to constitute a debt provable in insolvency.

Is a claim for arrears of alimony, which has been decreed by a court of Massachusetts, released by a discharge in bankruptcy? As has been said, these arrears are not, prior to the issue of an execution to collect them, a fixed liability, absolutely owing; for the amount of the liability may be modified by the court which has decreed the alimony and issues the execution. Even arrears of alimony, therefore, are not a provable debt, within the letter of the present bankrupt law, and, upon the whole, the decisions concerning alimony and bankrupt laws in general hold alimony not to be provable.

In *Kerr v. Kerr* [1897] 2 Q. B. 439, it was held, by two able judges against the dissent of one, that arrears of alimony were not a provable debt, under the present English bankrupt act. The dissent was founded altogether upon the case of *Hardy v. Fothergill*, 13 App. Cas. 351, which permitted the proof of contingent debts, under the English bankrupt act, to an extent outside the utmost possibility of the construction of the present bankrupt act of the United States. No judge treated arrears of alimony as a fixed liability. The analogy of the English law is therefore strongly against the contention of the bankrupt in this case.

In *Re Cotton*, Fed. Cas. No. 3,269, it was held that a payment ordered by a state court to be made for the maintenance of a bastard child was not provable under the bankrupt act of 1841; and a similar decision was reached by the supreme court of Ohio in *Hawes v. Cooksey*, 13 Ohio, 242. The act of 1841 permitted the proof of "debts," which, as applied to alimony, does not seem a more restricted term than that of the present act, a "fixed liability absolutely owing." Generally speaking, that which is owed is a debt. See, further, *In re Baker* (D. C.) 96 Fed. 954.

In *Re Lachemeyer*, Fed. Cas. No. 7,966, Judge Choate held, in an able and careful opinion, that arrears of alimony were not barred by a discharge granted under the bankrupt act of 1867. The decision was based principally upon the fact that the order to pay alimony was at all times subject to modification, and that, moreover, the wife ought not to be allowed to prove what is essentially a claim for support in competition with her husband's creditors. The reasoning of Judge Choate is as applicable to the present act as to the act of 1867. The act of 1867 permitted the proof of "debts due and payable."

Under the act of 1898 have been made several decisions supposed to favor the bankrupt's contention in this case.

In *Re Houston* (D. C.) 94 Fed. 119, the district court of Kentucky discharged a bankrupt from an arrest made by order of the state court to enforce the payment of arrears of alimony. Most of the opinion is devoted to a vindication of the unquestionable authority of the district court, under proper conditions, to release a bankrupt from arrest by a state court, but incidentally the court decided that alimony was a provable debt. Apparently, the decision was based

upon the authority of *Tyler v. Tyler*, 99 Ky. 34, 34 S. W. 898, where it was said that a judgment for alimony "makes him [the husband] an ordinary debtor to the wife for a fixed sum of money that his estate is liable for, in the same manner that it would be for a debt due upon any contract." If this is the nature of alimony in Kentucky, a claim for arrears of alimony there may well be barred by a discharge in bankruptcy; but, as this is not the nature of alimony in Massachusetts, *In re Houston* is here inapplicable.

In *Re Van Orden* (D. C.) 96 Fed. 86, the bankrupt sought to enjoin his wife from prosecuting in New Jersey a suit in equity to recover arrears of alimony decreed by a state court of New York, and the district court of New Jersey granted an injunction. In that case the liability was apparently fixed, inasmuch as its enforcement was sought in an independent suit, in which no modification of the original decree could be obtained. The decision has therefore no bearing on the present case, although the learned judge doubtless expressed his opinion that arrears of alimony in general are a provable debt.

In *Re Challoner*, 98 Fed. 82, the district court for the Northern district of Illinois enjoined the bankrupt's wife from attempting to collect alimony. The judge briefly said that, "under the decisions of the courts of Illinois, I am satisfied that money due under the decree, prior to the adjudication as a bankrupt in this court, is a debt, under the bankruptcy law." By the law of Illinois, it seems that arrears of alimony cannot be reduced by the court which made the original decree, but that they constitute a fixed debt. *Craig v. Craig*, 163 Ill. 176, 45 N. E. 153. This difference between the nature of alimony in Massachusetts and in Illinois renders the decision in *Re Challoner* inapplicable to this case. That alimony is not a provable debt, under the existing bankrupt law, was decided in *Re Shepard*, 97 Fed. 187, by the district court for the Southern district of New York, and it does not appear that, by the laws of New York, alimony is any the less a fixed liability absolutely owing than it is in Massachusetts. The difficulties that may arise in applying the ordinary statutory exemptions of the bankrupt to a liability for alimony are somewhat illustrated by *In re Garrett*, Fed. Cas. No. 5,252. Upon the whole, I hold that arrears of alimony in Massachusetts are not in general a provable debt, but I do not pass upon the effect of a discharge in bankruptcy upon an execution for alimony issued by the state court before the filing of the petition in bankruptcy. If that execution be held to create an absolute liability in favor of the wife, it may be that a levy of the execution upon the after-acquired property of the bankrupt will be stayed by the court of bankruptcy.

As to future alimony, there is no difficulty. It certainly is not a fixed liability, absolutely owing. On the contrary, it is contingent upon many circumstances,—upon the life of both husband and wife, as well as upon a modification of the original decree by reason of the future-acquired property and earning capacity of the husband, of the future needs, and, it may be, the health; of the wife, of her remarriage, and her receipt of property from other sources. Even

if the present act permits the valuation and proof of contingent liabilities generally, yet this contingent claim is impossible of valuation. As to future alimony, I must think that the decree made in *Re Challoner*, and naturally followed by the referee in this case, was made hastily. The learned judge there refused to pass upon "the status of the money which may become due thereunder after such adjudication," yet restrained suit for it for 12 months. But the bankrupt is not exempt from suit generally, but only from suit upon provable debts. To deprive the wife of alimony altogether for 12 months seems to me unwarrantable, inasmuch as future alimony is not a provable debt. The injunction granted by the referee is vacated, and the petition for the injunction denied.

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In re LEWIS.

(District Court, D. Massachusetts. March 2, 1900.)

No. 48.

**1. BANKRUPTCY—PRIORITY OF CLAIMS—SHERIFF'S FEES.**

Under Bankr. Act 1898, § 64b, cl. 5, giving priority of payment out of bankrupts' estates to "debts owing to any person who, by the laws of the states or the United States, is entitled to priority," fees of a sheriff accruing on a writ of attachment, founded on a provable debt, issued before the commencement of proceedings in bankruptcy against the debtor, and continuing in force at the date of the petition, are entitled to priority of payment out of the debtor's estate in bankruptcy, where the law of the state (Pub. St. Mass. c. 157, § 104, cl. 5; Id. § 139) gives priority of payment to such fees in insolvency proceedings.

**2. SAME.**

Bankr. Act 1898, § 63a, cl. 3, providing that debts which may be proved and allowed against a bankrupt's estate shall include "a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt," does not exclude such claims from a right of priority of payment accorded to them by the laws of the particular state.

**3. SAME.**

Bankr. Act 1898, § 64b, cls. 1-3, according priority of payment to the "cost of preserving the estate subsequent to filing the petition," and the "cost of administration," relate to costs directly connected with the proceedings in bankruptcy, and do not exclude a right of priority given by the laws of the state to fees and costs accruing, though before the filing of the petition, in legal proceedings against the bankrupt not directly connected with the bankruptcy proceedings.

**In Bankruptcy.** On review of decision of referee in bankruptcy.  
The referee's certificate was as follows:

"I, Lewis G. Farmer, one of the referees of said court in bankruptcy, do hereby certify that, in the course of the proceedings in said case before me, the following question arose pertaining to the said proceedings, as follows: Whether a claim of the National Wall-Paper Company for \$46.80 was entitled to priority, said claim being for sheriff's fees in an attachment on a writ in favor of said National Wall-Paper Company against the said bankrupt, the same having been incurred prior to the date of the filing of the petition in said case. The attachment was continued after the filing of the petition, and further sheriff's fees were incurred therefor, and as to those I ruled that the claim for the same was entitled to priority; but, as to costs incurred prior to the date of filing the petition, I ruled that the same were provable as an ordi-

nary debt against the estate; to which the said creditor objected, and desired a review by the judge of the order made by me thereon. No objection was made to the ruling that the costs, subsequent to the date of the filing of the petition, were entitled to priority. And the said question, to wit, as to whether the costs incurred prior to the date of filing the petition are entitled to priority, is certified to the judge for his opinion thereon.

"Lewis G. Farmer, Referee in Bankruptcy."

Carver & Blodgett, for creditor, National Wall Paper Co.  
R. W. & C. F. Light, for bankrupt.

LOWELL, District Judge. The sheriff's fees in a case like this are entitled to priority in insolvency proceedings in Massachusetts, under Pub. St. c. 157, § 104, cl. 5, and Id. § 139, which read as follows:

"Sec. 104. In the order for a dividend under the preceding section, the following claims shall be entitled to priority, and to be first paid in full in their order: \* \* \* Fifth. Legal fees, costs, and expenses of suit, and for the custody of the property proved as preferred under section 139."

"Sec. 139. When an attachment on mesne process has been made and is not dissolved before commencement of proceedings in insolvency, and when such attachment has been dissolved by bond given by the defendant, if the claim upon which the suit was commenced is proved against the estate of the debtor, the plaintiff may also prove the legal fees, costs, and expenses of the suit and of the custody of the property, and the amount thereof shall be a privileged debt."

These fees, therefore, being provable debts, under section 63a, cl. 3, are entitled to priority by section 64b, cl. 5, of the bankrupt act, unless this construction is excluded by some other provision of the act.

Section 63a, cl. 3, neither gives nor denies them priority. Debts covered by the various clauses of section 63a may or may not be entitled to priority, according to their nature and circumstances, and there is nothing in clause 3 to indicate that the debts therein described are excluded from priority, if the act elsewhere entitles them to it.

The difficulty in the way of the creditor's contention arises from section 64b, cls. 1-3, taken in connection with section 63a, cl. 3. It has been held that state laws, giving priority to wages, though included in the terms of section 64b, cl. 5, are yet ineffectual, because the whole matter of wages is dealt with and regulated by section 64b, cl. 4. In re Rouse (D. C.) 91 Fed. 514. In other words, although the laws of a state giving priority to certain debts are by section 64b, cl. 5, introduced into the scheme of the present bankrupt act, yet such state laws are so introduced only so far as the debts to which they give priority are not expressly dealt with as to priority in the bankrupt act itself. Where both a state law and the bankrupt act give priority to the same class of debts, the bankrupt act not only controls the state law in the case of absolute conflict between the two, but, by its express regulation of these priorities, excludes the state law altogether. The referee appears to have thought that section 64b, cls. 1-3, so deals with and regulates the priorities given to all costs that the creditor's costs here in issue, which were present to the consideration of the legislature, as is shown by section 63a, cl. 3, are excluded from the priority allowed



them by the state law. With considerable doubt, I have reached the opposite conclusion, and am of opinion that the provisions giving priority to certain costs in section 64b, cls. 1-3, do not so cover the whole matter of costs as to exclude the costs mentioned in section 63a, cl. 3, from the priority given them by the law of Massachusetts. The costs dealt with in section 64b, cls. 1-3, are costs directly connected with the proceedings in bankruptcy. The costs dealt with in the Massachusetts statute have no direct connection with proceedings in bankruptcy or insolvency. They are dealt with in a part of the Massachusetts insolvency act quite different from that which provides for the payment of costs and expenses in insolvency proceedings. See Pub. St. c. 157, §§ 56, 102, 140. That they should have priority does not seem intrinsically more unreasonable in bankruptcy than in insolvency. The decision of the referee is reversed, and the claim is declared entitled to priority.

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IN RE ROME PLANING-MILL CO.

(District Court, N. D. New York. March 5, 1900.)

1. INVOLUNTARY BANKRUPTCY—WHAT CONSTITUTES INSOLVENCY.

AN ISSUE as to the solvency of the respondent in a petition in involuntary bankruptcy at the date of the alleged act of bankruptcy must be determined by the question whether the aggregate of his property at that time, exclusive of any property conveyed or concealed in fraud of creditors, was sufficient in amount, at a fair valuation, to pay his debts.

2. SAME—FINDING OF REFEREE.

Where a petition in involuntary bankruptcy is referred to a referee in bankruptcy to find and report on the question whether the respondent was solvent or insolvent at the date of the alleged act of bankruptcy, his conclusion, based on the examination of witnesses as to the extent of the respondent's liabilities and the value of his property, will not be set aside by the court on review, unless plainly contrary to the evidence.

In Bankruptcy.

This matter was before the court on a previous motion to confirm the report of the referee. 96 Fed. 812. Pursuant to the decision then made the matter was referred back to the referee to make a finding upon the question whether or not the Rome Planing-Mill Company was insolvent on the 17th day of October, 1898. On the 8th day of December, 1899, the referee filed a report in which he finds "that on the 17th day of October, 1898, said corporation was insolvent and unable to pay its debts in full and that its assets at a fair valuation were not of sufficient value to pay the debts of the said corporation." Exceptions were filed to this report and the matter is again before the court upon these exceptions and motion to confirm.

Risley & Love, for creditors.

Oswald P. Backus, for alleged bankrupt.

COXE, District Judge. The sole question to be determined is whether the alleged bankrupt was insolvent on the 17th day of October, 1898; if so, an adjudication must follow; if not, the petition must be dismissed. "A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property \* \* \* shall not, at a fair valuation, be sufficient in amount to pay his debts."

Section 1, subd. 15. The total liabilities are agreed upon on all hands to be \$10,588. In order to bring the assets to a sum in excess of this figure the plant of the company is placed at \$7,107, the accounts receivable at \$2,823, the good will at \$6,127 and the tools, machinery, stock and materials at \$9,167. Manifestly the valuation thus placed upon the real estate is too high. By the terms of the contract under which the company held title the vendor could at any time declare the same forfeited for a breach of its conditions and take possession of the property with all the improvements thereon. As there was a default at the time the judgments were entered this fact should be considered in fixing the value. Indeed, a few days after the judgments were entered the vendor actually took possession under the contract and the creditors obtained nothing from the real estate. The sum of \$2,823—debts due the company—is found by the referee to be uncollectible. The good will is conceded to be unavailable as an asset and the tools and machinery are placed at too high a value in view of the sheriff's inventory at \$6,463 and the sale at public auction a week later for \$3,025. There is testimony that the value of the plant was but \$2,800 and the value of the stock but \$5,663, but even if the value of the former be fixed at \$3,500 and of the latter at \$6,500 there would still be insufficient property to pay the debts. The referee has twice examined this question and has had the advantage of seeing and hearing the witnesses. Even if it be admitted that the question of fact is a close one no sufficient reason has been advanced for disturbing his finding. It cannot be denied that the company is hardly in a position to ask that any doubts which may arise shall be resolved in its favor. The judgments obtained by the company's treasurer and his wife have swept away every vestige of property from the general creditors. That this proceeding was in conflict with the spirit of the bankruptcy law cannot be controverted. There should be the usual order of adjudication.

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#### UNITED STATES v. PILDITCH.

(Circuit Court, S. D. New York. January 22, 1900.)

No. 2,461.

#### CUSTOMS DUTIES—REVIEW OF APPRAISAL—SUFFICIENCY OF PROTEST.

The fact that the protest of an importer against an assessment for duty fails to state under what provision or what law it is claimed the merchandise should be assessed does not render it insufficient, where, on appeal, the right paragraph is found and the correct duty imposed.

This is an application by the collector of custom at New York for a review of the decision of the board of general appraisers.

The duty was assessed at 30 per cent. ad valorem, as within the specific enumeration of boiler or other plate iron or steel valued above  $1\frac{1}{4}$  cents, and not over 4 cents, per pound, in paragraph 114 of the tariff act of August 28, 1894. The importer protested that the duty should be assessed at  $1\frac{2}{10}$  cents per pound, but without stating under what section of the act (or any act) this was provided for. The board of general appraisers decided that the merchandise was sheet steel in strips, and nearly all was valued at above 4 cents per

pound, and was similar to the steel in *U. S. v. Wetherell*, 13 C. C. A. 264, 65 Fed. 987. The protests were therefore overruled, and the appraisal of the collector of customs affirmed.

Curie & Smith, for importer.

Chas. D. Baker, Asst. U. S. Atty.

WHEELER, District Judge. The protest does not point out the paragraph claimed under, in the act of 1894, imported under, nor that law, nor any law, as the foundation of the protest. Otherwise, it is like that in *U. S. v. Salambier*, 170 U. S. 621, 18 Sup. Ct. 771, 42 L. Ed. 1167, which pointed out the claim as "under existing laws." Such claims are, of course, under law and existing laws, and this distinction seems to be without adequate foundation. Under the protest the right paragraph was found, and the correct duty has been exacted. This would seem to be enough, there being no one wronged complaining or to complain. Decision affirmed.

NUNN, Collector, v. WILLIAM GERST BREWING CO.

(Circuit Court of Appeals, Sixth Circuit. February 12, 1900.)

No. 744.

1. INTERNAL REVENUE—AMENDMENT OF STATUTE—TIME OF TAKING EFFECT.

The tariff act of 1897, which, among other things, amended Rev. St. § 3341, did not take effect until it was signed by the president, at 4 minutes past 4 o'clock p. m., Washington time, on July 24; and, where material in a case arising under such section, the exact time of the taking effect of the amendment may be shown.

2. SAME—DISCOUNT ON BEER STAMPS—EFFECT OF AMENDMENT OF STATUTE.

Under the provision of Rev. St. § 3341, before its amendment by the Dingley tariff act of 1897, allowing a discount of 7½ per cent. on beer stamps purchased by a brewer "and by him used in his business," as construed by the treasury department during the 30 years it remained in force, the purchaser of such stamps was entitled to the discount at the time of the purchase, where the stamps were afterwards used in his business; and where stamps were purchased on July 24, 1897, but before the signing by the president of the act containing the amendment, the purchaser is entitled to the discount, although the stamps, in due course of business, were used on later dates.

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

This was a suit brought by William Gerst, the defendant in error, trading under the firm name and style of the William Gerst Brewing Company, to recover of D. A. Nunn, United States collector of internal revenue for the Fifth collection district of Tennessee, the sum of \$810.75. This sum was paid under protest to Collector Nunn, by reason of an alleged erroneous and illegal assessment made by the commissioner of internal revenue. The cause was begun in the chancery court of Davidson county, Tenn., and was removed to the court below on the petition of the defendant, under section 643 of the Revised Statutes of the United States. There is no dispute as to the facts, and they are correctly set forth in the declaration which the plaintiff was required to file upon the law side of the court below after removal. On July 23, 1897, about noon, the manager of the Gerst Brewing Company telephoned the office of the collector of internal revenue an order for beer stamps, the total face value of which amounted to \$10,810. The communication was had by the manager with a deputy collector in charge of beer stamps, and he replied

that they could not be delivered that day, but would be counted out and would be ready for delivery the next morning. The next morning, July 24, 1897, about 9 o'clock, the manager of the brewing company called and was given the stamps, paying therefor \$9,999.25, in accordance with the provisions of section 3341 of the United States Revised Statutes, and was allowed a discount of  $7\frac{1}{2}$  per cent. on the face value of the stamps, of \$810.75. At the time the order was given, and on the 24th of July, 1897, when the stamps were delivered, the brewing company had a sufficient quantity of beer on hand, ready for market, to use the stamps bought. On July 24, 1897, at 4 minutes past 4 o'clock in the afternoon, the president signed the Dingley tariff act, which repealed the provision of section 3341 of the Revised Statutes providing that "the commissioner of internal revenue shall allow upon all sales of such [beer] stamps to any brewer, and by him used in his business, a deduction of seven and a half per centum." On the 30th of July, 1897, the commissioner of internal revenue instructed the collector to collect from all brewers in his district the discount of  $7\frac{1}{2}$  per cent. which was allowed by him on beer stamps delivered by him on or after July 24, 1897, without regard to date of order of such stamps. The Gerst Brewing Company was accordingly assessed \$810.75, the amount of the discount allowed on the morning of July 24, 1897, already referred to. The assessment was paid under protest on March 21, 1898. An application was made to have the same refunded, but the application was rejected. Therefore on June 22, 1898, this suit was begun as already stated. The case was tried without the intervention of a jury, and judgment was given against the collector for the amount of the assessment, with interest from the date when it was paid.

Abram M. Tillman, U. S. Atty., for plaintiff in error.

John Ruhm & Son, for defendant in error.

Before TAFT, LURTON, and DAY, Circuit Judges.

TAFT, Circuit Judge (after stating the facts as above). It is urged on behalf of the United States that the judgment of the court below was erroneous for two reasons: First, it is said that the Dingley act, though not signed until 4 o'clock on July 24, 1897, became law and operative by relation from the first moment of the day of its approval (that is, from and after midnight of July 23, 1897), and that therefore when the money was paid for the stamps the provision of section 3341, allowing the  $7\frac{1}{2}$  per cent. discount, was not the law; second, it is contended that under section 3341, Rev. St., as it was before amended, no right to a discount arose until the stamps had been used in the business of the brewer. It is argued that by the purchase of stamps the brewer does not pay the tax, that the tax is paid only when the stamps are affixed to the barrel for the purpose of putting the product on the market, and that before the stamps purchased in this instance were so used section 3341 had been repealed.

In the case of *Carriage Co. v. Stengel*, 37 C. C. A. 210, 95 Fed. 637, we had occasion to consider the question of the right to introduce proof to show the exact time when the bill passing congress takes effect by virtue of the signature of the president. We there found and stated the law to be that in the absence of proof there is a presumption that the act was signed on the first minute of the day when it took effect, but that it was competent to show by proof the exact time when the law was approved by the president, and that when this was made to appear the law could only be given effect from that time. In addition to the cases cited to sustain this view

in the Stengel Case, we may refer to a consideration of the question in respect of this very act in *U. S. v. Iselin* (C. C.) 87 Fed. 194; *U. S. v. Stoddard* (C. C.) 89 Fed. 699; s. c., on appeal, 34 C. C. A. 175, 91 Fed. 1005. The case of *U. S. v. Iselin* (C. C.) 87 Fed. 194, contains a very full discussion of the subject by the board of general appraisers. It necessarily follows that the law was not in force at the time the stamps were bought and the discount was allowed.

The averment of the declaration as to the time when the stamps purchased on the morning of July 24th were used is quite indefinite. It is that "some of the stamps (the exact amount will be shown) were actually used and affixed to packages and effaced, as required by law, during the 24th of July," and the evidence upon this point is that they actually did use on the 24th of July some of the stamps, and used the remainder afterwards in a comparatively short time. The question, then, is whether a brewer is entitled to a discount on his stamps before they are used, if they are used in the business. Section 3341 of the United States Revised Statutes is as follows:

"The commissioner of internal revenue shall cause to be prepared, for the payment of such tax, suitable stamps, denoting the amount of tax required to be paid on the hogshead, barrel, and halves, thirds, quarters, sixths and eighths of a barrel of such fermented liquors (and shall also cause to be prepared suitable permits for the purpose hereinafter mentioned), and shall furnish the same to the collectors of internal revenue, who shall each be required to keep on hand at all times a sufficient supply of permits, and a supply of stamps equal in amount to two months' sale thereof, if there be any brewery or brewery warehouse in his district; and such stamps shall be sold, and permits granted and delivered by such collectors, only to the brewers of their district respectively. Such collectors shall keep an account of the number of permits delivered and of the number and value of the stamps sold by them to each brewer; and the commissioner of internal revenue shall allow upon all sales of such stamps to any brewer, and by him used in his business a deduction of seven and a half per centum. And the amount paid into the treasury by any collector on account of the sale of such stamps to brewers shall be included in estimating the commissions of such collector."

Section 3339 fixes the tax on fermented liquors. The last clause of the section provides:

"The said tax shall be paid by the owner, agent or superintendent of the brewery or premises in which such fermented liquors are made, and in the manner and at the time hereinafter specified; that every brewer shall obtain from the collector of the district in which his brewery or brewery warehouse is situated, and not otherwise, unless such collector shall fail to furnish the same upon application to him, the proper stamps and shall affix upon the spigot-hole or tap (of which there shall be but one) of every hogshead, etc., in which any fermented liquor is contained, when sold or removed from such brewery or warehouse (except in case of removal under permit as hereinafter provided) a stamp denoting the amount of the tax required upon such fermented liquor, in such a way that the said stamp will be destroyed," etc.

The brewer pays the tax by buying the stamps. He secures the benefit of such payment, to wit, the removal and sale of beer from his brewery or warehouse, by fixing the stamps to the package in which the beer is contained. It appears from an examination of the regulations adopted by the commissioner of internal revenue and the secretary of the treasury that the practical construction of section 3341, since its passage, July 13, 1866 (14 Stat. 165), and its amendment, June 6, 1872 (17 Stat. 246), is that the discount of 7½

per centum is to be allowed at the time the stamps are sold. The form of application provided by the regulations of the revenue department, upon which stamps are to issue, shows a calculation of the total face value of the stamps, followed by a deduction of  $7\frac{1}{2}$  per cent., and a footing of the net total of the value of the stamps. The language of the section will easily bear two constructions. The phrase "by him used in his business" may be construed to be a postponement of the time for allowing a discount until the stamps have been used in the business, or it may be held to mean that the discount is to be allowed on all sales of stamps "by him to be used in his business," or in other words "stamps purchased for the purpose of being used in the business." The practical construction put upon the section by the department sustains the latter interpretation. The allowance has always been made upon the sales at the time the sales are made and the stamps have been delivered to the brewers upon their formal application therefor, prepared in accordance with the rules of the department, for the face value of the stamps less the discount. The effect of such 30 years' construction of the statutes by those who are charged with its enforcement is controlling. The cases are so numerous on this point, and the principle is so well settled, that citations are hardly necessary. *U. S. v. Union Pac. R. Co.*, 148 U. S. 562, 13 Sup. Ct. 724, 37 L. Ed. 560; *U. S. v. Alabama G. S. R. Co.*, 142 U. S. 615, 12 Sup. Ct. 306, 35 L. Ed. 1134; *Pennoyer v. McConaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; *Robertson v. Downing*, 127 U. S. 607, 8 Sup. Ct. 1328, 36 L. Ed. 269; *Heath v. Wallace*, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. Ed. 1063; *U. S. v. Johnston*, 124 U. S. 236, 8 Sup. Ct. 446, 31 L. Ed. 389; *U. S. v. Hill*, 120 U. S. 169, 7 Sup. Ct. 510, 30 L. Ed. 627. The executive construction of an act is not conclusive, but where there is doubt about the statute it will be followed unless there are cogent reasons to the contrary. We find none here. The stamps which were purchased on the morning of July 24, 1897, and upon which the discount was then allowed, were used in due course of business. The right to the discount accrued at the time of the purchase of the stamps. Had the stamps not been used in the business of the brewery, other questions might have arisen. As it is, the action of the court below in giving judgment to the plaintiff was clearly right, and the judgment is affirmed.

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#### DE BARA v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 12, 1900.)

No. 799.

#### 1. INDICTMENTS—CONSOLIDATION—HABEAS CORPUS—SCOPE—REVIEW.

Error in the consolidation of indictments cannot be inquired into in habeas corpus proceedings, since such writ cannot serve as a writ of error, where a court has acted within its jurisdiction.

#### 2. SAME—EXCESSIVE SENTENCE—DISCHARGE.

Prior to the expiration of that part of a term of imprisonment that a court could legally impose, a prisoner will not be discharged on habeas corpus on the ground that the court had imposed an excessive sentence.

Appeal from the District Court of the United States for the Southern Division of the Eastern District of Michigan.

Harlan Cleveland, for appellant.

Wm. D. Gordon, U. S. Atty.

Before TAFT, LURTON, and DAY, Circuit Judges.

DAY, Circuit Judge. Edgar De Bara, being in custody of the superintendent of the house of correction, at Detroit, Mich., in pursuance of a sentence and judgment of the United States district court for the Northern district of Illinois, filed his petition in the district court of the United States for the Eastern district of Michigan, praying allowance of a writ of habeas corpus, to the end that he might be discharged from custody. Upon hearing the court denied the prayer of the petition, and dismissed the same. An appeal was allowed to this court, and the correctness of the judgment of the district court is now before us for review. It appears from the transcript of the record filed in the case that on the 5th of May, 1898, an indictment was returned against Edgar De Bara and one Fanny De Bara for violation of section 5480 of the Revised Statutes of the United States (1 Supp. Rev. St. p. 694), charging in three counts separate violations of said section. On the 1st of June, 1899, in open court, in the presence of the defendants and with their consent, it was agreed that causes 3,007, 3,008, 3,009, 3,010, 3,011, 3,012, 3,013, 3,014, 3,015, 3,016, and 3,017 should be consolidated and tried with "this cause" (entry to that effect being made in said cause No. 3,012); that all of said causes should be tried by the same jury. It was therefore ordered by the court that said causes be consolidated. The causes, other than 3,012, in which a copy of the indictment is set forth in the transcript of the record, are said to be indictments for violations of the section of the statutes above referred to; each indictment, as in the case of indictment No. 3,012, containing three counts. From the transcript of the record, it does not appear very distinctly as to the nature of the cases other than 3,012, in which the indictment is set forth; but, upon the statements of the petition for allowance of the writ and of counsel in presenting the case, it may be taken that each of these was an indictment for offenses similar to those charged in No. 3,012. Upon the same day upon which the order of consolidation was made, defendants having pleaded not guilty to the indictments in all the cases, trial was had to a jury. On the 5th of June, 1899, the jury returned a verdict finding the defendants guilty as charged in all the counts in cases Nos. 3,009, 3,012, and 3,015, and on counts 2 and 3 in indictments 3,007, 3,008, 3,010, 3,011, 3,013, 3,014, 3,016, and 3,017. Motion for a new trial having been overruled, judgment was pronounced as follows, on June 17, 1899:

"Came the parties by their attorneys, and the defendant in his own proper person, in the custody of the marshal, to have the sentence and the judgment of the court pronounced upon him, he having heretofore, to wit, on the 5th day of June, 1899, one of the days of this term of court, been found guilty by a jury in due form of law as charged in the indictment filed herein against him; and the defendant being asked by the court if he has anything to say why the sentence and judgment of the court should not now be pronounced upon

him, and showing no good and sufficient reason why sentence and judgment should not be pronounced, it is therefore considered by the court, and as the sentence and judgment of the court, upon the verdict of guilty so rendered by the jury as aforesaid, that the defendant, Edgar De Bara, be confined and imprisoned in the house of correction, at Detroit, in the state of Michigan, for and during the term of three years."

Prior to the passing of sentence, on June 17, 1899, an order was made that a nolle prosequi be entered as to the first count in each of the cases numbered 3,007, 3,008, 3,010, 3,013, 3,014, 3,016, and 3,017. On the 20th of June, 1899, an order was entered in said record of case numbered 3,012, as consolidated, that the sentence imposed upon said Edgar De Bara begin to run at noon, on June 20, 1899. In the petition filed in the district court for the allowance of the writ, it was alleged that the court had no authority to sentence the petitioner except as granted by section 5480 of the Revised Statutes; that said trial and sentence was a violation of said statutory provision. It further states that the court had no jurisdiction to order a trial upon a consolidation of the 11 indictments; that the maximum punishment by imprisonment should not exceed 18 months, or a fine of \$500, or both; that the sentence of the court for 3 years is wholly unauthorized, illegal, and void.

Section 5480, which prohibits and punishes any use of the mails of the United States for fraudulent purposes, provides a penalty for each violation of such section, as follows:

"Shall upon conviction be punishable by a fine of not more than \$500 and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the postoffice establishment enters as an instrument into such fraudulent scheme and device."

As to the alleged error in consolidating the indictments, it appears in the record that this was done with the consent of the appellant, and whether erroneous or not it is immaterial now to inquire. This is not a proceeding in error, and mere assignments of error cannot be inquired into in a proceeding in habeas corpus. This point was distinctly passed upon by this court in *Howard v. U. S.*, 21 C. C. A. 586, 75 Fed. 986, 34 L. R. A. 509, where it was held that this question of alleged error in the order of consolidation could only be reviewed upon a writ of error after exception had been taken in the court below. In the *Howard Case* it was also determined that the order of consolidation did not make one case of the several indictments. It does not very clearly appear whether the district court in Illinois in passing sentence upon De Bara predicated its action upon a conviction had under the indictment in case No. 3,012, or upon the conviction upon all the indictments, nor, in the view we take of this case, is it necessary to construe this judgment. As we have already said, it is not the office of the writ of habeas corpus to serve as a writ of error. It can only be granted in cases where the court has exceeded its authority, and has undertaken to act beyond its power and jurisdiction.



In *Ex parte Virginia*, 100 U. S. 339-343, 25 L. Ed. 678, the court, speaking by Mr. Justice Strong, uses this language:

"In *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872, it was ruled, after an examination of authorities, that when a prisoner shows that he is held under a judgment of a federal court, given without authority of law, this court, by writs of habeas corpus and certiorari, will look into the record, so far as to ascertain whether that is the fact, and, if it is to be found so, will discharge him. Mr. Justice Miller said, in delivering the opinion: 'The authority of the court in such a case, under the constitution of the United States, and the fourteenth section of the judiciary act of 1789, to issue this writ, and to examine the proceedings in the inferior court, so far as may be necessary to ascertain whether that court has exceeded its authority, is no longer an open question.' While, therefore, it is true that a writ of habeas corpus cannot generally be made to subvert the purpose of a writ of error, yet when a prisoner is held without any lawful authority, and by order beyond the jurisdiction of an inferior federal court to make, this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all."

Similar language was used by Mr. Justice Miller in *Ex parte Yarbrough*, 110 U. S. 652, 653, 4 Sup. Ct. 152, 28 L. Ed. 274:

"That this court has no general authority to review, on error or appeal, the judgments of the circuit courts of the United States, in cases within their criminal jurisdiction, is beyond question; but it is equally well settled that, when a prisoner is held under the sentence of any court of the United States in regard to a matter wholly beyond or without the jurisdiction of that court, it is not only within the authority of the supreme court, but it is its duty, to inquire into the cause of commitment, when the matter is properly brought to its attention, and if found to be, as charged, a matter of which such a court had no jurisdiction, to discharge a prisoner from confinement. *Ex parte Kearney*, 7 Wheat. 38, 5 L. Ed. 391; *Ex parte Wells*, 18 How. 307, 15 L. Ed. 421; *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872; *Ex parte Parks*, 93 U. S. 18, 23 L. Ed. 787. It is, however, to be carefully observed that this latter principle does not authorize the court to convert the writ of habeas corpus into a writ of error, by which the errors of law committed by the court that passed the sentence can be reviewed here; for if that court has jurisdiction of the party and of the offense for which he was tried, and has not exceeded its powers in the sentence which it pronounced, this court can inquire no further."

What sentence, then, did the district court of Illinois pronounce in the case which is beyond its jurisdiction and power? An analysis of section 5480 shows that, under its provisions, an indictment may be framed so as to cover three offenses committed within the same six calendar months, but the court thereupon shall give a single sentence. This section is not to be construed as limiting the number of offenses for which indictments may be returned within the period of six calendar months, but the number of offenses which may be joined in the same indictment when committed within that period. In *re Henry*, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. Ed. 174. When a person has been found guilty under such indictment, whether he be convicted upon one or more of its counts, the law provides there shall be a single sentence. This sentence is clearly laid down in the terms of the act itself, which provides for a fine of not more than \$500, and imprisonment not exceeding 18 months, or both punishments, in the discretion of the court. Therefore, if the order of the court be construed as imposing a sentence for the conviction under the indictment in case No. 3,012, upon which a conviction was had upon all three counts, the court could pass a sentence fining the prisoner not exceeding \$500,

and imprisoning him not more than 18 months. If the sentence be construed to have been passed in pursuance of a conviction on all of the indictments, then it was within the province of the court to pass cumulative sentences upon the indictments, not exceeding 18 months in each case, the imprisonment upon the one to commence upon the termination of the other, and to impose a fine not exceeding \$500 in each case. This point was expressly ruled in *Howard's Case*, 21 C. C. A. 586, 75 Fed. 986, 34 L. R. A. 509; and it is not necessary to repeat the reasoning upon which that conclusion was reached, or to again cite the authorities by which it is supported. For the purpose of this proceeding, it may be taken as within the power of the court to have sentenced the prisoner upon conviction upon each indictment, or upon a single indictment, within the limitations just stated. Examining the sentence actually passed, we find that the court fixed the term of imprisonment at 3 years, but that the appellant has not yet served the term of 18 months, for which he might have been legally sentenced. The term of imprisonment which the court could have imposed, within the clear limits of its power and jurisdiction, has not yet expired, and, assuming that the sentence has gone beyond the power granted in the statute, the question now presented is, should the writ be granted and the prisoner discharged while he is yet serving within the time for which he might lawfully have been sentenced? There is considerable conflict of authority in the state decisions as to the effect of a sentence in excess of the powers of the court. It does not seem to us profitable to review them here. We think the case is sufficiently determined by principles laid down in the decisions of the supreme court of the United States. In the case of *In re Bonner*, 151 U. S. 258, 14 Sup. Ct. 326, 38 L. Ed. 152, in the course of a careful and full discussion of the rules applicable to the jurisdiction of courts in criminal cases, Mr. Justice Field, in stating rules applicable to all of them, by which the jurisdiction as to a particular judgment of the court in such cases may be determined, among other things says:

"When the jury have rendered their verdict, the court has to pronounce the proper judgment upon such verdict, and the law, in prescribing the punishment, either as to the extent or the mode or the place of it, should be followed. If the court is authorized to impose imprisonment, and it exceeds the time prescribed by law, the judgment is void for the excess. \* \* \* A question of some difficulty arises, which has been disposed of in different ways, and that is as to the validity of a judgment which exceeds in its extent the duration of time prescribed by law. With many courts and judges,—perhaps with the majority,—such judgment is considered valid to the extent to which the law allowed it to be entered, and only void for the excess. Following out this argument, it is further claimed that, therefore, the writ of habeas corpus cannot be invoked for the relief of a party until the time has expired to which the judgment should have been limited."

It is true the question here was not directly made in that case. As Mr. Justice Field says, it was only one of speculative interest, for there was no excess of punishment in the sentence in that case. Still the intimation as to the weight of the authorities, as well as the reasoning of the court, point strongly in the direction of holding the rule to be that a sentence is valid to the extent that it is authorized by law, and void only as to the excess. The question was under

consideration in *U. S. v. Pridgeon*, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631. The opinion is by Mr. Justice Jackson, and he says:

"Without undertaking to review the authorities in this and other courts, we think the principle is established that, where a court has jurisdiction of the person and of the offense, the imposing of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack. In other words, the sound rule is that a sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over person and offense, and only void as to the excess when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence. \* \* \* Under a writ of habeas corpus, the inquiry is addressed, not to errors, but to the question whether the proceedings and the judgment rendered therein are, for any reason, nullities, and, unless it is affirmatively shown that the judgment or sentence under which the petitioner is confined is void, he is not entitled to his discharge. It may often occur that the sentence imposed may be valid in part and void in part, but the void portion of the judgment or sentence should not necessarily, or generally, vitiate the valid portion. Rev. St. § 761: 'The court, or justice, or judge shall proceed in a summary way to determine the facts of the case [in habeas corpus] by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.' There is no law or justice in giving to a prisoner relief under habeas corpus that is equivalent to an acquittal, when, upon writ of error, he could only have secured relief from that portion of the sentence which was void. In the present case the five-year term of imprisonment, to which Pridgeon was sentenced, cannot properly be held void because of the additional imposition of 'hard labor' during his confinement. Thus, in *Re Swan*, 150 U. S. 637, 653, 14 Sup. Ct. 230, 37 L. Ed. 1211, it is stated that, 'even if it was not within the power of the court to require payment of costs, and its judgment to that extent exceeded its authority, yet he cannot be discharged on habeas corpus until he has performed so much of the judgment, or served out so much of the sentence, as it was within the power of the court to impose.'"

Under a writ of habeas corpus the inquiry is, does the judgment exceed the authority of the court, and is the prisoner serving under a sentence beyond the power of the court to impose?

It is true that the cases wherein the writ has been denied, because a part only of the sentence was within the power of the court to impose, have generally been those in which the judgment was of a clearly separable nature, as for costs and imprisonment, where there was power only to impose the one or the other. We see no reason why the rule should be limited to such cases, and think the true principle to be that, before a prisoner can be discharged upon habeas corpus, it must appear that he is serving by virtue of a judgment which the court had no power to impose. As long as he is serving an imprisonment within the limits of a term which the court might lawfully impose, acting within its power and jurisdiction, he cannot be discharged on habeas corpus, no matter how irregular or erroneous the judgment may be. In the present case the court had power to impose so much of the judgment as is now operative upon the prisoner, and therefore he cannot have relief by the writ of habeas corpus. We have already seen that it was within the power of the court, in any aspect of the case, to impose a sentence upon the prisoner of 18 months. This much of the sentence the prisoner has not yet served. We do not undertake to determine herein what may be the rights of the prisoner at the expira-

tion of the term of 18 months, nor do we wish to be considered as in any wise foreshadowing the views which the court may hold as to his rights, should further application for the writ be made at that time. All that is now determined is that the petitioner, not having served the period for which he might legally be sentenced, cannot now have the benefit of the writ. Finding no error in the judgment of the district court for the Eastern district of Michigan, the same is affirmed, with costs.

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ROSE *ex rel.* CARTER *v.* ROBERTS.

(Circuit Court of Appeals, Second Circuit. January 24, 1900.)

No. 118.

1. **COURTS-MARTIAL—REVIEW BY HABEAS CORPUS.**

The judgment of a court-martial cannot be reviewed by a writ of habeas corpus, except to determine the question of jurisdiction.

2. **SAME—JURISDICTION—JOINDER OF OFFENSES.**

An indefinite number of offenses may be adjudicated together in one proceeding by a court-martial, and a single sentence rendered covering all the convictions.

3. **SAME—PUNISHMENT.**

Under the sixtieth article of war, declaring that a person in the military service, who conspires to obtain or aid others to obtain the allowance of any fraudulent claim against the United States, or who makes or causes to be made any such claim, or who shall be guilty of certain other offenses, "shall on conviction thereof be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge," a person convicted of two offenses named therein may be punished by fine as to one and by imprisonment as to the other.

4. **SAME.**

A person sentenced by a court-martial to fine and imprisonment for presenting fraudulent claims to the United States may be punished by dismissal from the service for the same offense, as conduct unbecoming an officer.

5. **SAME.**

The fact that an army officer sentenced by a court-martial to fine and imprisonment is by the same judgment dismissed from the service does not deprive the military authorities of jurisdiction to carry out the sentence.

In Error to the Circuit Court of the United States for the Southern District of New York.

Abram J. Rose, for plaintiff in error.

Henry L. Burnett, for defendant in error.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This appeal presents for review an order of the circuit court of the United States for the Southern district of New York dismissing a writ of habeas corpus. The writ was obtained in behalf of Oberlin M. Carter on a petition alleging that the relator was unlawfully imprisoned pursuant to a sentence of a court-martial.

It appears by the record that the relator as a captain in the corps of engineers, United States army, was convicted by the court-martial

of four different offenses committed by him while in the military service of the United States, viz. conspiring to defraud the United States, in violation of the sixtieth article of war; causing false and fraudulent claims to be made against the United States, in violation of the sixtieth article of war; conduct unbecoming an officer and a gentleman, in violation of the sixty-first article of war; and embezzlement, as defined in section 5488, Rev. St. U. S., in violation of the sixty-second article of war. He was thereupon sentenced by the court-martial to suffer a fine of \$5,000, to be imprisoned at hard labor for five years, to be dismissed from the service of the United States, and to the publication of his crime and punishment as prescribed by statute upon a dismissal for fraud. The findings and sentence of the court-martial were approved by the secretary of war and confirmed by the president, and before the institution of the proceedings under review the relator had paid the fine imposed by the sentence, and had been dismissed from the service of the United States.

It is not the office of a writ of habeas corpus to perform the functions of a writ of error in reviewing the judgment of a court-martial. Courts-martial are tribunals created by congress in pursuance of the power conferred by the constitution, and have as plenary jurisdiction of offenses committed to them by the law military as do the circuit and district courts of the United States in the exercise of their statutory powers over other offenses. The question of jurisdiction may be reached by such a writ, as it may be when the judgment of any tribunal is attacked; but the range and scope of the inquiry is controlled by the same rules and limitations in either case. There must be jurisdiction to hear and determine, and to render the particular judgment or sentence imposed; but, if this exists, however erroneous the proceedings may be, they cannot be reviewed collaterally, or redressed by habeas corpus. These principles have been repeatedly declared by the authorities. In *re Davison* (C. O.) 21 Fed. 618; *Ex parte Reed*, 100 U. S. 13, 25 L. Ed. 538; In *re Coy*, 127 U. S. 731, 8 Sup. Ct. 1263, 32 L. Ed. 274; *Ex parte Yarborough*, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274; *U. S. v. Pridgeon*, 153 U. S. 59, 14 Sup. Ct. 746, 38 L. Ed. 631.

It is not contended for the appellant that the court-martial did not have jurisdiction of the person of the accused and of the offenses of which he was convicted, but it is insisted that the court transcended its power in the imposition of punishment. More specifically, the contention for the appellant is that, while it was within the competency of the court-martial to try and punish the relator for the offenses in violation of the sixtieth article of war of which he was convicted, the court exceeded its authority when it punished him by fine and imprisonment instead of fine or imprisonment; and that the conviction and sentence for the offense alleged to be in violation of the sixty-second article of war were void, because the facts charged did not constitute an offense against that article.

If the sentence was in excess of the authority conferred upon the court by the articles of war enacted by congress, it was to that extent void, as the court would have gone beyond its jurisdiction in

imposing punishment. On the other hand, if the authority of the court extended to the punishment of the relator by fine and imprisonment upon his conviction of the two offenses in violation of the sixtieth article of war, the sentence defeats any remedy by the writ of habeas corpus, as that remedy reaches only cases of unlawful imprisonment, and it matters not, for present purposes, whether the authority of the court extended to his conviction and sentence for any other offense. There being no statutory direction upon the subject, usage permits an indefinite number of offenses to be adjudicated together in one proceeding by courts-martial, and the rendition of a single sentence covering all the convictions and imposing punishment accordingly, however separate and distinct may be the different offenses, and however different may be the punishments prescribed for them. 1 Winthrop, Mil. Law (2d Ed.) 219, 614; Davis, Mil. Law, 148, 689. It follows that, if the sentence is warranted by a conviction of two offenses, it is justified to the extent that such offenses are punishable.

The sixtieth article of war declares, among other things, that a person in the military service of the United States, "who enters into any agreement or conspiracy to defraud the United States by obtaining, or aiding others to obtain, the allowance of any false or fraudulent claim," or "who makes or causes to be made any claim against the United States, or any officer thereof knowing such claim to be false or fraudulent, \* \* \* shall on conviction thereof be punished by fine or imprisonment, or by such other punishment as a court-martial may adjudge." The article, besides the two offenses mentioned, defines disjunctively eight others, and the language prescribing the punishment is contained in a concluding clause at the end of the enumeration. We entertain no doubt that the concluding clause is to be read distributively, and applies to each of the ten enumerated offenses; and that a person convicted of two or more of the ten offenses is by its terms punishable for each by fine, or by imprisonment, or by such other punishment as the court-martial may adjudge. Any other construction would attribute to congress the intention to ignore any distinction between degrees of guilt in punishing crime, and to subject a person guilty of one offense to the same measure of punishment as one guilty of several or of all of the ten offenses.

As has been stated, the relator was convicted of two of the offenses defined by the sixtieth article of war. The record presents the charges and specifications upon which he was found guilty of those offenses. The charges describe each offense in the language of the article. Whether the specifications support the charges or the evidence supports the specifications, we are not at liberty to consider. Nor is it open to inquiry whether the two offenses were in fact but one and the same criminal act. When properly constituted and convened, a court-martial has jurisdiction to hear and determine the question whether the accused is guilty of any of the offenses created by the articles of war. This jurisdiction necessarily includes the authority to decide, when the charge preferred against the accused is the commission of one or more of these offenses,

whether the specifications and the evidence sufficiently exhibit the incriminating facts. As was said by the supreme court in *Dynes v. Hoover*, 20 How. 65, 15 L. Ed. 838, the sentence (when confirmed by the president) "is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever, unless it shall be in a case in which the court had no jurisdiction over the subject-matter or charge, or one in which, having jurisdiction over the subject, it has failed to observe the rules prescribed by statute for its exercise." Having found the relator to be guilty of two offenses, the court was empowered by the statute to punish him as to one by fine and as to the other by imprisonment. The sentence was not in excess of its authority.

It is proper to state that the other punishments imposed upon the relator by the sentence were authorized by the articles of war. The conviction of conduct unbecoming an officer and a gentleman was for an offense in violation of article 61, and that article requires that, upon conviction, the officer be dismissed from the service. The punishment by publication of his crime was authorized by article 100, which provides for such punishment when an officer is dismissed from the service for cause. It is also proper to state that congress can, if it sees fit, carve out two or more offenses from a single criminal transaction, and impose cumulative punishments for the different offenses (*Com. v. Trickey*, 95 Mass. 559; *U. S. v. Harmison*, 3 Sawy. 556, Fed. Cas. No. 15,308); and, if the court-martial convicted the relator of several offenses for a single criminal transaction, it did not transcend, necessarily, the power conferred by the sixtieth article of war.

The appellant has urged the proposition that the relator, having been dismissed from the service, was not thereafter amenable to military authority. If by this it is meant to be said that he was no longer lawfully in custody under the sentence of imprisonment, the proposition has not sufficient color of merit to require discussion.

In dismissing the writ the court below expressed the opinion that the relator was properly convicted by the court-martial of an offense in violation of the sixty-second article of war, and that the sentence of imprisonment was supported by such conviction. Without intending to impugn the correctness of this conclusion, we have not considered the question, because, in the view we have reached, it does not arise. The relator was lawfully restrained of his liberty by the sentence and commitment pursuant to it, because the sentence was warranted, both as to fine and imprisonment, by his conviction of one offense subjecting him to punishment by fine, and of another subjecting him to punishment by imprisonment, and both in violation of the sixtieth article of war.

The order dismissing the writ of habeas corpus is affirmed, with costs.

**ROSE ex rel. CARTER v. ROBERTS.**

(Circuit Court of Appeals, Second Circuit. February 7, 1900.)

No. 118.

**HABEAS CORPUS—STAY OF MANDATE PENDING REVIEW.**

A mandate of affirmance of a decision of the circuit court denying a writ of habeas corpus will be stayed pending decision by the supreme court on error, where, if the mandate should issue, the relator would be delivered to the custody of officers in another state.

In Error to the Circuit Court of the United States for the Southern District of New York.

L. Laflin Kellogg, for the motion.

Wm. S. Ball, Asst. U. S. Atty., opposed.

Before WALLACE and SHIPMAN, Circuit Judges.

**PER CURIAM.** We think this is a proper case in which to stay the issuing a mandate of affirmance pending the decision of the supreme court upon the application for a certiorari, which is now under consideration by that court. If the mandate should now be issued, and it should be decided by the supreme court that the writ of habeas corpus ought not to have been dismissed, the relator would be remediless, as he would have been meantime delivered into the custody of officers in another state, and the writ would necessarily be nugatory, as the respondent could not produce him to be released. It is the right and privilege of a person deprived of his liberty to review to the extent permitted by law the legality of his detention, even when it is pursuant to the judgment or sentence of a court; and the execution of the sentence should be stayed pending the final determination, unless very exceptional circumstances justify the court in refusing to do so.

**UNITED STATES v. LACKEY.****SAME v. CONNERS et al.**

(District Court, D. Kentucky. February 19, 1900.)

**1. ELECTIONS—OFFENSES AGAINST RIGHT OF SUFFRAGE—RIGHTS SECURED BY FIFTEENTH AMENDMENT.**

The fifteenth constitutional amendment, within the limitations specified, applies generally to the elective franchise, prohibiting the denial or abridgment of the right to vote on account of race, color, or previous condition of servitude, whenever, wherever, or however such right is sought to be exercised; and Rev. St. §§ 5507, 5508, which were enacted as a part of the legislation for the enforcement of such amendment, under the power conferred on congress by section 2 thereof, are not limited to elections for representatives in congress, but apply equally to all elections, whether national, state, or municipal.

**2. SAME—CONSTITUTIONALITY OF LEGISLATION.**

The fifteenth amendment secures to citizens of the United States the right of exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude, which right congress has the power to protect by appropriate legislation, not only against hostile action by the states, but also against outrage,



violence, or combinations on the part of individuals, irrespective of state laws; and Rev. St. § 5508, providing for the punishment of conspiracies to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of "any right or privilege secured by the constitution or laws of the United States," is within such power, as applied to conspiracies to defeat the right secured by such amendment, and is constitutional.

**3. SAME.**

The fifteenth amendment was meant to guaranty and secure to the negro, as such, the same right to vote that the white man, as such, has; and, under the power conferred upon congress to enforce the same by appropriate legislation, any legislation having in view the sole object of protecting that right, if adapted to that end, and not otherwise unconstitutional, is valid.

**4. SAME.**

Rev. St. § 5507, providing for the punishment of "every person who prevents, hinders, controls, or intimidates another from exercising the right of suffrage, to whom that right is guarantied by the fifteenth amendment to the constitution of the United States, by means of bribery or threats," etc., being limited by its terms to the protection of rights guarantied by the fifteenth amendment, and being reasonably adapted to that end, is "appropriate legislation" for the enforcement of such article.

**5. SAME—EFFECT OF FIFTEENTH AMENDMENT.**

The right of citizens of the negro race to vote was in many states derived directly from the fifteenth amendment, which by its own force alone nullified provisions of state constitutions excluding them from such right on account of color; and, so far as such citizens are concerned, the right, however originating, is guarantied by that amendment against denial or abridgment on account of their race, color, or previous condition of servitude.

**6. SAME—APPLICABILITY OF STATUTES TO STATE ELECTIONS.**

Neither the fifteenth amendment, nor the statutes enacted for its enforcement, were intended, in any primary sense, to protect any right or interest of the United States; and the fact that the national government had no direct interest in an election does not affect the applicability thereto of such statutes, or constitute a defense to an indictment for their violation in connection with such election.

**7. CRIMINAL LAW—REPEAL OF PORTION OF STATUTE—EFFECT.**

The repeal of Rev. St. § 5506, did not render section 5507 ineffective, because of the provision therein that the penalties for its violation shall be "those prescribed in the preceding section." For the purposes of such reference, the penalties so prescribed still remain unaffected by the repeal of the section as such.

**8. INDICTMENT—SUFFICIENCY—CONSPIRACY TO PREVENT COLORED MEN FROM VOTING.**

An indictment is sufficient, under Rev. St. § 5508, which charges the defendants with conspiring to injure, oppress, threaten, and intimidate certain colored men in the exercise of their right to vote, to which they were legally entitled, on account of their race and color, and need not charge, in terms, that the right injured was the right not to be discriminated against on account of race, color, or previous condition of servitude.

**9. CRIMINAL LAW—JURISDICTION—FEDERAL AND STATE COURTS.**

The fact that an act constitutes an offense under the statutes of a state, cognizable only in the state courts, does not deprive a federal court of jurisdiction to entertain a prosecution based on the same act, where it also constitutes an offense against the laws of the United States.

These are prosecutions by the United States for violations of the statutes enacted to enforce the fifteenth constitutional amendment. On demurrers to indictments.

R. D. Hill, U. S. Atty., and John G. Fitzpatrick, Asst. U. S. Atty. Strother & Gordon, Swager Sherley, Isaac T. Woodson, Samuel E. Blackburn, John B. O'Neal, Bishop & Hendrick, J. R. Morton, George C. Webb, Maury Kemper, J. H. Mulligan, O. J. Bronston, John W. Yerkes, and W. G. Welch, for defendants.

EVANS, District Judge. The indictment in the first of the cases named is for a violation of section 5507, and that in the second is for a violation of section 5508, of the Revised Statutes of the United States; all the aggrieved persons being men of color, of the African race, and the wrongs committed being charged to have been committed on account of that fact. A demurrer has been interposed to each indictment, and, as a decision in both cases depends in a large measure upon the same principles, they may conveniently be disposed of in one opinion.

When the statutory provisions referred to are considered solely with reference to the meaning of the language used, and with regard to the general purpose to be accomplished, we find that congress intended to protect the right of suffrage, and to prevent its abridgment or denial, by prescribing: First, in section 5507, punishment for those who, by means of bribery or certain forms of threats, either prevented, hindered, controlled, or intimidated a described class of persons from exercising or in exercising the right of suffrage, namely, those persons, but only those persons, to whom that right was guarantied by the fifteenth amendment to the constitution; and, second, in section 5508, by prescribing punishment for those who conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise and enjoyment of any right or privilege secured to him by the constitution or laws of the United States. There would be some hardihood in a serious contention that either of the objects disclosed by this analysis of the sections referred to was, per se, wrong, or fairly subject to any just criticism. On the contrary, those objects are manifestly just and commendable in the estimation of every right-thinking man. When we go further, and consider that the purpose, in some important respects, was to assist in guarding the right to vote so recently given by the nation itself to a certain class of its citizens, it suggests the reflection that free and fair elections, at which the honest, intelligent, and uncontrolled choice of the qualified voters of the community shall be fairly ascertained and announced, are the only sure foundations of free institutions, and the only real guaranty of the liberties of the people. If the first are systematically denied or prevented, the others may be sooner or later overthrown. True, under our form of government, the state authorities must, for the most part, enforce and preserve these safeguards; but so essential to our happiness are honest and free elections, that if the federal authorities, acting within their proper sphere, can in any way help to secure them, they should not omit or neglect to do so. With these general propositions before us, we come to the consideration of the principal objection raised to the indictments, to wit, that congress had no constitutional power to enact the legislation referred to; and we proceed

to its investigation, but, with the exception of one case under section 5507, without any express adjudications to guide us upon the exact points involved in these cases.

On July 28, 1868, the secretary of state proclaimed that the fourteenth article of amendments to the constitution of the United States had been ratified by three-fourths of the states of the Union. The first section thereof emphatically declared that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." The instantaneous effect of this was to make all the persons described in the first section citizens alike of the United States and of the states wherein they lived. It required no legislation by congress to perfect this right. The amendment itself, of its own force, achieved the object. This much being accomplished, the people went further, and the momentous result was that on March 30, 1870, by a similar proclamation, the secretary of state announced the ratification, by a like proportion of the states, of the fifteenth amendment to the constitution, which is as follows:

"Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, nor by any state, on account of race, color or previous condition of servitude."

"Sec. 2. The congress shall have power to enforce this article by appropriate legislation."

It will be observed that the prohibition of this amendment extends equally to the denial and to any abridgment of the right to vote on account of race, color, etc. It must be admitted that this amendment is, and was intended to be, the great charter of the negro's right to vote. It is the fountain source from whence alone it sprung, and which alone gave it vitality in many of the states. In the exercise of the powers given by these two amendments, congress passed several acts which were deemed by it appropriate; but in the cases before us we are concerned only with the provisions of the act entitled "An act to enforce the rights of citizens of the United States to vote in certain states of this Union, and for other purposes," approved May 31, 1870 (16 Stat. 140), commonly called the "Enforcement Act," as those provisions now appear in the Revised Statutes. Certain sections of this celebrated enactment have been passed upon by the supreme court. Some of them have been repealed, and some of them, though changed in form, are now sections 2004, 5507, 5508, and 5509 of the Revised Statutes. No one of these has ever been repealed or further modified. They still remain parts of the body of the laws of the United States, and are in full vigor, unless they be such enactments as are not authorized by any grant to the congress of power to pass them.

It is contended for the accused that congress has no power, under the constitution, to impose penalties upon acts done at an election held for state officers only, by which is meant an election for officers of the state, as distinguished from presidential electors and representatives in congress; and it is urged that this court has no jurisdiction in the cases before us, because it plainly appears from the indictments that, in that sense, the offenses charged were all com-

mitted at an election at which only state officers were chosen. It seems to the court that this argument proceeds upon a misapprehension alike of the statutes themselves and of the charge made against the accused. They are charged with violating the laws of the United States, and not those of the state. These laws of the United States are not intended to deal with elections at all, in any direct or proper sense,—either to regulate, control, or protect them. What the statutes which are to be construed and applied in these cases are designed to accomplish is: First, by section 5507, to prevent the denial or the abridgment of the right to vote of certain citizens (that is to say, the hindering, controlling, or preventing the exercise of the right of suffrage, by means of bribery or intimidation, on account of race, color, or previous condition of servitude); and, second, by section 5508, to punish every conspiracy to intimidate certain persons in the exercise of the right to vote on account of race, color, etc. These statutes relate, not to the election, *per se*, but to the denial or abridgment of the right of suffrage, as it is secured by the laws of the United States, by certain means, namely, by bribery, intimidation, etc., for certain reasons, namely, on account of race, color, etc., and for conspiracies designed to defeat that right. Article 1, § 4, of the constitution gives congress power to enact laws regulating the time, place, and manner of electing representatives in congress; and legislation may be based upon that section, in which event, of course, a statute having that purpose alone in view could only be applied when representatives were elected. But congress, under the fifteenth amendment, may also legislate to enforce and protect the rights given by that amendment, in which event the legislation may apply to any occasion when the act is committed by which the right to vote is denied or abridged on account of race, color, or previous condition of servitude. Overlooking this distinction will lead to some confusion in endeavoring to apply the decisions of the courts. The idea would at least be novel that the fifteenth amendment applied only to congressional elections.

While, as we have shown, congress may, under article 1, § 4, pass laws to regulate the election of representatives in congress, still, to limit the right of congress to that power would require a new reading of another very plainly expressed constitutional provision. The fifteenth amendment, within the scope of its purpose, is as wide as the right to vote itself. It expressly and unequivocally prohibits the denial or the abridgment of the right to vote at any election whatever—national, state, or municipal—on account of race, color, or previous condition of servitude. Its terms are general, and it is as admissible to exclude all elections from its operation as it is to exclude any. Within the limitations specified, it applies to the elective franchise,—the right to vote,—whenever, wherever, and however exercised by the people. It is apparent and undeniable that the nation itself determined to take care that no such discrimination as that provided against should be made, and it not only adopted the amendment to prohibit it, but authorized the congress to enforce the prohibition by appropriate legislation. The power of congress under a less liberal but somewhat similar provision was clearly, and we may say finally, fixed by the supreme court of the United

States when it approved the words of the great chief justice in the case of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, presently to be noticed. As we have seen, part of this legislation remains upon the statute books. It has been there 30 years unrepealed. It has a beneficial purpose behind it, namely, the enforcement of a provision of the organic law; and the court of first instance would not be inclined to hold it invalid, does not have any predisposition to do so, and should not in any event do it, except under a strong persuasion that it certainly violated the constitution. Indeed, it may be admissible to apprehend that, if this legislation is swept away by judicial action, the entire fabric so carefully builded upon the fifteenth amendment may disappear. However, the question should be most carefully examined, because of its great importance, not only to the public generally, but to the defendants particularly. For that reason we have bestowed upon it the most painstaking consideration. We have already noticed generally the language of the statutes under which these indictments were found, and have pointed out the intention thereby at least to attempt to guard the rights of a certain class of citizens to vote without being discriminated against on account of race, color, etc., and have to some extent animadverted upon the importance of guarding the right of suffrage, and the free exercise thereof by all who are entitled to vote; and we may add that none of the provisions of any of the statutes referred to in any possible way interfere with or abridge the right of any citizen to vote as he pleases. The purpose—probably the most obvious purpose—of the legislation is to safeguard the right of citizens to the extent authorized by the fifteenth amendment. In doing this it interferes with the rights of none. It simply punishes those who unlawfully interfere with the rights of others. As we have indicated, this is, to say the least, a laudable design. The evident intention being to enforce and preserve the rights given by the fifteenth amendment, it still remains to be seen whether congress has exercised its acknowledged power in a constitutional and effective manner. The courts have had other portions of the act under consideration upon several notable occasions, the most conspicuous instances of which we will notice in somewhat chronological order:

The case of *U. S. v. Cruikshank*, reported in 25 Fed. Cas. 707, 1 Woods, 308, was decided by Mr. Justice Bradley, sitting in the circuit court. Much of what he said in his very strong opinion is instructive, but, as the case turned upon sections now not on the statute books, it is not so much in point as it would otherwise have been. That case, so far as it has any relevancy to these, was based upon section 4 of the act (later found, in a greatly changed form, in section 5506 of the Revised Statutes), and which has been repealed. Speaking generally, the learned justice said at page 713, 25 Fed. Cas., and page 324, 1 Woods:

"I am inclined to the opinion that congress has the power to secure that right, not only as against the unfriendly operation of state laws, but against outrage, violence, and combinations on the part of individuals, irrespective of state laws. Such was the opinion of congress itself in passing the law at a

time when many of its members were the same who had consulted upon the original form of the amendment in proposing it to the states. And as such a construction of the amendment is admissible, and the question is one at least of grave doubt, it would be assuming a great deal for the court to decide the law, to the extent indicated, to be unconstitutional."

This part of the opinion will be found very important further along. On page 715, 25 Fed. Cas., and page 329, 1 Woods, the justice also said:

"The sixth count charges a conspiracy to prevent and hinder certain citizens of the United States, who were of African descent, and persons of color, in the exercise and enjoyment of their right to vote at any election to be thereafter held in the state of Louisiana or in the parish of Grant, knowing they had such right to vote. A conspiracy to hinder a person from exercising his right to vote at any election is made indictable by the fourth section of the enforcement act; also, by the sixth section, read in connection with the first. Over the general subject of the right to vote in the states, and the regulation of said right, congress, as we have seen, has no power to legislate. The fifteenth amendment relates only to discriminations on account of race, color, and previous condition of servitude, and, as we have before shown, is a prohibition against the making of such discriminations. The law on which this count is founded is not confined to cases of discrimination above referred to. It is general and universal in its application. Such a law is not supported by the constitution. The charge contained in the count does not describe a criminal offense known to any valid and constitutional law of the United States. It should at least have been shown that the conspiracy was entered into to deprive the injured persons of their right to vote by reason of their race, color, or previous condition of servitude. This count I also regard as invalid."

It will be seen that the court held that the sixth count in the indictment, which, in general terms, charged a conspiracy to hinder certain citizens of African descent, and who were in fact persons of color, in exercising the right to vote at any election in Louisiana thereafter to be held, but which failed to show that the conspiracy was entered into to deprive the injured persons of the right to vote on account of their race or color or previous condition of servitude, was not good, so that, however wide the range of the court's observations, the real question decided was that the sixth count was insufficient in law for that reason. On a writ of error the case was taken before the supreme court, where the judgment was affirmed. From the report of the case in 92 U. S. 543, 23 L. Ed. 588, we get a somewhat clearer idea of the language of the sixth count. In passing upon it the court left no doubt about its position at that time, whether the Yarbrough and later cases indicated modifications or not. At pages 555, 556, 92 U. S., and page 592, 23 L. Ed., we find this language:

"In *U. S. v. Reese*, 92 U. S. 214, 23 L. Ed. 563, we hold that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship, but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the states comes from the states, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the constitution of the United States, but the last has been."

And on page 557, 92 U. S., and page 593, 23 L. Ed., the court continues:

"According to the view we take of these counts, the question is not whether it is enough, in general, to describe a statutory offense in the language of the statute, but whether the offense has here been described at all. The statute provides for the punishment of those who conspire 'to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States.' These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of 'every, each, all, and singular,' the rights granted them by the constitution, etc. There is no specification of any particular right. The language is broad enough to cover all."

It is important to bear in mind—First, that there was no charge that the acts done were done on account of the race, color, or previous condition of the injured persons; and, second, that what the court was then speaking about was not section 5 of the enforcement act, nor section 5507 of the Revised Statutes, which took its place.

At the same term at which the Cruikshank Case was decided, the court had previously passed its judgment upon the case of *U. S. v. Reese*, 92 U. S. 214, 23 L. Ed. 563. In that case the indictment was likewise based upon the third and fourth sections of the enforcement act, and not upon the fifth, which is now invoked by the United States. The fourth section, as originally enacted, as already shown, was commuted, with most important modifications, into section 5506 of the Revised Statutes, which was repealed by the act of February 8, 1894 (28 Stat. 36), when the sections now under consideration were not touched. Under then existing circumstances, this was quite significant. The ground upon which section 4 was held in the Reese Case to be ineffectual was (as is sufficiently shown in our extracts from the opinion in the Cruikshank Case, where they were also stated, and in a quotation from the opinion in the Reese Case, presently to be made) that it applied, in general terms, to all voters, instead of being confined to the colored man and his rights under the fifteenth amendment. For this reason, and because the court was thereby rendered unable to separate its constitutional application from its unconstitutional, the whole section was condemned. Up to this point the supreme court had never expressed itself upon what are now sections 2004, 5507, 5508, and 5509 of the Revised Statutes; but in *U. S. v. Harris*, 106 U. S., at page 637, 1 Sup. Ct., at page 607, and 27 L. Ed., at page 293, the court did incidentally allude to the subject of at least one of them, and said:

"The right guarantied by the fifteenth amendment is protected by other legislation of congress, namely, by sections 4 and 5 of the act of May 31, 1870, c. 114, and now embodied in sections 5506, 5507, Rev. St."

A similar observation was made by Mr. Justice Woods in his opinion in the case of *Le Grand v. U. S. (C. C.)* 12 Fed. 579, in which case it was held that section 5519, Rev. St., had no reference to rights guarantied by the fifteenth amendment.

The weight of these remarks is not altogether destroyed by in-

cluding in them the reference to section 5506, because the modifications of section 4 of the act of 1870, in the opinion of the court in the Fourth circuit in the case of *U. S. v. Munford* (C. C.) 16 Fed. 223, relieved section 5506 from the objections taken to the fourth section in the *Reese* Case, and at least brought the legislation within article 1, § 4, of the constitution. See, also, the very interesting remarks of Judge Hughes in the case of *U. S. v. Belvin* (C. C.) 46 Fed. 382.

Coming now to a consideration of what has been determined respecting the sections involved upon these demurrers, we find it different. Section 5508 is in this language:

"If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured by the constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise upon the highway, or on the premises of another with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be punished," etc.

In *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152, 28 L. Ed. 274, the constitutionality of this section was directly adjudicated, as was that of section 5520, which was afterwards repealed. *Yarbrough*, having been convicted upon an indictment which charged him with violations of those sections, applied to the supreme court for a writ of habeas corpus upon the ground that those statutory provisions were unconstitutional. The writ was refused. In passing upon the question the court, through Mr. Justice Miller, said:

"The fifteenth amendment of the constitution, by its limitation on the power of the states in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the states. \* \* \* While it is quite true, as was said by this court in *U. S. v. Reese*, 92 U. S. 214, 23 L. Ed. 563, that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slaveholding states had not removed from their constitutions the words 'white man,' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the state law, and a part of the state law, it annulled the discriminating word 'white,' and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a state which should give the right of voting exclusively to white people, whether they be men or women. *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567. In such cases this fifteenth article of amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and congress has the power to protect and enforce that right.

"In the case of *U. S. v. Reese*, so much relied on by counsel, this court said in regard to the fifteenth amendment that: 'It has invested the citizens of the United States with a new constitutional right, which is within the protecting power of congress. That right is an exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude.' This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of congress is as necessary to the right of other citizens to vote as to the colored citizen, and to the



right to vote in general as to the right to be protected against discrimination. The exercise of the right in both instances is guaranteed by the constitution, and should be kept free and pure by congressional enactments whenever that is necessary. The reference to cases in this court in which the power of congress under the first section of the fourteenth amendment has been held to relate alone to acts done under state authority can afford petitioners no aid in the present case; for, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a state, or which are not committed by any one exercising its authority, are not within the scope of that amendment, it is quite a different matter when congress undertakes to protect the citizen in the exercise of rights conferred by the constitution of the United States, essential to the healthy organization of the government itself."

And on page 667, 110 U. S., page 160, 4 Sup. Ct., and page 279, 28 L. Ed., the court continues:

"If the recurrence of such acts as these prisoners stand convicted of are too common in one quarter of the country, and give omen of danger from lawless violence, the free use of money in elections, arising from the vast growth of recent wealth in other quarters, presents equal cause for anxiety. If the government of the United States has within its constitutional domain no authority to provide against these evils, if the very sources of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger, and its best powers, its highest purposes, the hopes which it inspires, and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists, on the other."

Again, in *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429, the constitutionality of sections 5508 and 5509 was directly adjudicated. Mr. Justice Gray, after reviewing all the cases in stating the opinion of the court, and while distinguishing the facts of that case from others, on pages 293 and 294, 144 U. S., page 626, 12 Sup. Ct., and page 439, 36 L. Ed., said:

"The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the amendments to the constitution, are thereby guaranteed only against violation or abridgment by the United States or by the states, as the case may be, and cannot, therefore, be affirmatively enforced by congress against unlawful acts of individuals, yet that every right created by, arising under, or dependent upon the constitution of the United States may be protected and enforced by congress by such means and in such manner as congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the constitution may, in its discretion, deem most eligible and best adapted to attain the object. Among the particular rights which this court, as we have seen, has adjudged to be secured, expressly or by implication, by the constitution and laws of the United States, and to be within section 5508 of the Revised Statutes, providing for the punishment of conspiracies by individuals to oppress or injure citizens in the free exercise and enjoyment of rights so secured, are the political right of a voter to be protected from violence while exercising his right of suffrage under the laws of the United States, and the private right of a citizen, having made a homestead entry, to be protected from interference while remaining in the possession of the land for the time of occupancy which congress has enacted shall entitle him to a patent."

The section was also held constitutional in the case of *In re Quarles*, 158 U. S. 535, 15 Sup. Ct. 959, 39 L. Ed. 1080.

But these cases do not quite reach the exact point under consideration, however clearly they establish the general proposition

that section 5508 is constitutional. It becomes necessary, therefore, to go further. In doing so, we find that the able statesmen in congress who were endeavoring to legislate to carry into effect the fifteenth amendment framed, and congress passed, what is now section 2004 of the Revised Statutes, as follows:

"All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any state, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any state or territory, or by or under its authority, to the contrary notwithstanding."

We think this is appropriate legislation, that it is within the constitutional power of congress, that it is adapted to the end in view, and that it must be read in connection with section 5508.

It is urged with much zeal in respect to both indictments that the many adjudged cases which hold that the fourteenth amendment operates only as an inhibition upon the states, and not individuals, in respect to the matters therein embraced, must control the construction of the fifteenth amendment, also, upon the same grounds. The court does not yield to this view, but accepts that of Justice Bradley in passing upon the Cruikshank Case at the circuit in the language previously quoted. And in the Reese Case, 92 U. S. 218, 23 L. Ed. 565, the court, after saying that article 1, § 4, was not under consideration, used this significant language:

"It has not been contended, nor can it be, that the amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at state elections. It is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude that congress can interfere and provide for its punishment. If, therefore, the third and fourth sections of the act are beyond that limit, they are unauthorized."

These considerations appear to us to be decisive of the demurrer in that one of the cases now before us in which the indictment is based upon section 5508. Indeed, as it cannot be doubted that the right of the colored man to vote is "secured" by the constitution of the United States, in the sense of that word as used in that section, and especially when it is construed in connection with section 2004, the question is no longer open to argument. If that right is not "secured" in that way, it rests upon no security whatever.

We now come to section 5507, upon which the other indictment is based, and which is in this language:

"Every person who prevents, hinders, controls or intimidates another from exercising or in exercising the right of suffrage, to whom that right is guaranteed by the fifteenth amendment to the constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section."

Is this "appropriate" legislation, and within the power of congress, under section 2 of the fifteenth amendment? We think a test has been established for our guidance in reaching a conclusion

upon that question. The constitution had granted congress power to pass all laws "necessary and proper" to carry into effect the other powers given by that instrument. It will be admitted that the words "necessary and proper" are stronger than the word "appropriate," as used in the section just referred to. Yet Chief Justice Marshall said:

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 4 Wheat. 421, 4 L. Ed. 605.

Tested by this rule, we are now to determine whether congress had the constitutional power to enact this particular legislation which it deemed appropriate to enforce the amendment. Of course, it cannot be said that the decision of congress in the premises is necessarily final, and for that reason I have endeavored to find the test by which the matter was to be judged. If it is not found in 4 Wheat., 4 L. Ed., and in the cases which follow that authority, and which are collected in 1 Notes on U. S. Reports, 872 et seq., it cannot be found at all. We are clearly of opinion that the rule is applicable to this case, and that it must be followed. The plain and manifest intention of congress, as avowed and expressed in sections 2004 and 5507, was to prevent, by the means therein indicated, any abridgment of the free exercise of the right to vote guarantied by the fifteenth amendment by means of bribery, threats, or intimidation. That was the sole intention. There was no other. The end was legitimate. The purpose was within the scope of the fifteenth amendment. The means are plainly adapted to that end, and are not prohibited, but consist with the letter and spirit of that amendment.

Possibly we may get additional light upon the question by going back somewhat, and viewing it from another standpoint. Section 4 of the act of 1870, and which was considered in the Reese Case, is as follows:

"That if any person, by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, prevent, or obstruct, or shall combine and confederate with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote or from voting at any election as aforesaid, such person shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case with full costs, and such allowances for counsel fees as the court shall deem just, and shall also for every such offense be guilty of a misdemeanor, and shall on conviction thereof be fined," etc.

In direct reference to this language the supreme court said (92 U. S. 220, 221, 23 L. Ed. 565, 566):

"But when we go beyond the third section, and read the fourth, we find there no words of limitation, or reference, even, that can be construed as manifesting any intention to confine its provisions to the terms of the fifteenth

amendment. That section has for its object the punishment of all persons who, by force, bribery, etc., hinder, delay, etc., any person from qualifying or voting. In view of all these facts, we feel compelled to say that, in our opinion, the language of the third and fourth sections does not confine their operation to unlawful discrimination on account of race, etc. If congress had the power to provide generally for the punishment of those who unlawfully interfere to prevent the exercise of the elective franchise, without regard to such discrimination, the language of these sections would be broad enough for that purpose. It remains now to consider whether a statute so general as this in its provisions can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, etc. There is no attempt in the sections now under consideration to provide specifically for such an offense. If the case is provided for at all, it is because it comes under the general prohibition against any wrongful act or unlawful obstruction in this particular. We are therefore directly called upon to decide whether a penal statute enacted by congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the constitution. The question then to be determined is whether we can introduce words of limitation into a penal statute, so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and, when called upon in due course of legal proceedings, must, annul its encroachments upon the reserved power of the states and the people. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty. We must therefore decide that congress has not as yet provided 'appropriate legislation' for the punishment of the offense charged in the indictment."

That is to say, congress has not provided for that case. It was, however, by no means intended to be said that congress had not provided for the punishment of the very different offense charged in the indictment we are now considering.

When we turn from this section to section 5507, Rev. St., we find that it is not framed in such general terms as to include as well offenses which may be constitutionally provided against as those which may not,—the only vice which led to the condemnation of section 4 of the act of 1870. On the contrary, section 5507 is so phrased that by no possibility could any one be punished except for doing such an act as would deny or abridge the right of a colored man to vote freely as he pleased. The reason this is so is that this section is expressly limited to those to whom that right is guarantied by the fifteenth amendment. The language of this

section admits of no construction that would punish the obstructing of a white man's vote, except on the ground of race or color, in which event (though in fact it is inconceivable in our social condition) he would be as much entitled to the benefit of the fifteenth amendment as the negro is now. At all events, the whole scope of section 5507 appears plainly to be within the intent of the fifteenth amendment, and to have the purpose to make section 2004 effective. There is therefore no occasion for an attempt, as there was in reference to section 4, to separate what was within the power of congress from what was not. The effort would be vain, inasmuch as the object was single. This conclusion is inevitable when we compare the two sections in the light of what is said in 92 U. S., at page 221, and 23 L. Ed., at page 566, as copied above; and this may further indicate why the reasoning of the Yarbrough Case, and not that in the Reese Case, controls those we are now considering.

Undoubtedly the general right to vote existed long before the adoption of the fifteenth amendment, because it sprung up in the remote past with the genesis of free government by the people, but, so far as the colored man is concerned, the right not only originated, but is "guarantied," by that amendment, as that word is used in section 5507; that is to say, that amendment guaranties that that right shall not be denied or abridged on account of race, color, or previous condition of servitude. This section of the statute was intended to enforce and protect that right by appropriate legislation which may extend to punishing those who seek to deny or abridge it upon those grounds. Ex parte Yarbrough, 110 U. S. 657, 4 Sup. Ct. 152, 28 L. Ed. 274. Section 4 and other sections were held to be unconstitutional because they referred to the right of everybody to vote, and were not confined to the right as guarantied by the fifteenth amendment. The court held that congress did not have power to legislate so generally on the subject of voters and their rights. Neither the reasoning nor the decisions apply, however, to cases where, by the express provisions of the statute, the legislation is limited to cases of persons whose violated rights are guarantied by that amendment. Sections 2004 and 5507 are so limited, and they supplement one another. Indeed, it is difficult, in Kentucky, to conceive that the right of suffrage was not directly conferred upon the colored man by the fifteenth amendment, notwithstanding the statement to the contrary in the Reese Case. The difficulty, moreover, is increased when we read the language used by Mr. Justice Harlan in delivering the opinion of the court in Neal v. Delaware, 103 U. S. 388, 389, 26 L. Ed. 567, and especially when we recur to the remark of Mr. Justice Miller in the Yarbrough Case, 110 U. S. 665, 4 Sup. Ct. 159, 28 L. Ed. 278, where, in speaking of states in whose constitutions the word "white" remained, he said:

"In such cases this fifteenth article of amendment does, proprio vigore, substantially confer on the negro the right to vote, and congress has the power to protect and enforce that right."

It is incontrovertibly true that at all times prior to September, 1891, and to the constitution then adopted, the negro was excluded

by our state laws from the right to vote. From 1850 to September, 1891, the word "white" remained in that provision of the state constitution which fixed the qualifications of voters. Yet so certainly did the fifteenth amendment confer the right of suffrage upon the negro, that in Kentucky, from March, 1870, forward, he voted precisely as the white man did, in spite of the state constitution. To say the very least, the nation indirectly conferred upon the negro the right to vote, by directly and expressly forbidding that that right should be denied or abridged on account of race, color, or previous condition of servitude, and it gave congress the power to protect and guard the right thus bestowed. Congress plainly exercised that power by the legislation referred to. This was not grudgingly done by the American people or by congress. It was done as a matter of supreme national concern, and to meet what were decided to be the ends of national justice. The courts are not called upon, in the interest of wrongdoing, to fritter away by narrow or frivolous construction the safeguards of this great right so carefully bestowed. That congress, in enacting remedial criminal legislation, is not hampered by the narrow limitations contended for, is shown by what is so admirably expressed by Mr. Justice Miller in the *Yarborough Case*, where, on pages 657, 658, 110 U. S., page 155, 4 Sup. Ct., and page 276, 28 L. Ed., he says:

"That a government whose essential character is republican, whose executive head and legislative body are both elective, whose most numerous and powerful branch of the legislature is elected by the people directly, has no power by appropriate laws to secure this election from the influence of violence, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration. If this government is anything more than a mere aggregation of delegated agents of other states and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption. If it has not this power, it is left helpless before the two great natural and historical enemies of all republics,—open violence and insidious corruption. The proposition that it has no such power is supported by the old argument, often heard, often repeated, and in this court never assented to, that, when a question of the power of congress arises, the advocate of the power must be able to place his finger on words which expressly grant it. The brief of counsel before us, though directed to the authority of that body to pass criminal laws, uses the same language. Because there is no express power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in construing the constitution of the United States, the doctrine universally applied to all instruments of writing,—that what is implied is as much a part of the instrument as what is expressed. This principle, in its application to the constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers,—a difficulty which the instrument itself recognizes by conferring on congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted, and all other powers vested in the government, or any branch of it, by the constitution. Article 1, § 8, cl. 18. We know of no express authority to pass laws to punish theft or burglary of the treasury of the United States. Is there, therefore, no power in the congress to protect the treasury by punishing such theft and burglary? Are the mails of the United States and the money carried in them to be left to the mercy of robbers and of thieves who may handle the mail, because the constitution contains no express words of power in congress to enact laws for the punishment of those offenses? The prin-

ciple, if sound, would abolish the entire criminal jurisdiction of the courts of the United States, and the laws which confer that jurisdiction."

This demonstrates that it was in no way essential to use the words "race, color, or previous condition of servitude," in order to make section 5507 constitutional. It being obvious from the language actually employed that congress thereby meant to enforce the fifteenth amendment, the only question was, is the plan provided by this section an appropriate way to accomplish the result? That it is, at least, adapted to that end, seems clear. All that is required is that the legislation shall come within the scope of the power to enforce the amendment. It is not essential that the language of the statute shall be the same as that of the amendment. For example, the statutes of the United States make the act of robbing the mails a criminal offense. There is not a word in the constitution about such an offense. But that instrument does give congress the power to establish post offices and post roads, and it does authorize congress to pass all laws necessary and proper to carry that power into effect. Punishment for robbing the mails is indispensable to that end. But an indictment need not, in its averments, reason this out. The courts do that. *U. S. v. Arjona*, 120 U. S. 488, 7 Sup. Ct. 628, 30 L. Ed. 728. Other cases illustrative of this may be found in 1 Notes on U. S. Reports, 872 et seq. In attempting to enforce and protect the colored man's right to vote, it is obvious that congress was utterly powerless to pass any law that could operate upon states as such. It could only enforce the rights of voters as given by the fifteenth amendment by punishing individuals who attempt to invade, impair, or destroy it. *U. S. v. Reese*, 92 U. S. 218, 23 L. Ed. 563, and *U. S. v. Cruikshank*, 25 Fed. Cas. 713. If congress could not do this, if section 2 of the amendment does not authorize this, then that section was a vain thing, for in no other general manner could congress appropriately legislate to that end. We adopt the language of Mr. Justice Bradley on this subject in the *Cruikshank Case*, first quoted above, as being incontrovertibly sound. The legislation in question was designed and intended to protect the right given by the amendment, by prescribing punishments for attempts upon the part of individual persons to deny or to abridge the right to vote as guaranteed by a constitutional amendment which forbade any abridgment. The purpose of the statute being such, and it being thus limited in scope, the question of its mere wisdom or efficiency was exclusively within the discretion and judgment of congress, as decided in *McCulloch v. Maryland*, and many succeeding cases; and there appears to be nothing in *Williams v. Mississippi*, 170 U. S. 213, 18 Sup. Ct. 583, which has any contrary bearing.

It is insisted, also, upon the part of the defendants, that the offenses actually charged in the indictments are not embraced by any proper construction of the statutes, because: First, the right alleged to have been injured was not one which was "secured" by any law of the United States; and, second, because the things done, and which are charged to be offenses, did not touch any right or interest of the United States, but only those of the state of Kentucky, and hence no crime was committed. A critical inspection of

the statutes and of the indictments leads to the conclusion that these objections, while plausible, are not sound. Neither the fifteenth amendment, nor the statute to enforce it, was intended, in any primary sense, to protect any interest of the United States. The great direct and fundamental object was to secure for the colored man an equal participation with the white man in the inestimable individual and personal privilege of voting and having a voice in the affairs of government, and what we have already said sufficiently indicates that our view is that the right of the colored man to vote is "secured" to him by the laws of the United States, within the sense of that word as used in section 5508. This is done by the amendment, and by section 2004, Rev. St., passed to enforce it. The court has by no means overlooked the opinion of Judge Gresham in the case of *U. S. v. Amsden* (D. C.) 6 Fed. 819, which held section 5507 to be unconstitutional. That case is not followed, because, in our judgment, it does not appear to have been ruled according to the views of the supreme court, either in the *Yarborough Case* or in the *Reese Case*. Indeed, if the views of that learned judge, as there expressed, are to prevail, the fifteenth amendment is far less important, and far less adapted to the objects its framers had in view, than might have been inferred from the tremendous struggle for its adoption, and the matter had probably as well have been left with the states altogether. Opposed to what he said, it seems to us that the phrase, "to whom the right of suffrage is guaranteed by the fifteenth amendment," as used in section 5507, when properly construed, does the very thing which he thought it did not, and in the light, especially, of the *Yarborough Case*, if not, indeed, of the *Reese Case* itself, entirely exempts that section from the criticism passed upon section 4 of the enforcement act by the court in the *Reese Case*. Differing from Judge Gresham, we cannot doubt that the use of the words, "to whom the right of suffrage is guaranteed by the fifteenth amendment," in section 5507, shows conclusively that the sole intention of congress was to enforce and protect the right of the colored man to vote, and clearly limits the legislation to that legitimate and constitutional end. In short, it seems to us that the general conclusions to be drawn from the authorities are: (1) That the fifteenth amendment was meant to guaranty and secure to the negro, as such, the same right to vote that the white man, as such, has; (2) that congress has the power by legislation to enforce and protect that right; (3) that any legislation having that sole object in view, if adapted to that end, if consistent with that object, and not otherwise forbidden by the constitution, is within the power of congress; and (4) that section 5507 comes within these principles, and is a valid exercise of the power of that body.

The right of the colored man to vote had its only source in, and is most certainly, in the language of Justice Gray in the *Logan Case*, 144 U. S. 263, 12 Sup. Ct. 617, 36 L. Ed. 429, "dependent upon," the fifteenth amendment, which, beyond doubt, not only created that right for him, but which at the same time gave to congress the power, and morally, at least, imposed upon it the duty, to en-



force and protect it by legislation. Sections 2004, 5507, 5508, and 5509 may not by any means be entirely adequate for the purpose; but they are all that is left, and should not be hastily swept away by the courts. The three sections, at least, which are now before us for consideration, appear to be appropriate and valid. The supreme court in several cases, as we have seen, having refused, upon the clearest principles, to declare section 5508 unconstitutional, we are not only bound by that ruling, but must decline to hold that section 5507 is void, because it seems to the court that there are, if possible, even less grounds for so holding than there might be as to section 5508. It will be observed that section 5507 fixes the penalties for the offenses therein created, by providing that they shall be the same as those "prescribed in the preceding section." As section 5506 was repealed by the act of 1894, it is contended that there is no punishment left for the offenses named in section 5507, thereby leaving the section ineffectual. It must be seen, however, that the real intention of congress in the act of 1894 was twofold, viz. (1) to repeal section 5506; and (2) not to repeal section 5507. But the contention of counsel, if sustained, must lead to a result plainly different from that evidently contemplated by congress, to wit, the repeal of one, and the emasculation of the other. The difficulty can be easily removed upon a just principle of construction which will effectuate both of the objects congress had in view, by holding that the repeal of section 5506 in no wise obliterated the record of the language used in prescribing the penalties for offenses which were no longer to be such, but left it still known and ascertainable, and in full effect, so far as it was, by reference, made a part of section 5507, and necessary for its construction and effectiveness. As to the mere penalties prescribed, section 5506 is, and always was, a part of section 5507, and to that extent and for that purpose is not repealed. The indictment under section 5508 charges that on November 7, 1899, a general election for state officers within the state of Kentucky was held under and in accordance with the laws of said state, and a poll was then and there opened, and an election was then and there legally had and held, in each voting precinct in said state, in each of which said voting precincts persons were then and there lawfully voted for by the legal voters therein for said state officers, and that at a certain named precinct certain named persons, and divers other parties to the grand jurors aforesaid unknown, were then and there, as the defendants well knew, colored men, negroes, men of African descent, and not white men, male citizens of the United States, and, as the defendants well knew, citizens and residents of said voting precinct, 21 years of age, and had been citizens and residents of said precinct for more than 60 days, and of said county in which said precinct is located for more than 6 months, and of the said state for more than 1 year, next preceding said election, and were then and there, as defendants well knew, under the laws of the United States and the laws of the state of Kentucky, legally entitled to vote for persons for said state offices; that said voters at the time and place aforesaid presented themselves with the intention and for the purpose of

voting, and demanded of the officers of said precinct permission to vote; that the defendants, knowing all of the aforesaid facts, did then and there unlawfully, knowingly, and feloniously conspire, confederate, combine, and agree together, and each of them with the other, and they and each of them with divers other parties to the grand jurors aforesaid unknown, to injure, oppress, threaten, and intimidate said voters, on account of their race, color, and previous condition of servitude, in the free exercise and enjoyment of a right and privilege which they then and there had, and which was then and there secured to them by the constitution and laws of the United States, of then and there voting for persons to fill offices at said precinct, and that in pursuance of said conspiracy, and to effect the purpose and object thereof, the defendants then and there unlawfully, willfully, corruptly, and maliciously injured, oppressed, threatened, intimidated, and prevented the said voters from voting in said precinct on said election day. It is contended that this is not good, because it does not charge, in terms, that the right injured is "the right not to be discriminated against on account of race," etc. That language, however, is the language of the courts, and not that used either in the amendment or in sections 2004 or 5508,—a fact which the contention overlooks. If such discrimination be in substance and effect charged, as we think is the case here, it is sufficient, although that word is not used in making the accusation. Construing the constitutional and statutory provisions together, the indictment seems to be good, and to charge that the accused conspired to injure certain colored men in the exercise of the right to vote, who were otherwise legally qualified to do so, on account of their race and color,—they having that right in the sense that it is "secured" to them by the amendment and section referred to,—which conspiracy is an offense against the United States, for which section 5508 fixes the penalty.

Only one thing remains to be noticed. It is urged against the indictment under section 5507 that the offense charged is mere bribery at a state election, and that the state courts alone have jurisdiction. This contention does not seem to be very material, because, while doubtless the state could also punish such an offense, it by no means follows that the national government may not do it also, in proper cases. There are many instances where the same acts are offenses against the laws both of the state and of the United States, probably the most conspicuous example of which is the offense of passing counterfeit money. Bribery at an election may be made an offense by the state, and, if that were all that had been done, this court could not enforce the law. But in attempting to enforce the fifteenth amendment, and to prevent the abridgment of the right to vote on account of race or color, congress has made it an offense against the United States to influence or control the vote of a colored man by means of bribery. Of this offense thus created, and as charged in the indictment, the federal courts alone have jurisdiction. For these reasons, it seems to the court that the demurrers and motions to quash should be overruled.

**BRENNAN et al. v. EMERY-BIRD-THAYER DRY-GOODS CO.**

(Circuit Court, W. D. Missouri, W. D. February 26, 1900.)

**1. CORPORATIONS—NOTICE TO OFFICER OR AGENT.**

Notice given, before the organization of a corporation, to a person who afterwards became a stockholder and officer or an agent of the corporation, is not notice to the corporation.

**2. TRADE-MARKS—NOTICE—EFFECT OF REGISTRATION.**

The registration of a trade-mark in the patent office does not affect those not engaged in commerce with foreign nations or Indian tribes with notice thereof.

**3. SAME—INFRINGEMENT—SUIT FOR INJUNCTION.**

Defendant, a mercantile corporation, caused to be placed on shoes manufactured for its trade certain words and a symbol, which together were claimed by complainants as a trade-mark. As used by complainant, there was nothing about the device to indicate the manufacturer of the shoes, or that it was a trade-mark, and defendant's officers were not aware that it was so used. As soon as they learned the fact they ceased to have it stamped on their shoes, and at the time suit for infringement was instituted they had on hand but about two dozen pairs of shoes bearing it, and at about that time caused it to be erased from them. *Held* that, under such circumstances, the court would not entertain a suit for an injunction against infringement, it being clear that there had been no intentional violation of complainant's rights, and that none was threatened.

**4. SAME—DESCRIPTIVE WORDS.**

A trade-mark, used on shoes, and consisting of the words "Steel Shod" in connection with a symbol, is not infringed by the words "Steel Clad" alone, stamped on shoes having the soles quilted with steel wires; such words being descriptive merely, and not subject to appropriation as a trade-mark.

**Suit in Equity for Infringement of a Trade-Mark.**

Robert Bach McMaster and Clarence Palmer, for complainants.  
John L. Peak, for defendant.

**PHILIPS**, District Judge. This is a bill of complaint to enjoin the defendant from the use of the complainants' alleged trade-mark, and for an accounting. The words claimed as a trade-mark symbol are "Steel Shod," used in connection with the representation of an anvil, stamped on the shank of shoes manufactured by the complainants since 1891. In considering this case, regard must be had to the fact that the whole allegations of the bill in respect of the alleged infringement are lodged against the Emery-Bird-Thayer Dry-Goods Company, a corporation created under the laws of the state of Missouri. It is, therefore, its acts and conduct which are the subjects of inquiry and determination. The evidence shows that this corporation was organized in November, 1895. The complainants have taken evidence and based much of their argument touching things done by the co-partnership firm of Bullene, Moore, Emery & Co., which existed for several years prior to January, 1895, and the co-partnership firm of Emery, Bird, Thayer & Co., which came into existence perhaps in January, 1895, as the successors of Bullene, Moore, Emery & Co. This last concern went out of existence on the creation of said corporation. As the corporation is a distinct legal entity, in the absence of any averment in the bill and evidence showing a devolution of the

right upon or assumption by the corporation of the liabilities and obligations of said co-partnership concerns, any act done or liability incurred by such concerns could not bind or affect this defendant. Neither does the bill or proof show any such assumption or liability by this defendant.

It appears that one Robinson had been in the employ of said co-partnership firms as their agent, in charge of their shoe department, in a department store, and that he attended to making all the purchases of shoes for them, and that he had sustained the same relation to the corporation since its organization. The evidence also shows that not all of the persons who composed said co-partnerships are directors or stockholders in the defendant corporation. I do not understand the law to be that any information or knowledge which said Robinson may have acquired in his capacity as agent for said co-partnerships is imputable to the defendant corporation. The foundation of the doctrine that knowledge of the agent is chargeable to the principal rests upon the proposition that such knowledge comes to him while acting within the line of his agency for the given principal; and, as it is his duty to advise his principal of facts and information pertaining to his office as agent, the law presumes that he performs this duty, and therefore the further presumption arises that his principal obtains such information. *Story, Ag. par. 140; Bank v. Lovitt, 114 Mo. 525, 21 S. W. 825.* With the dissolution of the co-partnership, the office of Robinson as its agent ceased. When the corporation was created this legal entity became a distinct existence. Any knowledge or notice which an agent may have received while acting for another party or association, or which any individual member of the corporation may have obtained prior to the constitution of the corporate body, most certainly would not, as matter of law, by implication, be carried over and imputed to the corporation, simply because one or more of the members of a previously existing concern may have become officers or stockholders of the corporation, nor because such agent afterwards became an agent for the corporation. Were the law otherwise, most serious and unjust consequences might be brought upon the corporate body. "The notice must be given to the agent while the agency exists, and it must refer to business which comes within the scope of his authority." *Anderson v. Volmer, 83 Mo. 406.* See, also, *National Waterworks Co. v. City of Kansas City (C. C.) 78 Fed. 434, 435.*

In this view of the law, what are the facts to be dealt with in this case? The last sale of shoes by complainants was to Bullene, Moore, Emery & Co. in June, 1892, more than three years before the defendant came into being; and, in so far as the evidence discloses, it does not appear that, when the defendant had the shoes in question made, after November, 1895, and up to December, 1896, it knew that the complainants were manufacturing and stamping such shoes. It had no notice that the complainants were using or claiming their alleged trade-mark. On the contrary, the testimony on behalf of the defendant shows affirmatively that its agent in charge of the shoe department, when knowledge came to him in 1891 and 1892, assumed and believed that the stamp in question

on the bottom of complainant's shoe was not used or claimed as a trade-mark, but was merely descriptive of the quality and character of the shoe. No constructive notice to the defendant is predicable of the fact that complainants had registered such symbol or device as a trade-mark in the patent office. The act of congress of July 8, 1870, providing for the registration of trade-marks, "is void for want of constitutional authority, inasmuch as it was so framed that its provisions are applicable to all commerce, and cannot be confined to that which is subject to the control of congress." Trade-Mark Cases, 100 U. S. 82, 23 L. Ed. 550. And the act of March 3, 1881, applies only to "trade-marks used in commerce with foreign nations, and with the Indian tribes."

The shoe marked "Complainants' Exhibit March 28, 1898," as the one manufactured by them after the defendant began business, is unlike the shoe bought and sold by the defendant. Complainants' shoe had a plain black sole unquilted, while the defendant's had a steel-quilted sole of wires; and while it is true that the brand on the sole of defendant's shoe, with the words "Steel Shod" above the anvil, stamped on the shank, is practically the same as that of the complainants, the defendant had stamped beneath the anvil in large letters the initials of the defendant company, "E., B. T. & Co.," indicating that it was defendant's manufacture. There was nothing about the symbol on complainants' shoe to indicate that it was used as a trade-mark, or to indicate ownership or the manufacturer of the shoe. Not until December, 1896, did the agent, Robinson, learn that the complainants claimed the words "Steel Shod" as a trade-mark. Even this information did not come from complainants, but from Rice & Hutchings, of Boston, who manufactured shoes for the defendant. Immediately on receipt of such information, Robinson wrote to Rice & Hutchings to the effect that he was not aware that the complainants claimed such words as a trade-mark, and to discontinue the use thereof in the manufacture of shoes for the defendant. Thenceforth the defendant had not another shoe made with such stamp or symbol.

It is quite clear, from defendant's evidence, that there was never any purpose on its part to infringe upon the complainants' alleged trade-mark, or to palm off its goods as those of complainants' make. This suit was filed in March, 1897, without any previous complaint or notice from complainants to defendant that they made claim to a trade-mark; and the testimony of Mr. Robinson, the agent, and that of Mr. Thayer, defendant's secretary and treasurer, the only parties representing the defendant who had anything to do with this matter, is that their best impression is that at the time the house only had on hand a dozen or two of the shoes manufactured for them by Rice & Hutchings; and their best recollection is that before this suit was filed the house had erased entirely from said shoes said words and the impression of an anvil, which erasure is shown by an exhibit in this case. Certainly it should be the equity of the case that under such circumstances, indicating entire absence of any purpose on defendant's part to interfere with complainants' claimed prescriptive right, that any reasonable doubt as to the

exact time when this erasing was done should be resolved in the defendant's favor. But suppose it were conceded that this erasure of the alleged trade-mark on the few shoes in stock was near to or at the time this suit was filed; should the court, under the circumstances of this case, decree an injunction? Should the valuable time of this court, pressed, as it is, with multitudinous causes of importance, pressing for hearing and judgment, be taken up with practically a moot question, which, as far as the court is able to perceive, can have no other object than to enable the complainants to get an adjudication for future use? While it is to be conceded that a party having an established trade-mark may sue for its infringement without first notifying the infringer to desist, yet, when it is made clear that before any suit was brought the alleged infringer, on the first intimation of the infraction, discontinued the use, and did everything that could be reasonably required to remove even the appearance of the use, and both by answer to the bill and at the hearing its counsel proclaimed that, waiving any question as to whether or not the complainants have a trade-mark, the defendant had ceased, before or at the time of the institution of the suit, to use the same, that they had no purpose to continue the employment of the symbol,—and the court is well satisfied that such disclaimer was and is in good faith, and will be scrupulously adhered to,—shall the court, nevertheless, grant an injunction, and put upon such defendant the costs? For myself, I am unwilling to encourage such unnecessary litigation, and think that, in the interest of the public and of waiting bona fide litigants, the court ought to discountenance such lawsuits. As said in *Bass, Ratcliff & Gretton v. Guggenheimer* (C. C.) 69 Fed. 271:

"It is a sound rule for the prevention of unnecessary litigation, and to encourage parties who have ignorantly and without bad faith infringed a trade-mark to promptly desist, without suit, upon being notified, that where a complainant had already obtained, before entering suit, by prompt acquiescence of the defendant, all that an injunction could give him, he should not recover costs."

If it be said that, notwithstanding, the case should be retained by the court in order to ascertain and assess damages, the answer is that it is perfectly clear from the complainants' evidence in this case that no conceivable, tangible loss has ensued by reason of any act of the defendant. The evidence shows that the complainants sold all the shoes which they made up to the capacity of their factory in 1896 and 1897. "In 1897 we had the full benefit of our increased capacity, and then we did a good deal more, \$232,000," which was a decided increase over 1895. The falling off in 1896 was, as the witness concedes, solely attributable to the delays occasioned in the improvement of the factory. During the period run that year, their books show a decided increase over the preceding year. It is only made to appear from the evidence that one man called at defendant's store for a "steel-shod" shoe; and the books of the complainants, in evidence, show that beginning with 1893, and up to June 6, 1896, the sales of the complainants to other merchants in Kansas City were in no wise affected by the fact that Bullene,

Moore & Emery ceased to buy from the complainants after June, 1892. Their books show that in the year 1891 they sold to Bullene, Moore & Emery \$79.50 worth of goods; in 1892, to Bullene, Moore & Emery, \$436.50, and to the Doggett Dry-Goods Company \$112.50, aggregating \$549; in 1893 they sold to other merchants in Kansas City \$661.40 worth; in 1894, \$1,013.85; in 1895, \$555.75; and up to June, 1896 (the year in which their factory was not run all the time), their sales amounted to \$538.45. The case thus presented is *damnum absque injuria*.

Impressed, as the complainants must have been, in view of the foregoing facts, with the slender thread upon which they were suspending a lawsuit, they now contend that, since the defendant abandoned the use of their exact symbol, it resorted to a device so similar to theirs as to constitute a continuation of the alleged infringement. It should be a sufficient answer to this suggestion to say that no such issue is presented by the bill. The thing complained of solely in the bill is the use of the alleged trade-mark of the complainants,—the same, or substantially the same, as complainants', with the words, "as by reference to defendant's said shoes here in court to be produced will more fully appear." The shoes thus referred to, and the only shoes put in evidence, are those above referred to, stamped with the words "Steel Shod" in connection with the representation of an anvil. The case of *P. Lorillard Co. v. Peper*, 30 C. C. A. 496, 86 Fed. 956, referred to in counsel's brief as supporting its contention, is not applicable. That case having been tried below by me, I am quite familiar with the state of the pleadings therein. In that case between the time of filing the original bill, in which an injunction was denied, and the filing of the amended bill, on which the case was finally tried, the defendant had abandoned the first simulated trade-mark, and substituted another, which fact had escaped the attention of the complainant up to the time of the argument and final hearing. It was in that state of the case that the complainant insisted that the change made did not destroy the similitude, and therefore it was a continuing infringement, which existed at the time the amended bill was filed. That is not this case. Here the change was made after the suit was brought; and, even if the rule contended for by complainants' counsel could be applied to such a situation of the pleadings, there is no such resemblance between the alleged trade-mark of the complainants and the words "Steel Clad," stamped on the bottom of the defendant's present shoe, as would entitle the complainants to relief against it. The evidence shows that since the suit was brought the defendant has had its shoes manufactured with the words "Steel Clad" stamped on the shank, without employing the representation of an anvil, which designates the complainants' shoe. Such contention excites impatience. It seems to the court to carry the idea of a trade-mark beyond precedent or any reasonable necessity.

The court has not taken upon itself the burden of discussing and determining whether or not the complainants could appropriate to their exclusive use as a trade-mark the words "Steel Shod," used on a shoe with steel in the composition of the heel, as shown by

complainants' exhibit, for the obvious reasons hereinbefore stated. But when counsel go further, and insist that the words stamped on the bottom of defendant's shoe now in use, "Steel Clad," quilted with steel wires on the bottom, with prominent steel posts in the heel, are the equivalent of their stamp, the answer is that no one could obtain a trade-mark in the words "Steel Clad," even if other persons had employed them or their equivalent. In the first place, no trade-mark is predicable of words which are merely descriptive of the kind, nature, quality, or characteristics of the goods or articles manufactured or sold. This is especially so when such words are not intended by the manufacturer or vendor to perform any other office than to indicate the quality or character of the article. *Marshall v. Pinkham*, 52 Wis. 578, 9 N. W. 615; *In re Anderson's Trade-Mark*, 26 Ch. Div. 409; *Street v. Bank*, 30 Ch. Div. 156; *Manufacturing Co. v. Trainer*, 101 U. S. 51, 25 L. Ed. 993; *Goodyear India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535; *Larrabee v. Lewis*, 67 Ga. 561; *Van Beil v. Prescott*, 82 N. Y. 630; *Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247. "No principle of the law of trade-marks is more familiar than that which denies protection to any word or name which is descriptive of the qualities, ingredients, or characteristics of an article to which it is applied." *Bennett v. McKinley*, 65 Fed. 505, 13 C. C. A. 25. "Words belonging to the common stock of words may not be exclusively appropriated as a trade-mark." *Clinton Metallic Paint Co. v. New York Metallic Paint Co.* (Sup.) 50 N. Y. Supp. 437; *Lamont v. Leedy* (C. C.) 88 Fed. 72. What combination of words is more common, and the import of which is more universally recognized, than the words "Steel Clad"? The dictionaries, under the head of "Steel," say:

"Steel is often used in the formation of compounds, generally of obvious meaning, as steel-clad, steel-girted, steel-hardened, steel-plated, steel-pointed."

Such combined words are of the most obvious meaning. No person, seeing those words stamped upon the sole of a shoe, like that sold by the defendant, would for a moment imagine that they were a mere arbitrary symbol, indicating a trade-mark or ownership; but the purchaser would at once conclude that it was merely descriptive of the quality and characteristics of a shoe with quilted soles and prominent steel posts in the heel, indicative of strength and durability. Nor is it conceivable that a purchaser of common observation and common sense could mistake the words, plainly stamped, "Steel Clad," for the words "Steel Shod," and especially when the latter words are designated and pointed out by the accompaniment of an anvil. Nor is there any evidence in this case that any purchaser was deceived into purchasing defendant's shoe in the belief that it was of the complainants' manufacture.

If the complainants can maintain that "steel clad" is similar to "steel shod," with equal reason might it be said that they could exclude the use of the words "steel girted," "steel hearted," "steel plated," or "steel pointed," on shoes. The combined words are not the same in sound or in spelling. Carried to its logical sequence,



therefore, to sustain this contention of complainants, it would result that the complainants have acquired a complete monopoly in the word "steel," so that no other word could be used in combination therewith, even when employed merely as descriptive words. It would result in holding that, if the defendant were to have manufactured for sale a shoe with a composition of steel worked into the toe, he could not stamp on the bottom of the shoe the words "Steel Pointed"; or, if he were to have the heel of the shoe plated with steel, he could not stamp his shoe with the words "Steel Heel." While a court should be swift to prevent the pirating of one's property as a trade-mark, its zeal ought not to go to the extent of permitting one tradesman to pirate and appropriate to himself a common word of the English language, such as "steel," so as to prevent its use in connection with any other word by any other person; otherwise, one tradesman might appropriate to himself as a trade-mark the whole English language.

The injunction is refused, each party to pay its own costs.

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#### MORRIN v. LAWLOR.

#### MORRIN et al. v. EDISON ELECTRIC ILLUMINATING CO. OF BROOKLYN (two cases).

(Circuit Court of Appeals, Second Circuit. January 24, 1900.)

Nos. 8, 9, and 10.

#### 1. PATENTS—ANTICIPATIONS—IMPROVEMENT IN STEAM GENERATORS.

The Morrin and Scott patent, No. 309,727, for certain improvements in steam generators, *held* valid, not anticipated, and infringed as to claim 2.

#### 2. SAME.

The Morrin patent, No. 463,307, for improvements in steam generators, as to claim 1 was anticipated by claim 2 of the Morrin and Scott patent, No. 309,727; claim 2 *held* valid and infringed.

#### 3. SAME—SECTIONAL CASINGS FOR STEAM GENERATORS.

The Morrin patent, No. 463,308, for improvements in sectional casings for steam generators, *held* valid, not anticipated, and infringed.

Wallace, Circuit Judge, dissenting.

#### Appeals from the Circuit Court of the United States for the Eastern District of New York.

These three bills in equity were brought before the United States circuit court for the Eastern district of New York, the respective suits being based upon the infringement of different letters patent, which are, respectively, No. 309,727, dated December 23, 1884, and issued to Thomas F. Morrin and Walter W. Scott, No. 463,307, dated November 17, 1891, issued to Thomas F. Morrin, each of said patents being for improvements in steam generators, and No. 463,308, dated November 17, 1891, issued to said Morrin for an improved sectional casing for steam generators. The respective suits upon these patents are known as Nos. 9, 10, and 8. The circuit court issued decrees in the usual form to restrain the infringement of claim 2 of the first patent, claims 1 and 2 of the second patent, and all the claims of the third patent. 90 Fed. 285. Appeals have been taken by the respective defendants in each case, and the questions arising thereon will be considered in one opinion.

Edwin H. Brown, for appellants.

Arthur v. Briesen, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts). The invention of the first two patents related to the "class of steam generators wherein a vertical generator shell, provided with lateral tubular branches, is arranged within a furnace shell, provided with an annular grate." The boilers which have been constructed under the various patents in suit, and known as the "Climax Boilers," have obtained a deservedly high reputation, which has been mainly owing to the fact that they furnished to manufacturers a steam boiler to be used upon a small ground area, with an amount of heating surface above that which existed in pre-existing boilers. This result was due to the improvement described in claim 2 of the patent to Morrin and Scott, and which consisted, in general terms, in attaching to a central vertical cylinder, having an annular grate, tiers or substantially horizontal series of radial double-branched tubes, or a network of tubes, both branches of which enter the cylinder, one above the other, whereby a large increase of heating surface is obtained, because each of these tubes occupies or spans a small portion of the height of the boiler, and, as the heat of the fire is not confined to the bottom of the central cylinder, the water in the branch tubes has a temperature above that of the central cylinder, and a constant circulation is maintained between tubes and boiler. The tubes overlap; "that is, the upper branches of one tier of tubes overlap and enter the cylinder above the lower branches of the next tier above, and the two ends of the tubes are arranged in different vertical planes. \* \* \* By overlapping the tiers of tubes as shown, we are enabled to fit within a practicable compass an unusually large amount of heating surface, and to fill up the gas passage of the furnace with a network of tubes."

Claims 1 and 2 are as follows:

"(1) A steam generator provided with one or more tiers or horizontal series of double-branched radial obliquely arranged tubes, H, both ends of which tubes enter the generator cylinder, and the lower ends of which are constructed to extend further into the interior of the said cylinder than the upper ends, substantially as and for the purposes set forth.

"(2) A steam generator provided with tiers or horizontal series of radial double-branched tubes, H, both branches of which enter the generator cylinder, one above the other, and the upper branches of one series constructed to enter said generator cylinder above the point or line where the lower branches of the next tier above enter it, substantially as set forth."

The specification describes also another cylinder, called "G," open at both ends, set in the generator cylinder called "B," and extending upwards to the water level, so as to leave an annular space between the two. Circulation in the tubes was thought to be promoted by extending the lower end of the tubes across the annular space and into the inner cylinder, the upper series of tubes being above it. The supposed benefit to the circulation was upon the theory that an upward movement would be established in the annular space, and a downward current in G. This cylinder is not an element of the combination described in claims 1 and 2, which contain the gist of the

invention, but is an element of the combination described in seven of the ten claims of the patent.

Upon the question of the patentable novelty of the invention described in the Morrin and Scott patent, the defendant chiefly relies upon the series of patents to Robert E. Rogers and James E. Black,—No. 41,323, and its reissue, No. 2,130; No. 55,539, dated June 12, 1866; No. 65,281, and its reissue, No. 4,535; and No. 65,280. All these boilers had circular grates and tubes, always extending from their lower towards their upper portions, sometimes in double sets in which one set is shorter than the other, and sometimes in double sets the two ends of a tube being in different vertical planes. No one of these boilers has an annular grate, which is indispensable to a Climax boiler, and no one has the system of Morrin and Scott. The system of Rogers and Black was that of long and substantially vertical lateral tubes, whereas the system of claim 2 of the first patent in suit was that of a network of tubes in substantially horizontal series, interlapping with each other, and thus exposing a large extent of tube surface to a strong heat.

The well known and successful Hazleton or "Porcupine" boiler, for which letters patent No. 247,910, dated October 4, 1881, were issued to Milton W. Hazleton, is next regarded as an anticipation of claim 2. It has a series of radiating tubes, but closed at their outer ends, and arranged in successive planes one above the other, and in the patent a series of vertical tubes is described, which extends upward in the spaces between the ends of the radiating tubes, and downward from near the water line to the bottom of the boiler, and communicating therewith. The object of these circulating vertical tubes was to furnish greater heating surface, but they were a failure, and were soon abandoned. These two alleged anticipations are those which are principally relied upon by the defendant, but are not of value, unless a broad construction is given to claim 2, and it should be construed to include a system unlike the network of radiating double-branched pipes, which is the principal feature of the invention, as described in the specification.

The alleged improvement described in patent No. 463,307 consisted in dispensing with cylinder, G, of the Morrin and Scott patent, and placing the ends of peculiarly curved tubes in the shell of the outside cylinder. The specification of the patent says that in the former generators for which patents had been issued to Morrin and Scott (No. 309,727), or to himself (No. 407,940),—

"An inner cylinder is set concentrically in the upright generator cylinder, thus providing an annular water space between them, and one extremity of each of the bent generating tubes passes through the shell of the generator cylinder, and is connected to this inner cylinder. Thus, one end of each tube, or a thimble extension thereon, projects into the cylinder further than the other end. In my present construction I employ no inner cylinder and no extensions, and expand both extremities of the peculiarly curved generating tube in the shell of the generating cylinder."

The form of the loop of the tubes is that of the outline of a pear with unequal lobes, which is said to enable each tube to avoid interference with adjacent tubes, and to compel "every portion of the ascending gases to come into contact with some portion of" a gen-

erating tube. In order to give as much length as may be to the tube, an outcurve and an incurve of the "ogee" form are made in its loop.

The claims of the patent are as follows:

"(1) A steam generator having an upright generator cylinder provided with tiers of double-branched radial obliquely arranged generating tubes, both branches of which are secured in the shell of said generator cylinder, and extend therein to an equal extent, said tubes being arranged about the entire periphery of the cylinder, and overlapping one another, as set forth.

"(2) A steam generator having an upright generator cylinder provided with tiers of generating tubes, b, of loop-like form, said loop having a pear-shaped outline, when seen in plan, and each loop having at one side a lobe formed by the short outcurve at b', and the short incurve at b'', the planes of the loops in the tubes being set obliquely to the axis of the generator cylinder, substantially as set forth."

A comparison of claim 1 with claim 2 of the Morrin and Scott patent shows that there is no patentable difference between the two claims. The specification of the entire patent shows that the difference between tiers or a horizontal series of radial double-branched tubes and a horizontal series of radial double-branched obliquely arranged tubes has no inventive character. Claim 2 of the first patent was intentionally drawn so as not to include the inside cylinder as a member of the combination, and so that, in case any one should thereafter undertake to utilize the gist of the invention by discarding that cylinder, he could be regarded as an infringer. The improvement described in claim 1 of the second patent, having been distinctly claimed in a previous patent, is not patentable, unless the last patentee was the earlier inventor. In *James v. Campbell*, 104 U. S. 356, 26 L. Ed. 786, Mr. Justice Bradley says:

"It is hardly necessary to remark that the plaintiff could not include in a subsequent patent any invention embraced or described in a prior one granted to himself, any more than he could an invention embraced or described in a prior patent granted to a third person. Indeed, not so well, because he might get a patent for an invention before granted to a third person in this country, if he could show that he was the first and original inventor, and if he should have an interference declared."

*Machine Co. v. Hedden*, 148 U. S. 490, 13 Sup. Ct. 680, 37 L. Ed. 529.

If Morrin had been the sole patentee in the Morrin and Scott patent, the discarding of the inner cylinder would have been what he had himself prefigured in claim 2 of the earlier patent, and, "if a man cannot have a patent for what another has claimed or described in a prior patent, much less can he have one for what he himself has claimed or described, for he thus shows that he has anticipated himself." *Mathews v. Flower* (C. C.) 25 Fed. 830. It is, however, said by the complainant that Morrin alone was the original inventor of the improvement described in claim 1 of patent No. 463,307, and that he invented it as early as 1882, and prior to the date of the Morrin and Scott invention. This earlier date was attempted to be proved by two machinists who were in the employ of the Lorillard Tobacco Works in 1882, in which Morrin was the engineer in charge, and who testified that they helped to make for Morrin the model of a single-cylinder boiler, which was produced in evidence. The model is a crude one, and, while the history of the invention would

seem to have been more within the knowledge of the inventor than of his workmen, it is noteworthy that, although Morrin was present when these witnesses testified, he was silent in regard either to the history of the invention or of the model, and did not undertake by his own oath to identify the model as the one of which the machinists testified. The testimony in regard to the date of Morrin's invention is inadequate.

The invention of the "ogee" form of loop, described in claim 2, was original with Morrin, and was patentable.

The invention described in patent No. 463,308 was a casing for the generators, in which the products of combustion pass upward among generating tubes, and its object was to provide for the ready access to and repair of any particular portion of the generator which may need inspection or repair. Sheet-metal drums, composed of segments, are mounted upon an iron base. About each segment is a marginal flange, for convenience in bolting segments and drums together. Each segment is lined with blocks or tiles or refractory material, and each tile is independently secured to the plate. A convenient number of doors are provided in the drums for access to the interior of the casing. The last of the four claims of the patent describes the invention with the most particularity, and is as follows:

"(4) An upright cylindrical casing for housing a steam boiler or generator, composed of drums or metal placed upon the other, and detachably secured together, each drum being composed of segments or sections detachably secured together, and lined on their inner faces with tiles of refractory material, secured, removably and independently, to the metal section of the casing, substantially as set forth."

The patentable character and the novelty of this casing for a vertical boiler are so fully and clearly set forth in the opinion of Judge Thomas (90 Fed. 285) that it is unnecessary to add anything upon the subject of that patent.

The inventions which are described in the claims of the three patents which were the subject of the decrees have been substantially copied by the respective defendants, with entire knowledge of the complainant's assertion of exclusive right under the patents in suit, and, as respects Lawler, under circumstances of marked aggravation.

The decrees of the circuit court in the two suits which relate to patents 309,727 and 463,308 are affirmed, with costs of this court. The decree of the circuit court in the suit which relates to patent 463,307 is directed to be modified, without costs, and the case is remanded to the circuit court, with instructions to enter a modified decree, with costs of that court, in accordance with the foregoing opinion in regard to the invalidity of claim 1 and the validity and infringement of claim 2.

WALLACE, Circuit Judge. I dissent from so much of the opinion of the court as adjudges the validity of claim 2 of patent No. 309,727, being satisfied that there was no patentable novelty in the invention therein specified. Hazleton was the inventor of everything covered by that claim (patent No. 247,910), except the peculiar form of the tubes, and tubes of that form, "radial, double branched," were old,

and were shown in the patents to Rogers and Black, Nos. 55,539 and 65,280. In the prevailing opinion the claim is sought to be validated by reading into it a limitation,—“a network of radiating tubes.” This is a catch phrase, which really has no meaning, except as it may describe a somewhat larger number of tubes than are necessarily required by the claim or were shown in the earlier patents. The tubes do not interlace. Any steam generator provided with two tiers of radial double-branched tubes, and embodying the other elements of the claim, would infringe it. I do not doubt that the so-called “Climax” boiler is an exceedingly meritorious apparatus, but, so far as the improvements embodied in it are original with Morrin and Scott, they are protected by the other nine claims of the patent, and by the claims of the later patent to Morrin and Scott.

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AMERICAN ORDNANCE CO. v. DRIGGS-SEABURY GUN & AMMUNITION CO.

(Circuit Court, D. Connecticut. February 23, 1900.)

No. 962.

PATENTS—VALIDITY—BREECH-LOADING ORDNANCE.

The Dashiell patent, No. 544,637, for breech-loading ordnance, as to claims 12, 14, 19, and 20, is void for anticipation and lack of patentable invention.

This was a suit in equity for infringement of a patent. On final hearing.

W. H. Singleton, for complainant.

Wilson & Wallis and Wilkinson & Fisher, for defendant.

TOWNSEND, District Judge. Final hearing on bill and answer raising usual questions as to validity and infringement of claims 12, 14, 19, and 20 of patent No. 544,637, granted August 13, 1895, to Robert B. Dashiell, for breech-loading ordnance. Counsel for complainant strenuously contends that defendant is estopped to deny the validity of the patent in suit, because certain persons who sold to complainant's representatives their stock in an earlier company, which owned the patent in suit, afterwards became the incorporators of the defendant company. The evidence does not sufficiently support the contention, and it will not be discussed.

Claims 12 and 14 relate to extractor mechanism. They are as follows:

“(12) In breech-loading ordnance, the gun, the extractor having a fulcrum on, and said extractor bearing directly against the body of said gun, and a bearing surface on the breech mechanism engaging said extractor to turn same on its fulcrum as the breech opens.” “(14) In breech-loading ordnance, the combination, with the gun, of the extractor loosely pivoted thereto, and having a fulcrum thereon, and the breech-operating mechanism engaging the extractor as described to first rock it on its fulcrum, and then turn it on its pivot, and away from the fulcrum, all substantially as described.”

Complainant's expert says:

“I understand the twelfth claim to be for the extractor having the inner fulcrum directly against the body of the gun, in combination with the breech

mechanism adapted to engage the extractor, and cause the same to swing on said fulcrum. I understand the fourteenth claim to be, in substance, for the extractor arranged to swing first around the fulcrum on the gun near the cartridge, and thereafter around a second fulcrum, more remote from the cartridge, in combination with the breech mechanism acting on the extractor, and causing the same to move or turn on the two fulcra successively, whereby the extractor is first given the short powerful action to loosen the cartridge shell, and thereafter a longer and quicker movement to carry the shell rearward."

It is so clear from the specifications of the patent, the history of the prior art, and the admissions which the learned and candid expert for complainant was forced to make, in view, especially, of the Lee, Nordenfelt, and Farquharson patents, that these claims are anticipated, that it is unnecessary to discuss them. Claim 19 is as follows:

"(19) In breech-loading ordnance, the combination with the gun and a breech-block carrier pivoted thereto, of the mutilated screw breech block on said carrier having a side cut away longitudinally in a curve drawn from the pivotal support of the carrier."

The experts agree that the gist of the alleged invention covered by this claim was the cutting away of the side of a cylindrical breech-block concentric with the pivot pin. In the older forms of "three-motion gun" the breech block was first rotated, then withdrawn axially from the breech, and then swung to one side. The construction covered by claim 19 represents one form of what is known as a two-motion gun, so called because there is no axial movement. This two-motion element was not invented by Dashiell, but was first shown in the Noble patent, No. 377,906, of 1888, and later in the patents of Gerdorn, Seabury, Dardier & Mellstrom, and others. The defendant claims as follows:

"(1) The claim is drawn to an incomplete combination, and is ambiguous, and therefore void. (2) The claim, if given the construction sought by complainant, is for a mere mechanical arrangement, which does not rise to the dignity of invention. (3) The claim is anticipated by the prior state of the art."

It is not clear, from the specifications of the patent, for what purpose the breech block is cut away. Complainant's expert contends that the intention in cutting it away was to allow the block to swing directly out of the breech of the gun. Defendant's expert contends that its real essential function is to so combine with the tongue of the breech as to hold the block against rotation while swinging on the carrier in the act of closing. The chief support for the contention of complainant's expert is found in the following statement in the preamble of the specification:

"The object of the invention is \* \* \* also to swing the breech block of a mutilated screw breech gun to one side of the bore of the gun without first retracting it in line with the bore."

But in the rest of the specification it is repeatedly stated that the segments of the breech block embrace the projections on the gun so as to prevent the rotation of the breech block on its center, and complainant's counsel is forced to admit the correctness of the following admission of complainant's expert:

"The Dashiell patent has its parts put together in an inartistic or an illogical way. There are several references in the patent, in various connections,

to the breech block engaging the guide face, 7, to prevent rotation at improper times, and apparently a large part of this could be left out without tending to render the patent obscure in its meaning. It is a fact, I think, that the descriptive matter relating to the function of the guide face, 7, in preventing rotation of the breech plug occupies more space than the descriptive matter of the breech plug and its adjuncts."

If defendant's interpretation be correct, or, rather, if complainant has failed to prove that the function covered by claim 19 was merely to enable the breech block to swing outward without being retracted, then defendant does not infringe. If complainant's contention be conceded, then the construction is so nearly anticipated in the prior art that it did not involve invention. The alleged invention, according to complainant's counsel, "consisted in applying the cutaway feature to a cylindrical breech block." The other two-motion guns, except Dardier & Mellstrom, were described by the patentee as follows:

"I am aware that frusto-conical breech plugs on the mutilated-screw system have been made to swing open on a pivoted carrier from closed (but unlocked) position. The frusto-conical form of breech block permits this; but there are practical difficulties in the way of construction of frusto-conical breech mechanism which make that form objectionable in many instances. I am also aware that a cylindrical breech mechanism of the mutilated-screw form has been devised wherein the breech plug has but two thread-segments and flattened sides, in which the plug swings open through a slot in the side of the gun. This form has some objections on account of the considerable cutting away both of gun and breech plug."

In these prior constructions the surface was cut away so as to leave alternately these segments and blanks. The Dashiell drawings indicate that he cut away or chamfered out only enough of the block to permit it to clear the corner of the breech. This construction appears to be shown in the drawings of, although it is not described in, the Seabury patent. Dardier & Mellstrom's British patent No. 17,490 of 1893 shows the combination of said claim 19, and Fig. 13 of the drawings shows the precise construction covered by said claim, except that the gun itself is not drawn. In Mellstrom's patent of 1893 he states:

"Instead of using a taper-sided breech block, such as that above described, I sometimes used a cylindrical segmental-screw block or plug."

The only other distinction between Dardier & Mellstrom and the patent in suit is that in said patent the breech-block carrier is not pivoted to the gun, as in the patent in suit, but to a movable ring on the gun. Such alternative constructions were common in the art, and do not show any patentable difference. The Dardier & Mellstrom patent probably comes nearer to an anticipation than the other constructions of the prior art. Other patents, however,—notably said patent to Seabury,—showed various kinds of breech blocks cut away on different sides in order to dispense with the axial movement. Therefore there was no invention in adapting the cutaway idea to the cylindrical breech. This conclusion is supported by the disclaimers of the patentee in his specification, and by the admissions in the file wrapper. Even if claim 19 sufficiently states the function of its construction claimed by complainant, and even if said construction is not anticipated, yet it must be held to be void, as being for a mere me-



chanical arrangement which did not involve invention in view of the prior art. These conclusions dispense with the necessity of discussing the contentions as to the Silfversparre patent, No. 542,639, which, if part of the prior art, would alone be conclusive against the validity of claim 19. Claim 20 is as follows:

"(20) In breech-loading ordnance, the gun, the breech-block carrier pivotally connected thereto and having a closed rear face piece covering and projecting beyond the edges of the breech block, which block is swiveled thereto, all combined substantially as described."

This claim covers merely a hinged cover extending beyond the block. Complainant's expert says it "is directed to a special construction and arrangement of parts for keeping dust, dirt, and other foreign matters out of the joint at the rear end of the breech plug." It is wanting in invention, and is shown in prior patents. Let the bill be dismissed.

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NATIONAL FOLDING-BOX & PAPER CO. v. ROBERTSON et al

(Circuit Court, D. Connecticut. February 9, 1900.)

No. 1,019.

1. PATENTS—INFRINGEMENT—FOLDING PAPER BOXES.

The Wilson patent, No. 286,360, for an improvement in folding paper boxes, *held* not anticipated, and valid, on motion for a preliminary injunction.

2. SAME—SUIT FOR INFRINGEMENT—DEFENSES.

The fact that the owner of a patent is a corporation alleged to have been formed in violation of the anti-trust law, and that the patent is alleged to have been assigned to it in furtherance of the illegal purpose to create a monopoly and control the price of an article of commerce, is not available to an infringer of such patent to defeat a suit for the infringement.

This is a suit in equity for the infringement of a patent. On motion for a preliminary injunction.

Walter D. Edmonds, for complainant.

Charles W. Comstock and W. E. Simonds, for defendants.

TOWNSEND, District Judge. On motion for a preliminary injunction against infringement of the first claim of patent No. 286,360, granted October 9, 1883, to Arthur Wilson, for improvement in folding paper boxes. This claim has been sustained by Judge Thomas, after exhaustive consideration of the issues of anticipation and noninfringement, in two opinions in the suit of this complainant against Robert Gair (C. C.; 91 Fed. 905, and 97 Fed. 813). The new evidence introduced related only to patents set up in the answer, but not discussed, in said Gair Case. The defendants relied chiefly on one only of said patents, namely, No. 269,682, to Linnett, which they claim exactly corresponds with the boxes of the patent in suit, except in the use of what are known as the tongues and slits for securing the same, and that this construction was suggested by Linnett when he said, "the parts at the ends being attached together to secure them, as by pasting or otherwise

securing the parts," and they contend that the use of such slits and tongues was well known in the art. As pointed out by Judge Thomas in his carefully considered opinion, the merit of the invention in suit is that the end piece, with its tongues, when caught into said apertures and loosely held therein, closes and holds together the end of the box by means of its lever function. This construction dispensed with the exterior perforations of the boxes of the prior art, and reinforced the sides of the box against strain.

Counsel for complainant says the Linnett patent was not presented for Judge Thomas' consideration, because the patent to Arthur, May 15, 1877, No. 190,803, which was discussed and considered, covered everything embraced in the Linnett construction. The construction of Arthur is nearer to the patented construction than that of Linnett. It is apparent that neither Arthur nor Linnett had any idea of the clutch invention which Wilson devised. All the other questions herein were before Judge Thomas, and were disposed of by him.

The defendants have also filed a plea in abatement alleging that certain partnerships and corporations which were rivals in business, situated in various states, engaged in the manufacture of these boxes, being articles of commerce and in great demand throughout the United States, for the purpose of stifling competition, and controlling and limiting the output of each of said manufacturing concerns, or lessening the amount of production of said goods and articles of commerce, entered into a conspiracy, for the purpose of stipulating and providing for uniform minimum prices of said articles of commerce sold throughout the states, and enhancing the price thereof, and limiting the production of the same, and that, in pursuance of said conspiracy, each of the parties entered into a contract to sell its plant to a new corporation, to be organized under the laws of the state of New Jersey. Said contract was set forth in full. It comprised an agreement between certain firms, persons, and corporations to take stock in said corporation, and provisions for the appraisal of the property of each of the constituent members, and for the allotment to each of them of stock in the new corporation in proportion to such appraisal. The plea in abatement further alleged that said parties further agreed that neither of the persons or companies mentioned in said agreement should engage in the manufacture or sale of said articles of commerce, or directly or indirectly continue in, carry on, or engage in said business of which said articles might form a part, independently of the said National Folding-Box & Paper Company, to be organized as aforesaid, for the period of 49 years, and that during said period the parties should refrain from entering into competition as rivals of said company; and that in pursuance of said conspiracy the parties abandoned the manufacture of such articles, and that said National Folding-Box & Paper Company has carried out all the designs of said parties; and that, in pursuance of said agreement and conspiracy, all the patents have been transferred to said corporation; and that "it was further agreed between the parties

\* \* \* that each of the parties to said agreement could and did

manufacture said articles of commerce under patents owned by them prior to the formation of said company," and that such articles "were sold by said parties \* \* \* at uniform prices, and upon the same terms, without respect to the cost of production or the merits of the respective articles"; and that the patent in suit was conveyed to the complainant corporation in pursuance of said conspiracy to restrain the trade in the states where said plants were located. The plea further alleges as follows:

"The direct tendency and the direct result of said conspiracy and agreement between said parties, as aforesaid, was and did, as intended by the parties thereto, create a scarcity of said articles of commerce, and enhance the price thereof, in the states where said plants were located, and throughout the several states where said articles were in use by the public to a great extent; and the said conspiracy, and the natural results of the same, as intended and designed by the parties to said agreement, and the acts of the parties thereto under the same, are all and each in violation of law, in restraint of trade and commerce between the several states, and are directly prohibited by the common law and the laws of the United States, and, as said illegal and unlawful combination of the parties to said agreement, the said National Folding-Box & Paper Company, have no right, power, or authority to sue or plead in the courts of the United States, in any civil action wherein it invokes the aid of the courts of the United States, to protect the plaintiff to further engage in or carry on the business for which it was illegally organized, and especially to protect it as demanded in this suit, and said combination is illegal and void, and your respondents, therefore, pray that the proceeding in the cause may be abated and dismissed."

This plea was argued under an oral stipulation to the effect that, for the purposes of the motion for a temporary injunction, the facts alleged in said plea should be taken as true, so far as they referred to the contents and execution of the agreements therein alleged, but that this admission should not be construed to extend to any innuendoes contained in the plea respecting the purposes of said agreements, except so far as they appeared on the face thereof, nor respecting the intent or animus of the parties thereto.

The conclusions reached dispense with the necessity of resting the decision on the legality of the agreement alleged in the plea in abatement. It does not appear that the original contract was illegal. There are no provisions therein which, directly or indirectly, refer to any restriction of trade or regulation of output or of prices. The parties thereto bound themselves not to engage in like business for 49 years. This was essential to effectuate the transfer of the good will, and is not unusual in such cases. The allegation that it was further agreed that the parties "could and did manufacture," etc., is in direct conflict with the previous allegation of the plea. To sustain this plea, it would be necessary to hold, as claimed by defendants, that a corporation formed in restraint of trade in one state could not, in another state, maintain a suit to restrain the infringement of its patent.

The federal cases chiefly relied on by defendants are *Harrow Co. v. Hench* (C. C.) 76 Fed. 667, affirmed in 27 C. C. A. 349, 83 Fed. 36, 39 L. R. A. 299; *Harrow Co. v. Quick* (C. C.) 67 Fed. 130.

*Harrow Co. v. Hench*, supra, was a suit to enjoin licensees from violating a license contract by selling below the price agreed on therein, and for a decree for the specific performance thereof, which

contract was made with a combination controlling 90 per cent. of the manufacturers of certain harrows in the United States. Said contracts prevented licensees from selling their products at a price less than was set forth in a schedule annexed to the license, so that, as the court said, the corporation is simply clothed with the legal title to the assigned patents, while "the several assignors are invested with the exclusive right to manufacture and sell their old-style harrows under their own patents; but all of them must sell at uniform prices, and upon the same terms, without respect to cost or the merits of their respective styles of harrows, and all the members of the combination are strictly forbidden to manufacture or sell any other kind or style of float spring-tooth harrow than they are thus licensed to make and sell." Judge Acheson refused the injunction, and the court of appeals affirmed his decision, taking the ground that the prior owners were the beneficial owners, with right to continue their business, subject only to the restriction in its management imposed by the contract, and that "the result would be the same, in legal contemplation, if the corporation and licenses had been dispensed with, and the contract had provided simply, as it does, for combination and restraint of competition." This was not an infringement suit, but a suit to compel the performance of an unlawful contract. The decision rests upon the fact that the corporation was organized solely for the purpose of making a combination to restrain competition and trade and to enhance prices.

In the same line, Judge Coxe, in the suit of the same complainant against the same defendant (C. C.; 84 Fed. 226), to restrain infringement of a patent which had been assigned in accordance with said contract, held that, as the contract was illegal and void, the assignment also was void, and solely on that ground dismissed the complaint.

The only opinion in the federal courts cited by defendant which would seem to support the doctrine that an infringer might defend his illegal acts, even in a case where the complainant was a combination formed for the purpose of restraining trade and competition, is *Harrow Co. v. Quick*, supra, in which the learned judge disposed of the question of infringement on the merits, but, in passing on the defense that this same harrow company was an illegal combination, said:

"It seems to me that the court cannot sustain the present bill without giving aid to the unlawful combination or trust represented by the complainant. The question is not free from doubt, but in a case of doubt I feel it my duty to resolve it in such a way as will not lend the countenance of the court to the creation of combinations, trusts, or monopolies."

The court of appeals, however, said on this point:

"While not prepared, in view of the authorities, to sanction the proposition that the infringer of a patent may escape liability by showing that the legal owner is engaged in a supposed unlawful combination or trust, we do not consider the point." 20 C. C. A. 413, 74 Fed. 239.

And in *Columbia Wire Co. v. Freeman Wire Co.* (C. C.) 71 Fed. 306, Judge Adams said:

"I would quite agree with the learned judge who wrote that opinion, that the correctness of his conclusion, even in that case, was not free from doubt."

And he refused to apply said doctrine in a case of infringement. The question here presented was discussed by Judge Wallace in *Strait v. Harrow Co.* (C. C.) 51 Fed. 819. Judge Wallace says:

"The proposition that the plaintiff, while infringing the rights vested in the defendant under the letters patent of the United States, is entitled to stop the defendant from bringing or prosecuting any suit therefor because the defendant is an obnoxious corporation, and is seeking to perpetuate the monopoly which is conferred upon it by its title to letters patent, is a novel one, and entirely unwarranted."

The opinion in *Machine Co. v. Smith* (C. C.) 70 Fed. 383, is to the same effect. Judge Simonton says:

"The issues are these: Do the complainants hold letters patent of the United States giving them the exclusive right to make, vend, and use certain patentable devices? Have the defendants infringed the rights thus granted? If in procuring these exclusive rights, or if, in their exercise, the complainants have been guilty of fraudulent or improper conduct towards these defendants, the fundamental principles relied on would debar them of any relief in this court. But if, in the absence of these, it is sought to deprive them of their remedy for the infringement of their rights because of their motives in asserting them, such motives are not the subject of judicial inquiry. *Strait v. National Harrow Co.*, 51 Fed. 819. 'The rule that one coming into equity must come with clean hands is confined to the conduct of the party in the matter before the court, and not to matters aliunde. Courts of equity, as well as courts of law, will not refuse redress to the suitor because his conduct in other matters not then before the court may not be blameless. It is enough if the suitor shows that he has acted justly, fairly, and legally in the subject-matter of the suit.' Beach, Mod. Eq. Jur. § 16, and cases cited."

The distinction between the cases where such a defense might and might not be interposed is stated as follows by Judge Wallace in *Strait v. Harrow Co.*, supra:

"If the defendant had brought suit against the plaintiffs for some breach of contract or violation of its alleged rights, founded upon the combination agreement, then it might become pertinent to inquire into the character of the combination, and ascertain whether the court would enforce any rights growing out of it. But, in a suit brought for the infringement of a patent by the owner, any such inquiry, at the behest of the infringer, would be as impertinent as one in respect to the moral character or antecedents of the plaintiff in an ordinary suit for trespass upon his property. Even a gambler, or the keeper of a brothel, cannot be deprived of his property because he is an obnoxious person or a criminal."

The court of appeals in this circuit said in *Light Co. v. Electric Co.*, 3 C. C. A. 605, 53 Fed. 598:

"They [the owners of the patent in suit] do not lose that right merely because they may have joined in a combination with others, holding other patents securing similar monopolies, which combination may, when judicially examined in a proper forum, be held to be unlawful. We do not feel justified in assuming, upon the facts before us in the present suit, that the use which the complainants propose to make of the injunction—an injunction which seems necessary to secure their monopoly and make their patent fruitful—will be such as to promote any other monopoly. When it shall be made to appear that some one, to whom in fairness and good conscience these complainants should sell their lamps, has been arbitrarily refused them, save upon oppressive and unreasonable terms, it will be time to consider whether the complainants should be allowed to continue in possession of the injunction."

In *Soda-Fountain Co. v. Green* (C. C.) 69 Fed. 333, Judge Dallas sustained exceptions to such a plea, and ordered it stricken out as irrelevant, immaterial, and impertinent. The motion for a preliminary injunction is granted.

EVANS et al. v. ROOD et al.

(Circuit Court of Appeals, Third Circuit. February 9, 1900.)

No. 81.

**PATENTS—INFRINGEMENT—MACHINES FOR DRESSING HIDES.**

The Rood & Vaughan patent, No. 383,914, for an improvement in machines for shaving skins or hides, as to claim 3, which relates to the cutter cylinder, is limited by the prior art to the precise construction shown, which is a cylinder having two series of knives, arranged spirally thereon, the direction of each series being opposite to that of the other, and each series extending "from one end of the cylinder to and beyond the middle of such cylinder, longitudinally thereof, and until they abut against each other"; and such patent is not infringed by a machine in which the two series of knives terminate or abut against each other on the center line of the cylinder.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Henry E. Everding and Frederick P. Fish, for appellants.

Charles E. Morgan, for appellees.

Before ACHESON and GRAY, Circuit Judges, and KIRKPATRICK, District Judge.

KIRKPATRICK, District Judge. The appellees' patent in suit, No. 383,914, dated June 5, 1888, purports to be for an improvement in machines for shaving skins and hides, and especially for an improvement in a shaving machine designed as shown in letters patent No. 339,323, granted to John Rood, one of the joint inventors named in patent No. 383,914. The part of the patented device more particularly indicated as being infringed by defendants' machines is the cutter cylinder. This cylinder, which was common to both of Rood's patents, as constructed under patent No. 339,323, had certain alleged defects, which resulted, when operating, in marking and scratching the shaved skins in an undesirable manner. The alteration of the construction of this cutter cylinder, to effect such an arrangement of the knife blades thereon as would obviate this undesirable result, was the principal point of inventive change sought to be embodied in patent No. 383,914. There were other modifications in the appellees' machine of the later patent not found in the machine embodying patent No. 339,323, but they related only to detail of mechanical construction, the application of a sharpening device to the cutter blades, and other minor features, not directly relative to the question at issue in this cause. The third claim of the complainants' patent alleged to be infringed reads as follows:

"A cutter cylinder having two series of knives, as described, arranged in a spiral direction on the external surface of said cylinder, the direction of each series being opposite to, or the reverse of, the other series, extending from one end of the cylinder to and beyond the middle of such cylinder, longitudinally thereof, until they abut against each other, substantially as shown and described."

The specification of the patent relating to this claim is as follows:

"A cutter cylinder, B, having on its external surface two series of knives, a, b, each series being arranged to extend from one end of the cylinder to

wards the other end thereof, and in a spiral direction, the direction of each series being opposite to that of the other series. The knives of each series are extended beyond the middle of the cylinder, longitudinally thereof, until they abut each against the other, as shown in Fig. 4. By arranging the knives as represented, no mark will remain on the hide after it has been operated on by them, and during the operation of shaving the said hide, or skin it will be kept in a smooth state, owing to the arrangement of the knives, they tending to extend or spread the portion of the skin, while being acted upon by them, in directions from the said middle of the cylinder towards each end of it."

It is apparent, from the specific language of this claim and specification, that the patentees' conception of their invention was clearly defined and concisely expressed. The invention was, as stated, a cutter cylinder, with blades spirally arranged, as described, and extending from each end of the cylinder to and beyond the middle of each cylinder, longitudinally, until they abutted against each other. If we look into the prior state of the art, we will find the reversed spiral arrangement of blades in a number of machines constructed under earlier patents. As early as July 9, 1867, patent No. 66,640 was granted to John Schiffer for a machine for dressing hides and skins, which contained a rotary scraper, with knives spirally divergent around the cutter thereof, abutting against each other at the center. Patent No. 4,996, dated August 2, 1865, issued to Bray, describes a cutter cylinder with spirally arranged blades overlapping, but not abutting, against each other, so that the scratches left upon the hide by the extremity of one blade would be removed by the cutting of the next blade following. A cutting surface was thus continually presented to the hide, and the hide was so held firmly and flat while being operated upon. In the Masterson English patent, No. 782 of 1877, a cylinder somewhat similar to the Bray is found. Speaking of the helical arrangement of the cutter blades of this cylinder, the specification of the patent says: "They start from alternate points at the middle, the ends at the middle being rounded off so that no angles are presented."

The principle of overlapping cutter blades was adopted in the early Rood patent, No. 339,323, in order that no part of the skin or hide should remain untreated. It is evident that from the early stages of the art till the granting of the patent in suit, while slight differences in mechanical detail were to be found in the different devices, yet the same result was sought by the various patentees and inventors, and sought along the same lines and similar theories. The peculiar arrangement of the knives in all the above-mentioned cylinders was designed, not only to keep the skin or hide flat and stretched while being operated upon, but to prevent the marking of the skin or hide along the middle or at the terminals of the knife blade, just as in the cutter cylinder of the patent in suit the continuation of the knife blades across the center of the cylinder is to accomplish the like result. It was plain that the marks or scratches upon the hide were caused by the failure to have a cylinder that continuously presented a cutting-blade surface to the hide or skin, thereby leaving some part of the skin uncut or untreated, and which part would then form a ridge or mark upon the surface. As we

have seen, the idea of overlapping blades had been clearly conceived before complainants' patent was applied for, and when they chose such an arrangement for their device they embodied no new principle. It had been employed by Masterson as far back as 1877, and used by the designers of many other cutting cylinders well known to the trade. The complainants did no more than add to an old form a new feature, consisting of an extension of the blades beyond the center of the cylinder until they abutted.

The invention being, then, in no sense a pioneer in the art, no unexpressed meaning can be read with the claim, and the patent must be limited to the specific device described therein. Literally interpreted, it must be understood to claim that the cutter blades extend, not only to, but beyond, the middle of the cylinder, and there abut on some line not coincident with the middle line of the cutter cylinder. The appellants (the defendants below) have made and sold the forms or types of cutter cylinders known in the record as the "Burke-Evans Cutter Cylinder" and the "Creery-Evans Cutter Cylinder." The latter appears to have two series of knives, arranged in a spiral direction, upon its surface; the direction of each series being opposite to, or the reverse of, that of the other series. This cutter cylinder has the knives of each series extending towards, but not beyond, the middle of the cylinder. In the Burke-Evans cutter cylinder the abutting arrangement of the knives is not exactly like that in the Creery-Evans cylinder, but it varies only in small mechanical details, that do not change the principle of construction. They are both what is technically known as "balanced cylinders," having the distinguishing feature of center-line abutment of the knife blades. The appellees' cutter cylinder is of the class or type known as "staggered cylinders," in which the cutter blades do not abut on the center line of the cylinder. The requirement of the third claim of the patent is that the knives shall extend "from one end of the cylinder, to and beyond the middle of such cylinder, longitudinally thereof, until they abut against each other," and this construction of their device is fully explained in the specification to be essential to the particular improvement intended to be protected by their patent. The specification describing the novel feature of the complainants' device, set out in the third claim of patent No. 383,914, as clearly differentiates it from the construction found in the appellants' devices as it does from those of the prior Rood patent and the others to which we have referred. Upon the record presented, we are of the opinion that the appellants' cutter cylinders do not embody the construction specified in the appellees' patent in suit, and are not infringements thereon. The decree of the circuit court is therefore reversed, and the record will be remitted, with instructions to dismiss the complainants' bill of complaint.



## LAMB v. HORTON et al.

(Circuit Court, D. Massachusetts. February 28, 1900.)

No. 998.

**PATENTS—INFRINGEMENT—EYE SHIELDS.**

The Lamb patent, No. 540,746, for an eye shield which consists of mica lenses and cushions of felt or other suitable material, is limited by the proceedings in the patent office to a shield having the cushions made of felt or other similar fibrous material, and is not infringed by a shield having rubber cushions.

This was a suit in equity for infringement of a patent. On final hearing.

Odin B. Roberts, for complainant.

Warren R. Perce, for defendants.

COLT, Circuit Judge. This suit relates to the Lamb patent for eye shields, which was before this court in *Lamb v. Stevens* (C. C.) 81 Fed. 389. In that case the patent was held valid. In the present suit the only defense is noninfringement. The Lamb eye shield consists of mica lenses and a felt cushion. In the *Stevens* Case the defendant's eye shield had a felt cushion, and infringement was clear. In the present case the defendants' eye shield has a rubber cushion, and it is contended that an eye shield having a rubber cushion does not infringe the Lamb patent, because the patent is limited to a felt cushion, by reason of what took place in the patent office. In the consideration of this question it becomes necessary to carefully examine the history of the patent in the patent office, as disclosed by the file wrapper and contents. The Lamb application was filed September 25, 1891, and it contained four claims. In these claims the cushion was described as "a ventilated, flexible cushion," "a flexible cushion," and "a ventilated, flexible, nonmetallic cushion." These claims were rejected by the examiner October 27, 1891, November 20, 1891, December 1, 1891, and December 19, 1891, mainly upon reference to the Genese patent, of March 18, 1884. Upon appeal to the examiners in chief the majority affirmed the action of the examiner, holding that the Genese patent "describes its flexible cushion as elastic and as made of rubber," and that the alleged invention consisted merely in changing the location of the ventilating apertures. The dissenting examiner in chief thought the patent valid, provided the cushion was limited to felt. The applicant then appealed to the commissioner, and he affirmed the decision of the majority of the examiners in chief. The commissioner, in his opinion, says that the British (Genese) patent of 1884 "shows everything that is mentioned in the first claim," except that, "instead of the felt cushion," that patent shows "an India-rubber tube." He concludes as follows:

"The substantial questions which come up are these: (1) Does applicant's substitution of a flexible felt frame in the place of the old flexible metallic frame with rubber cushion, amount to invention? And (2) does the specific mode of ventilating the felt frame, as compared with the modes of ventilation

of the British and Swiss patents, amount to invention? It is held that both questions must be answered in the negative."

On May 18, 1892, Lamb filed a petition for rehearing of the appeal before the commissioner, and for leave to file an amendment, and on May 19th requested that his application be amended as follows:

"The principal novel element of the device as described is the rim or cushion projecting substantially at right angles to the frame, constructed of felt, and provided with apertures for the free circulation of air. The presence of this feature makes the device light and comfortable to the user, so that it can be worn without inconvenience."

He also asked to strike out the claims in the application, and substitute a single claim, as follows:

"An eye shield comprising lenses of transparent material inclosed by a suitable frame, and with a strip or cushion of felt projecting substantially at right angles to the said frame or binding, and provided with ventilation apertures, substantially as described."

The case was thereupon reopened by the commissioner. The foregoing amendment, however, was not acted upon, the examiner holding that the case then presented "two sets of claims in two different papers," and he ordered that "this case should be regularly amended before consideration." In compliance with this order the applicant, on June 30, 1892, filed an amendment canceling all claims heretofore existing, and substituting four new claims. The first of these claims described the cushion as "a felt strip or cushion"; the second, as "a cushion of fibrous material, pervious to air"; the third, as "a strip or cushion of felt projecting at right angles to the lenses"; and the fourth, as "a cushion substantially as described." The word "cork" was also stricken out from the original application. In a subsequent communication to Lamb, under date of July 5, 1892, the office said:

"In his report on the petition to the commissioner in this case, the examiner said: '\* \* \* Since he joins to this petition an amendment to his specification and a new claim, \* \* \* a new state of facts might justify a reopening of the case by the primary examiner, under rule 142. In the new claim presented by the applicant in connection with his motion, he restricts his structure to an eye shield having a cushion of felt. He has heretofore claimed broadly a cushion of flexible material. Such a claim not having heretofore been adjudicated upon, the case might properly be reopened, 'sufficient cause being shown,' and on the approval of the commissioner.' The commissioner said in his decision: 'In view of the allegations in this report, the case is reopened for the consideration by the primary examiner of the new claim applicant presents.' When applicant confines his new claims to the subject-matter above referred to, they will be considered, and no other claims will be."

To this communication Lamb replied on July 16, 1892, as follows:

"I have to acknowledge receipt of official letter of July 5, 1892, and in response thereto beg to submit the following amendment: In claim 2, line 3, of the last amendment, strike out 'a cushion of fibrous material, pervious to air,' and insert 'a cushion of felt.' Claim 4, of the same amendment, strike out 'cushioned,' and insert 'a cushion of felt.' These changes are thought to be in full accordance with the examiner's requirement, for, although it is plain the invention is not a mere change of material, yet the one essential element of the combination is the felt cushion; meaning, of course, a cushion of those peculiar qualities possessed by felt. Favorable action is requested."

The first four claims of the patent as finally issued are the claims embodied in the letter of June 30, 1892, as amended by the letter of July 16, 1892, and in each of these claims the cushion is restricted to felt. The adoption of this limitation is the sole ground upon which Lamb obtained a reopening of his case after it had been finally rejected by the commissioner, and he is bound thereby at least with respect to these claims.

In the early part of September, 1892, Lamb appointed Lange & Roberts, in place of Cilley, his attorneys. In a communication to the patent office dated September 9, 1892, Lange & Roberts amended the application by the addition of six new claims. They also erased the first two paragraphs contained in the communication of May 19, 1892, already referred to. Subsequently five more claims were allowed. The whole number of additional claims finally allowed are numbered 5 to 15, inclusive, in the patent. In three of these claims the cushion is not strictly limited to felt. In claim 5 the cushion is described as "of felt or suitable material," in claim 6 it is described as "of felt or other suitable material," and in claim 10 it is described as "of felt or suitable material." In view, however, of the history of this patent in the patent office, it seems to me that these additional words do not enlarge the scope of these claims further than to cover a cushion having the peculiar qualities possessed by felt; that is, a cushion of fibrous material, which is soft, flexible, and absorbent, such as felt, flannel, and the like. In one of his communications to the patent office after the case had been reopened, the applicant said: "The one essential element of the combination is the felt cushion; meaning, of course, a cushion of those peculiar qualities possessed by felt." This would seem to be, under the circumstances connected with the grant of this patent, a fair and reasonable construction of the words "other suitable material." But, whether this be so or not, it is clear to my mind that, in view of what took place in the patent office, the patentee is estopped from claiming a rubber cushion as within his patent. The contest in the patent office centered around the Genese patent. That patent described a rubber cushion, and Lamb was obliged to limit his cushion to some material other than rubber, as the sole condition upon which the patent was finally granted. To hold that the words "or other suitable material" covered rubber would be to say that it included the rubber cushion of the Genese patent. The interference proceedings in the patent office have, in my opinion, no bearing upon the question of the scope and meaning of the claims of the patent as finally allowed. Upon careful consideration of this case, I am satisfied that the Lamb patent is limited to a cushion of felt or other similar fibrous material, and that it is not infringed by the defendants, who manufacture and sell an eye shield in which the cushion is composed entirely of India rubber. Bill dismissed, with costs.

**AMERICAN ORDNANCE CO. v. DRIGGS-SEABURY GUN &  
AMMUNITION CO.**

(Circuit Court, D. Connecticut. February 24, 1900.)

**PATENTS—INFRINGEMENT—BREECH—LOADING ORDNANCE**

The Driggs & Schroeder patent, No. 360,798, for breech-loading ordnance, was not anticipated by the Storm patent, No. 132,740, nor by the Pleri British patent, No. 8,615, and describes a breechblock mechanism for rapid-fire guns both novel and useful; also held infringed, as to claim 8, by a gun constructed in accordance with the Driggs-Tasker patent, No. 613,195.

This was a suit in equity for infringement of a patent. On final hearing.

W. H. Singleton, for complainant.

Wilson & Wallis and Wilkinson & Fisher, for defendant.

TOWNSEND, District Judge. Final hearing on usual bill and answer, raising questions of validity and infringement as to the first claim of patent No. 360,798, issued April 5, 1887, to Driggs & Schroeder. Said claim is as follows:

"(1) In a gun in which the breechblock first moves downward in opening, and then swings backward and downward, the combination, with the gun breech provided with grooves in its upper wall, of the pivoted breechblock, A, provided on its upper surface with bands or projections, a, a', adapted to fit in said grooves and hold said breechblock firmly in place, and means for moving the breechblock into and out of said grooves, substantially as described."

There was no patentable novelty in said downward, and backward and downward, movements of the breechblock, or in the construction and arrangement of cam mechanism for moving it in and out of the grooves of said claim. Defendant has copied these constructions in its gun, which is made according to the specifications of the Driggs-Tasker patent.

The combination of the claim in suit is intended for rapid-fire guns weighing, approximately, 1,000 pounds, in which the breechblock mechanism must be so organized as to withstand, when fired, a strain of many tons to the square inch. The specification describes the patented construction, and its function, as follows:

"A represents the breechblock, which is provided on its upper convex surface with bands or projections, a, a', fitting into correspondingly shaped recesses in the upper interior surface of the gun breech, and extending downward below the center line of the chamber. These bands and their grooves firmly hold the breechblock in position, and prevent backward movement of the same during firing."

Counsel for complainant contends as follows: (1) That the patented invention covers the novel construction of "a breechblock supported by what you may call a horseshoe bearing behind it; so that from the top of it to a point well below the center of the bore it was supported against rearward motion by a band in the breech bearing against the breechblock." (2) That, being confronted by the problem of how to get this breechblock down out of the way so as to eject the old and insert the new cartridge, the patentee "organized a resistance by this breechblock which required absolutely no withdraw-

ing, except one equal in amount to the thickness of the horseshoe that bore upon the breech at its thickest point, and he did that by having it of a certain thickness at the top, and then tapering out at the curve on the inside, which curve on the inside or lower part of the bearing surface finally met and vanished into the curve on the outside of the bearing surface of this horseshoe, \* \* \* whereby he had this resistance of the horseshoe for the long sweep over the top and sides of the breechblock, and was able to get that breechblock out of its bearing, so that it could be tipped away by a quick motion by lowering it, not the whole length of the horseshoe, but just the thickness of the bearing at its thickest point," and that this organization was radically new. (3) That the application of this novel bearing involved "the capacity of multiplying those bearings, and of distributing this strain by any number of curves and bands required."

To meet these contentions, counsel for defendant chiefly relies on the Mont Storm Patent, No. 132,740, of 1872, and the Pieri British patent, No. 3,615, of 1885. His expert testifies that United States Nordenfeldt patent, No. 282,008, of 1883, "is more closely allied to the mechanism shown and described in the patent in suit than perhaps any other mechanism of which I am aware." The Storm patent shows a musket with a flat-topped plate, which serves as a breechblock, and which moves downward, and then swings backward in opening, and means for moving the breechblock into and out of engagement with a "jaw or hook" on the top of the breech. It does not show either the "convex surface," or "bands fitting into correspondingly shaped recesses in the upper interior surface of the gun breech," of the patent in suit. Not only is the Storm device essentially different from the invention in suit, but its inoperativeness for large guns is shown by the unsupported overhanging top hook, the absence of all support opposite the bore and at the point of greatest strain, the impossibility of greater length of support against recoil than that of the downward unlocking movement, and a confessedly impracticable thumb lever to hold the breech plate in its closed position.

One of defendant's experts says that, if the Storm patent were applied to a breech-loading gun, he should put it last in point of practical value after Pieri, the patent in suit, and two other patents. The other expert admits that, to so adapt the Storm device to a rapid-fire gun as to make it operative and efficient, he "should think it necessary to devise an entirely different firing mechanism, and to provide more positive means for holding the breechblock in its upper or closed position," and that this would require a little study.

Pieri's British patent has the same means for moving and the same movements of breechblock as Storm. Defendant's counsel says that it is a "complete anticipation." Its experts do not support his contention. Prof. Alger originally, on cross-examination, admitted that the patent did not warrant the curved side pieces shown in the enlarged drawing and model, but that he thought it would be reasonable to infer that any one making such a gun would make said pieces in said shape. Later he testified as follows:

"A. Before answering this question, I wish to modify and add to my answers to your questions 101, 103, 104, 105, and 106. A further careful examination of the drawings of the Pieri patent has convinced me that the dotted lines in figures 1, 2, and 3, and which can be best pointed out in figure 2, being the 'curved line under the letter 'J,' continued vertically upward towards the letter 'Q,' are intended to show, and do show, that the cheek pieces on the sides of the block have the shape which has been given to them in the model and the large drawing of the Pieri mechanism. I was misled into supposing the curved dotted line just under the letter 'J' to be the main spring in the fired position, but, after more careful study of the drawings, I am now convinced that they do show the form of block illustrated in the model and large drawing. A careful examination of figure 3 shows the outline of one of the cheek pieces in dotted line, just as it is shown in the model."

Lieut. Driggs, the joint patentee of the patent in suit, defendant's other expert, says:

"X-Q. 89. Comparing the structure of the Pieri patent with that of the patent in suit, why do you regard the latter as of greater value than the former? A. The Pieri patent I do not think is very well suited for a breech closure, for the reason that I do not think that it is particularly strong; that is to say, that the surfaces engaged I do not think would be sufficient to hold the block in place under the high pressures that are developed in guns." "RD-Q. 107. Please state whether, as far as the supports for the blocks against backward pressure are concerned, you think the Driggs-Tasker design resembles most the Pieri patent or the Driggs patent in suit. A. I don't see how they can well be compared. From the bands alone, the support of the block is nearer the Driggs patent in suit. In the manner of supporting the block below the center of the bore, it is nearer like the Pieri patent; that is to say, the Driggs-Tasker patent, No. 613,195, may be said to have two features in the support of the breechblock, in one of which it is similar to the Driggs patent, No. 380,798, and the other similar to the Pieri British patent, No. 3,615 of 1885."

These admissions confirm the contention of complainant that the Pieri specifications and drawings are indefinite and misleading; that they only show anticipation by the inferences of defendant's expert as to what would be reasonable in carrying out the inventive idea; that they do not disclose any conception of plaintiff's method of holding the block against the action of the discharge; and that the Pieri and the patented constructions are so dissimilar that they cannot be compared. Pieri nowhere shows the plaintiff's corresponding grooves and bands, or the vanishing horseshoe curves, in breech and block. The top of his breech is open, and therefore the breechblock has no support in the space between the upper parts of the breech. The small vertical lugs which support the upper parts of the breechblock above the bore of the gun are insufficient to resist the tremendous strain of a discharge, and therefore are supplemented by an extension of the gun frame at the bottom. This construction prevents the length of the vertical supporting surface from being greater than the vertical sliding motion, as is possible in the patented construction.

Nordenfeldt's United States patent, No. 282,008, of 1880, is not mentioned by defendant's expert Driggs, and is not discussed by defendant's counsel in his brief. Defendant's expert Alger, as already stated, finds its mechanism closely allied to that of the patent in suit. But he admits that Nordenfeldt's mechanism controls the movement, not of a breechblock, but of a wedge, and that he used "a breech recess slotted completely through, and with recoil sup-

ports behind the block," instead of the patented "covered-over grooved breech recess with the transverse grooves cut in it to engage the bands on the top of the breechblock." Nordenfeldt's complicated construction comprised, not the patented breechblock with a downward and backward motion, but one which is rocked on a pivot in the arc of a circle, and which has a wedge on its back. When it is rotated outwardly it withdraws the wedge, and when rotated inwardly it jams the wedge into the breach. It is not in the same class with Pieri, Storm, and the patented invention, in construction or motion. The wedge is not supported across the top. The operation of locking it is a subsequent distinct operation, with an independent device. It is difficult to see how this complex arrangement could be adapted to operate a two-motion block. In this connection, it is significant that Nordenfeldt, in his later British patent of 1886, recognized the disadvantages of this wedge and block contrivance, and, as defendant's expert says, "shows a modification of his breech mechanism, in which the breechblock is in one piece instead of compound, and itself performs the movements of the wedge of his earliest construction."

Has defendant appropriated complainant's invention? Defendant's counsel says: "It is quite true that there is, at first inspection, a strong impression of resemblance between the patent in suit and the defendant's construction." Defendant's expert Alger admits that he does not find the patented bands or projections anywhere in the prior art; that their function is to support the breechblock, when in the closed position, against the force of the discharge of the gun, and that this same function is subserved in defendant's construction of rib and upper part of breechblock. Later he testifies as follows:

"X-Q. 186. In view of the detail examination of the Driggs-Tasker breechblock, its construction, the correlated parts in the breech, and the breechblock operating mechanism, are you not of opinion that this device contains mechanical equivalents, in the shape of duplication or substantial identity of parts or mechanical inversion, of the device contained in the patent in suit? A. To a certain extent that is true, but at the same time I consider the Driggs-Tasker breech mechanism to be an improvement over the mechanism shown in the patent in suit, and to be a patentable improvement."

There are other admissions to the same effect. It is unnecessary to discuss the differentiation of the two devices attempted by defendant's expert. It is not even necessary to the determination of the question of infringement to give to the claim the broad construction to which it is entitled by reason of the novel and meritorious character of the invention.

Whether defendant has improved on the patented construction by providing the lower part of the block with additional bearing surfaces is immaterial. As counsel for complainant says:

"There is the same convex hooded breech, exteriorly of the same substantial appearance. Within this covered hooded breech there are recesses across the top and down the sides, deeper at the middle of the top, and then gradually diminishing and disappearing at a point little below the middle of the bore of the gun. Within the recess is a transverse bolt on which is secured the breechblock. This breechblock has, at one or both sides, a pin or stud entering a cam-shaped recess in the side of the breech, so that, as the block is operated, it is first caused to move downward, and then backward and downward, in

opening, and a reverse action given in closing. On this axial shaft is a cam which engages upon surfaces on the side of the breechblock, and causes it to have the movements stated. In both cases the convex top of the block is provided with bands or curved surfaces following the contour of the convex top of the block, such bands or curved surfaces fitting the corresponding grooves or recesses in the top or sides of the block. In both cases these bands or curved surfaces, fitting into the corresponding recesses of the breech, take the back pressure, and support the block against the force of the discharge of the gun. In both cases the peculiar shape of these bands or curved surfaces permit the block to be opened and closed by a vertical motion, which is short compared with the amount of opening and closing."

The defendant has appropriated substantially the construction, function, and operation of complainant's vanishing horseshoe curves, with their incident novel features of maximum resistance, with minimum withdrawal and capacity of indefinite multiplication. Does its construction infringe this claim? Whether the patentee used the word "convex" in the specification in the sense of a double curvature—that is, curved like a sphere rather than like a cylinder—is not material on this question of infringement. Convexity is not claimed; it is not material; it is not functional. In the specifications of the Driggs-Schroeder patent, No. 378,828, issued nine months later, the patentees did not use the word "convex," but described bands and grooves which are convex in the sense of being curved like a cylinder, and said: "They are substantially the same as those disclosed in our above-named patent." On this point, Driggs, the patentee, now defendant's expert, admits as follows:

"X-Q. 87. Then the difference is a difference of machining, workmanship, costs, etc.? A. Yes. X-Q. 88. In point of function and operation the two devices are similar, in so far as it relates to the motion of the breechblock and the action of the grooves and projections? A. Yes."

He then explains his reasons for said construction, and finally admits as follows:

"RD-Q. 101. Did this peculiar shape of the bands and the longitudinally arched shape of the block constitute a part of the novel details that you said you believed your patent covered after you had discovered the existence of the Storm and Pieri patents, already referred to? A. No; they did not. I never laid any particular stress on the longitudinal curve. It was made just for the same reason that manufacturers or designers put in fillets or curves,—simply because they tend to add a little to the structural strength, or improve the design a little."

The argument of limitation by reason of the file wrapper does not affect the questions herein, because the words added to the claim have no reference to the novel construction infringed by defendant. The claim indicates the invention sought to be protected with sufficient accuracy. That it is for a useful invention is proved by the history of two guns manufactured thereunder, by the subsequent Driggs patents, and by the admissions of Driggs, the patentee. As defendant has appropriated complainant's construction, it is in no position to deny its utility.

In view of these conclusions, the strenuous contention of counsel for complainant that defendant is estopped to deny the validity of the patent in suit by reason of the action of certain of its officers in connection with the assignment of said patent will not be discussed. Let a decree be entered for an injunction and an accounting.



## THE LEIDERHORN.

(District Court, N. D. California. January 23, 1900.)

No. 12,020.

## 1. SEAMEN—SUIT FOR WRONGFUL DISCHARGE.

Evidence *held* not to sustain a libel by a seaman to recover wages, and damages on the ground of his wrongful discharge before the expiration of his term of service.

## 2. SAME—PART PERFORMANCE OF CONTRACT.

A seaman who quits ship without legal cause, before expiration of time for which he shipped, is not entitled to recover as upon a quantum meruit for services rendered in part performance of his contract.

This was a suit by a seaman to recover wages, and damages for wrongful discharge.

Bert Schlesinger and George A. Curtis, for libelant.  
Chas. A. Low, for respondent.

DE HAVEN, District Judge. On the 13th of August, 1899, the libelant shipped as a boatswain on the bark Leiderhorn for a voyage from Hamburg, Germany, to San Francisco, Cal., and return to Europe by way of various ports. The voyage was for a term of three years, and the libelant was to be paid for his services at the rate of four pounds per month. The libel alleges that while said bark was lying at San Francisco, on the 9th of January of the present year, the master, without any cause therefor, and against the will and consent of the libelant, "returned him on shore, and would not permit him to perform the remainder of the voyage \* \* \* for which he signed." The libel further alleges that there is due to the libelant the sum of about \$75 for services rendered on the voyage from Hamburg to San Francisco, and also the amount which he would have earned if he had been permitted to complete the three-years voyage; and a decree is asked for the recovery of the wages already earned, "and to accrue for the period of three years, and for costs." It will be observed that the particular ground upon which the libelant bases his right to recover in this action is that he has been unjustly discharged by the master. This allegation is not sustained by the evidence. On the contrary, it is shown that the libelant left the vessel on the 9th of January, 1900, because he was beaten in a fight which he had with the mate on that day. In my opinion, the great preponderance of the evidence points to the fact that in this matter the libelant was himself the aggressor; but, whether this is so or not, there is nothing in the evidence which would warrant a finding that, if the libelant should return to the ship, there would be any danger of his receiving bodily harm or improper treatment while on board, and in the discharge of the duties for which he shipped. The master has requested him to return to duty, and this he has refused to do. Upon these facts, the libelant is not entitled to recover. The libel will be dismissed; the claimant to recover costs.

**THE IDA MCKAY.**

(District Court, D. Washington, W. D. February 26, 1900.)

**SEAMEN—RIGHT TO LEAVE SHIP—REFUSAL TO FURNISH WARM ROOM.**

The refusal by the captain of a vessel to furnish a warm room for the use of the seamen in cold weather, as required by Act Dec. 21, 1898 (30 Stat. 755), after complaint made to him, is a breach of the shipping articles which justifies the men in leaving the vessel before the expiration of their term of service, and entitles them to recover wages for the time served.

In Admiralty. Suit for seamen's wages. Decree for libelants

Irwin & Bridges, for libelants.

Gorham & Gorham, for claimant.

HANFORD, District Judge. I find, from the pleadings and evidence in this case, that the three libelants were lawfully shipped as seamen on the schooner *Ida McKay*, for a voyage from San Francisco to Gray's Harbor, thence to the Hawaiian Islands, and return to San Francisco, and proceeded on said voyage from San Francisco to Aberdeen, on Gray's Harbor, and until the arrival of the vessel at Aberdeen they performed their duties faithfully. I find, also, that the vessel failed to provide a safe and warm room for use of the seamen on said voyage, which began in the season of cold weather; and after arrival at Aberdeen the libelants made complaint to the captain of the lack of a heating stove in the fore-castle, and that their clothing and bedding were wet, and they were cold. When this complaint was made, the act of congress of December 21, 1898 (30 Stat. 755), had gone into effect, which act, among other provisions, contains an amendment of section 4572, Rev. St., so as to positively require every vessel in the foreign and domestic trade to provide a safe and warm room for use of seamen in cold weather. Therefore, aside from considerations of humanity, the libelants were justified by the laws of the country in complaining of the discomfort which they suffered; but, instead of observing his duty in the matter, the captain positively refused to give any heed to their complaint. The only excuse offered for his conduct is that formerly there had been a stove in the fore-castle, and, as he had not inspected the fore-castle since August of the preceding year, he did not know that it was not still there; but the court can have no patience with a pretense on the part of the captain of a ship that he does not know how his vessel is furnished or equipped for a voyage, and that the lack of suitable furnishing was not known to him after he had been told of it, because, from sheer obstinacy, he failed to investigate. The next morning after making their complaint to the captain, the libelants showed their resentment of the contemptuous treatment which they had received by refusing to turn to, and thereafter, by the captain's orders, their meals were stopped. They remained with the vessel several days, but finally were obliged to leave her, or submit to the alternative of performing the voyage without the comfort of a warm room in which to live, which they were entitled to under the law.

Under the circumstances, I consider that it would be unjust and oppressive to decree a forfeiture of wages which the libelants earned

by faithful service. This case differs from *The A. M. Baxter* (D. C.) 93 Fed. 479, in the important particular that the libelants in this case did complain to the captain of the lack of proper heating apparatus before they refused to continue in the service of the vessel; and I hold that in this case the captain is blameworthy, and that the first violation of the contract contained in the shipping articles was on his part. A decree will be entered in favor of the libelants for the amount of their wages at the contract rate, from February 11 to March 3, 1899, both days inclusive, and for costs.

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### MEMORANDUM DECISIONS.

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**CIMIOTTI UNHAIRING CO. v. AMERICAN UNHAIRING MACH. CO. SAME v. MISCHKE.** (Circuit Court of Appeals, Second Circuit. January 25, 1900.) Appeals from the Circuit Court of the United States for the Southern District of New York. Motions to remand both causes to the circuit court in order to enable that court to entertain motion for rehearing. See 98 Fed. 297. Henry Schrelber, for the motion. Louis O. Raegener, opposed. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

**PER CURIAM.** Such an order as that prayed for cannot be made on the application of the parties or either of them. The court below alone can make the request. *Roemer v. Simon*, 91 U. S. 149, 23 L. Ed. 267.

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**DEXTER v. KELLAS.** (Circuit Court of Appeals, Second Circuit. January 30, 1900.) No. 98. In Error to the Circuit Court of the United States for the Northern District of New York. Sumner B. Styles, for plaintiff in error. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Order affirmed in open court.

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**FONG CHONG PAN v. UNITED STATES.** (Circuit Court of Appeals, Ninth Circuit. February 5, 1900.) No. 585. Appeal from the District Court of the United States for the Northern District of California. E. J. Banning, Asst. U. S. Atty. Dismissed pursuant to subdivision 1 of the sixteenth rule.

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**GERMAN SAVINGS & LOAN SOC. et al. v. NORTHWEST GENERAL ELECTRIC CO.** (Circuit Court of Appeals, Ninth Circuit. January 8, 1900.) No. 446. Appeal from the Circuit Court of the United States for the District of Oregon. Milton W. Smith, for appellants. Ralph E. Moody, for appellee. Dismissed pursuant to stipulation of counsel.

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**THE HOWARD CARROLL.** (Circuit Court of Appeals, Second Circuit. March 14, 1900.) No. 89. Appeal from the District Court of the United States for the Southern District of New York. Robt. D. Benedict, for appel-

lant. **Wilhelmus Mynderse**, for appellee. Before **WALLACE, LACOMBE, and SHIPMAN**, Circuit Judges.

**PER CURIAM**. We have carefully examined the record in this cause, and have reached the conclusion that the decree of the district court be affirmed, with interest and costs.

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**ILLINOIS CENT. R. CO. v. BOUSLOG**. (Circuit Court of Appeals, Fifth Circuit. March 5, 1900.) No. 853. In Error to the Circuit Court of the United States for the Eastern District of Louisiana. **Girault Farrer**, for plaintiff in error. **Chas. S. Rice, A. E. Billings, and R. B. Montgomery**, for defendant in error. Before **PARDEE and SHELBY**, Circuit Judges.

**PER CURIAM**. The judgment of the circuit court in this case is affirmed.

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**THE LADY WIMETT**. (Circuit Court of Appeals, Second Circuit. January 24, 1900.) No. 59. Appeal from the District Court of the United States for the Northern District of New York. **John W. Ingraham**, for appellant. **Geo. S. Potter**, for appellee. Before **WALLACE, LACOMBE, and SHIPMAN**, Circuit Judges. No opinion. Decree affirmed, with costs, on opinion of court below. 92 Fed. 399.

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**LAPPIN BRAKE-SHOE CO. v. CORNING BRAKE-SHOE CO.** (Circuit Court of Appeals, Second Circuit. March 14, 1900.) No. 115. Appeal from the Circuit Court of the United States for the Northern District of New York. **J. D. Gallagher**, for appellant. **Edmund Westmore**, for appellee. Before **WALLACE, LACOMBE, and SHIPMAN**, Circuit Judges. No opinion. Decree affirmed, with costs, on opinion below. 94 Fed. 162.

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**LAWRENCE v. GRAND RAPIDS SAV. BANK**. (Circuit Court of Appeals, Sixth Circuit. November 15, 1899.) No. 702. In Error to the Circuit Court of the United States for the Western District of Michigan. **N. A. Fletcher**, for plaintiff in error. **Willard A. Keeney**, for defendant in error. No opinion Affirmed.

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**LEDOUX v. FORRESTER et al.** (Circuit Court of Appeals, Ninth Circuit. January 8, 1900.) No. 568. Appeal from the Circuit Court of the United States for the Eastern Division of the District of Washington. **W. B. Heyburn, Littleton Price, E. M. Heyburn, and L. A. Doherty**, for appellant. **Albert Allen**, for appellees. Dismissed pursuant to stipulation of counsel. See (C. C.) 94 Fed. 600.

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**MACY et al. v. PERRY**. (Circuit Court of Appeals, Second Circuit. February 6, 1900.) No. 608. Appeal from the District Court of the United States for the Southern District of New York. **Frederick M. Brown**, for appellant. **J. Parker Kirlin**, for appellees. Before **WALLACE, LACOMBE, and SHIPMAN**, Circuit Judges.

**PER CURIAM**. We are satisfied with the decision of the court below, and concur in the opinion of the district judge (91 Fed. 671) in respect to all the questions presented by the assignments of error of the appellant. The decision is therefore affirmed, with interest and costs.

**THE MELROSE JONES v. OGILVIE** (Circuit Court of Appeals, Sixth Circuit. November 16, 1899.) No. 730. Appeal from the District Court of the United States for the Eastern District of Michigan. F. S. Masten, for appellant. John H. Goff, for appellees. No opinion. Affirmed.

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**MINOR v. JONES.** (Circuit Court of Appeals, Sixth Circuit. November 15, 1899.) No. 713. Appeal from the Circuit Court of the United States for the Southern District of Ohio. J. R. Shindel, for appellant. H. P. Lloyd, for appellee. No opinion. Reversed.

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**NEW ENGLAND R. CO. v. CONROY.** (Circuit Court of Appeals, First Circuit.) Question of law certified to the supreme court of the United States. See 20 Sup. Ct. 85, Adv. S. U. S. 85, 44 L. Ed. —.

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**PATTON et ux. v. CLARK et al.** (Circuit Court of Appeals, Sixth Circuit. December 4, 1899.) No. 718. Appeal from the Circuit Court of the United States for the Western District of Tennessee. Before TAFT, LURTON, and DAY, Circuit Judges.

LURTON, Circuit Judge. This was a bill filed by the trustee to enforce a mortgage on realty in Tennessee, made to secure a note executed to the Jarvis-Conklin Mortgage Trust Company, a foreign corporation, which had not complied with the Tennessee statute prohibiting foreign corporations from doing business within the state before registering their charters. The note purported to be made at Kansas City, Mo., the place of the principal office of the Jarvis-Conklin Mortgage Trust Company, which was a corporation of the state of Missouri, and was payable at Kansas City. This note was indorsed without recourse, before maturity, for value, and without notice of any infirmities, to the complainant below, John W. Clark. The defenses are substantially those presented by the case of *Hamilton v. Fowler* (C. C. A.) 90 Fed. 18, and was submitted upon the argument made in that case. The case is governed by the opinion in that case this day filed, and is, upon the authority of that decision, affirmed, with costs.

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**THE PHOENICIA.** (Circuit Court of Appeals, Second Circuit. March 14, 1900.) No. 66. Appeal from the District Court of the United States for the Southern District of New York. Everett P. Wheeler, for appellant. Harrington Putnam and Wilhelmus Mynderse, for appellee. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Decree affirmed, with interest and costs, on opinion below. 90 Fed. 116.

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**SCHNELLER v. NEW ORLEANS & N. E. R. CO.** (Circuit Court of Appeals, Fifth Circuit. March 5, 1900.) No. 792. In Error to the Circuit Court of the United States for the Eastern District of Louisiana. J. J. Prowell and Carroll & Carroll, for plaintiff in error. H. H. Hall, for defendant in error. Before PARDEE and SHELBY, Circuit Judges.

PER CURIAM. The judgment of the circuit court in this cause is affirmed.

**STANDRIDGE et al. v. SUPREME LODGE ORDER OF GOLDEN CHAIN.** (Circuit Court of Appeals, Fifth Circuit. January 30, 1900.) No. 907. Appeal from the Circuit Court of the United States for the Northern District of Georgia. Docketed and dismissed pursuant to the sixteenth rule.

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**TENNESSEE COAL, IRON & RAILROAD CO. v. PIERCE.** **PIERCE v. TENNESSEE COAL, IRON & RAILROAD CO.** (Circuit Court of Appeals, Fifth Circuit. February 13, 1900.) No. 846. In Error to the Circuit Court of the United States for the Northern District of Alabama. W. A. Percy and W. I. Grubb, for Tennessee Coal, Iron & Railroad Co. W. A. Gunter, for Pierce. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

**PER CURIAM.** This case has heretofore been before this court (52 U. S. App. 355, 26 O. C. A. 632, 81 Fed. 814), and before the supreme court of the United States (173 U. S. 1, 19 Sup. Ct. 335, 43 L. Ed. 591), and the main propositions of law involved, including the rule of damages, have been conclusively settled. On the last trial in the circuit court the trial judge made rulings on both sides, which are here made the basis of 51 assigned errors. Forty-five of them relate to instructions to the jury, given and refused. It is unnecessary to pass specifically upon these rulings, and we only observe in relation thereto that, if they were erroneous, there was practically a compensation of errors, for none of them seem to have misled the jury from the law and facts of the case. The general charge given by the trial judge appears to be full, and to cover the law of the case, and the verdict of the jury does substantial justice between the parties. No useful purpose will be subserved by a prolongation of the litigation. The judgment of the circuit court is affirmed on both writs, and the costs will be apportioned accordingly.

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**TEXAS & P. RY. CO. v. REISS et al.** (Circuit Court of Appeals, Second Circuit. March 16, 1900.) No. 150. In Error to the Circuit Court of the United States for the Southern District of New York. Rush Taggart, for plaintiff in error. Treadwell Cleveland, for defendants in error. Before WAL-LACE and SHIPMAN, Circuit Judges. No opinion. Judgment affirmed on the opinion in the former appeal. 98 Fed. 533.

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**TULLIS v. LAKE ERIE & W. R. CO.** (Circuit Court of Appeals, Seventh Circuit.) Questions of law certified to the supreme court of the United States. See 20 Sup. Ct. 136, Adv. S. U. S. 136, 44 L. Ed. —, 175 U. S. 348.

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**UNITED STATES v. DALLES MILITARY ROAD CO. et al.** (Circuit Court of Appeals, Ninth Circuit. February 14, 1900.) No. 434. Appeal from the Circuit Court of the United States for the District of Oregon. John H. Hall, U. S. Atty. Huntington & Wilson, G. G. Gammons, R. B. Lamson, Barin & Ward, Seneca Smith, J. K. Kelly, Richard Nixon, Chester V. Dolph, Carey & Mays, and P. Tillinghast, for appellees. Dismissed.

In re VIETOR et al. (Circuit Court of Appeals, Second Circuit. March 13, 1900.) No. 131. Petition to Review Order of the District Court of the United States for the Southern District of New York. Sidney H. Stuart, for petitioner. Alex. Blumenstell, for respondent. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges. No opinion. Order modified in open court. See 38 C. C. A. 701, 97 Fed. 989.

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WESTENFELDER v. GREEN et al. (Circuit Court of Appeals, Ninth Circuit. January 8, 1900.) No. 423. Appeal from the Circuit Court of the United States for the District of Oregon. Dismissed upon consent of counsel for appellant. See (C. C.) 76 Fed. 925; (C. C.) 78 Fed. 892; 31 C. C. A. 596, 87 Fed. 1006; 33 C. C. A. 689, 91 Fed. 1006.

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WESTERN RY. OF ALABAMA v. LAW. (Circuit Court of Appeals, Fifth Circuit. February 12, 1900.) No. 854. In Error to the Circuit Court of the United States for the Northern District of Georgia. Geo. P. Harrison, for plaintiff in error. Hoke Smith, for defendant in error. Dismissed on stipulation of counsel. See (C. C.) 91 Fed. 817.

END OF CASES IN VOL. 99.

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